

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 110332-U

Filed 11/29/11

NO. 4-11-0332

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SUPER BUDGET LIQUORS, LLC,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	McLean County
BUDGET LIQUORS, INC.,	)	No. 09CH200
Defendant-Appellee.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

---

PRESIDING JUSTICE KNECHT delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in granting a motion for a directed verdict at the close of plaintiff's case for specific performance of a contract where the evidence was not clear and convincing defendant interfered with plaintiff's ability to perform the contract.

¶ 2 Plaintiff-buyer filed suit for specific performance of a contract relating to the sale of a liquor store alleging defendant-seller interfered with plaintiff's ability to obtain a liquor license prior to the deadline for closing the sale. The trial court granted defendant's motion for a directed verdict after the close of plaintiff's case because there was no clear and convincing evidence of defendant's interference. We affirm.

¶ 3 **I. BACKGROUND**

¶ 4 In 2009, Christopher Cutler was the president and sole shareholder of defendant, Budget Liquors, Inc., a liquor store on Linden Street in Normal. The second floor of the

building contained three student apartments. On March 12, 2009, Cutler signed an asset purchase agreement to sell the property, business, and inventory to Harish Patel, Rakesh Patel, and Kamlesh Patel. On March 20, 2009, these individuals formed plaintiff, Super Budget Liquors, LLC, for the purpose of buying defendant.

¶ 5 Following negotiations between attorneys representing buyers and sellers, a contract was signed on behalf of plaintiff by Rakesh Patel but not dated while Cutler signed the contract on behalf of defendant on April 3, 2009. The contract provided it was contingent on plaintiff obtaining financing in the amount of 80% of the purchase price and obtaining a liquor license from the Town of Normal (town). The contract had a closing date of June 1, 2009, and stated time was of the essence. The contract further provided plaintiff would make a good faith effort to obtain a liquor license, but if it was unable to obtain a license and notified defendant in writing on or before May 15, 2009, the agreement would be null and void and the \$25,000 down payment would be returned to plaintiff. If either the seller or the buyer brought any action against the other with respect to the contract, the losing party was responsible for the reasonable attorney's fees, costs, and expenses of the prevailing party, including costs of litigation.

¶ 6 Addendums to the contract (1) contained a covenant not to compete barring Cutler from engaging in the retail sale of alcohol; (2) required Cutler to consult with plaintiff for 20 hours per week for two weeks after closing; (3) provided plaintiff was not responsible for the employment of any employees of defendant; and (4) required the parties to inventory the contents of the store before closing the contract.

¶ 7 Between the date he signed the contract and the end of May 2009, defendant, through its attorney, provided plaintiffs with all of the documents and paperwork required to

close the sale.

¶ 8 In March 2009, Rakesh obtained a liquor license application from the town. At the time he obtained the application, Wendy Briggs, town clerk, gave him a checklist for completing the application and told him it would not be submitted to the liquor commission and liquor commissioner for consideration until all of the required documents had been filed with her office. On April 29, 2009, plaintiff filed its liquor license application with the town clerk. It was not complete. Under the town's liquor ordinance, certain documents were necessary ~~to be filed~~ with each application. Each applicant was required to list the names of each person who owned 5% or more of the entity seeking the license. This would allow for a background check of the named individuals. The application listed four persons who owned 5% or more of plaintiff. The ordinance required a Stockholder's Statement be filed by each person listed as owning 5% or more. Stockholder's Statements were filed by three of the four individuals listed but the required statement was never filed by Anil Patel, one of the listed owners.

¶ 9 On May 7, 2009, plaintiff filed additional documents with the clerk's office in support of its application. One of the documents filed contained financial information for Cutler, the current owner of the liquor store. Briggs contacted Rakesh Patel and informed him plaintiff was required to file personal financial information of the applicant, not the current license holder. On May 12 and 13, plaintiff provided the clerk's office with financial information for all four of its listed owners. Briggs passed along this information to Wayne Karplus, assistant corporation counsel for the town, for his review.

¶ 10 Under the town's liquor ordinance, liquor licenses are issued by the mayor in his capacity as the liquor commissioner in consultation with the town council serving as the liquor

commission. The commission has four regularly scheduled meetings each year on the second council meeting in January, March, July and October. Liquor license applications can also be heard at special meetings held before a regularly scheduled council meeting. It was standard policy that a liquor license application was not placed on the council's agenda until all of the required forms and paperwork were properly completed and filed.

¶ 11 There was a regularly scheduled town council meeting held on May 18, 2009. No special meeting was held at that time to consider plaintiff's liquor license application, and it was not on the agenda for such meeting. The next regularly scheduled meeting of the town council was on June 1, 2009, and there was a special meeting scheduled to consider a liquor license application for Pizza Hut. Following June 1, the next two scheduled meetings of the council were set for June 15 and July 6, 2009.

¶ 12 On May 20, 2009, counsel for plaintiff sent a fax letter to defendant's attorney requesting an extension of the closing date under the contract because the town had been unable to put plaintiff's liquor license application on its May 18 meeting agenda. The letter stated the application would be heard on June 1 and plaintiff would close on the sale at the "first opportunity" thereafter. On May 26, 2009, counsel for defendant sent a letter to plaintiff's counsel stating defendant was not willing to extend the closing past June 1. Counsel went on to state plaintiff failed to make a good faith effort to obtain the liquor license in a timely manner. He also noted the property had not been visited by an appraiser, necessary to obtain financing. Counsel concluded by stating defendant was willing to terminate the contract and return the down payment to plaintiff.

¶ 13 In May 2009, Cutler had a conversation with Christopher Koos, mayor of the

town. Koos owns and operates a business located across the street from defendant and is a business acquaintance of Cutler. Koos told Cutler he heard he was selling his business and asked how the sale was going. Cutler voiced frustration with the process of the sale and his opinion the sale could not be completed in a timely manner. Cutler stated he regretted entering in to the contract because things were not moving forward toward the closing date.

¶ 14 After talking with Cutler, Koos instructed Karplus to send an E-mail communication to Briggs about plaintiff's application. Karplus then sent an E-mail to Briggs on May 20, 2009, in which he stated Koos, as liquor commissioner, had asked no special liquor meeting be scheduled for plaintiff's application on June 1, 2009, until both buyer and seller informed the town there is a "completed deal."

¶ 15 Harish Patel was responsible for arranging financing for plaintiff's purchase of the liquor store. Patel applied for financing with Illini Bank. On April 30, 2009, the Director's Loan Committee of Illini Bank approved the loan with the condition "\$750,000 of the loan be participated to Farmers State Bank of Camp Point." As of June 1, 2009, the loan had not been participated in by Farmers State Bank or any other bank.

¶ 16 On May 26, 2009, Illini Bank issued a loan commitment letter to plaintiff for the loan contingent upon an appraisal of the property. Prior to June 1, 2009, Harish Patel contacted the president of Illini Bank and asked if the bank would make a loan to purchase the property without a written appraisal. The president stated the bank would not do so. Further, since the loan was for the purchase of a liquor store, the bank would not make the loan if plaintiff was not able to obtain a liquor license. As of June 1, 2009, plaintiff did not have a liquor license.

¶ 17 The contract did not close on June 1, 2009. On June 5, plaintiff filed a "Specific

Performance Complaint" verified by Rakesh Patel. Paragraph 4 of the complaint stated: "That Defendant frustrated Plaintiff's effort to get a liquor license hearing by contacting the Town of Normal and canceling the hearing." On July 10, 2009, defendant filed a counter-claim against plaintiff seeking to recover its attorney's fees, costs, and expenses under the contract and requested a jury trial.

¶ 18 On December 14, 2009, plaintiff filed a two-count amended complaint verified by Kamlesh Patel. Count I of the complaint sought specific performance of the contract and contained the same paragraph 4 as contained in the original complaint.

¶ 19 On March 10, 2011, after plaintiff dismissed Count II of its amended complaint, the trial court severed the counterclaim from plaintiff's Count I and ruled it would be tried by the court and the counterclaim would be tried by a jury after the trial of plaintiff's claim.

¶ 20 At a March 14, 2011, trial, Cutler testified between the date he signed the contract to the end of May 2009, he sought and obtained other employment with a liquor distributor. The sales contract required him to consult with plaintiff for two weeks post-closing, so his start date for his new job was set for June 22, 2009. He notified the 13 employees of defendant as of June 1, 2009, they would be out of a job. One reason he wanted to close the contract by June 1, 2009, was because under the terms of his apartment leases, he was obligated to perform repairs and renovation to them before June 15, 2009. When the closing did not occur as scheduled, he made the repairs at a cost of \$15,000. Due to the failure to close the sale of his business on June 1, Cutler lost the job he was to start on June 22, and paid for repair and renovations of the apartments that he hoped to avoid.

¶ 21 Cutler testified he had two conversations with Koos while the contract at issue

was pending. The first conversation was on May 19, 2009. Koos told him he heard his store was for sale and asked how the transaction was coming along. Cutler stated he told Koos he did not know what was going on with the sale. He completed all that was required of him under the contract but expressed concern he had not seen a financial commitment letter from plaintiff's bank. He had not heard from an appraiser until six weeks after the contract was signed and that appraiser turned the appraisal job down because it could not be done by the closing date. Cutler was concerned about the deal closing. The next day, May 20, Koos returned to Cutler's store and stated he consulted the town's legal department. The town did not want to get involved in any dispute between the contract parties but wanted to be kept apprised as to how the closing was proceeding. Cutler never contacted Koos or any other officials of the town to have plaintiff's liquor license application removed from any council meeting agenda.

¶ 22 Previous counsel who represented plaintiff in the negotiation of the contract testified as of May 26, 2009, there was nothing defendant was required to do under the contract it had failed to do. Counsel also noted in his testimony, neither Rakesh Patel, nor any of the other owners of plaintiff ever asked for his assistance in the liquor license application process.

¶ 23 Briggs testified the mayor relied on the clerk's office to make certain all necessary required forms were properly completed and filed because he did not want an application before the council until it was in a final and complete form. The mayor would not expect the clerk to ask to set an application on an agenda for a special meeting without the application being complete.

¶ 24 When Briggs received the financial information required from the owners of plaintiff on May 13, 2009, she did not speak with any of them because she received the docu-

ments by fax. Plaintiff's application could not be put on the agenda for the May 18, 2009, regularly scheduled council meeting because the required shareholder's statement for Anil Patel had not been submitted and the financial information had not been received in a timely manner. The application was never on the agenda for May 18 and thus could not have been removed at the request of Cutler.

¶ 25 Rakesh Patel admitted Briggs told him when he picked up the application it would not be submitted to the mayor and counsel for consideration until all of the necessary paperwork was completed and filed with the town. Harish Patel testified he knew of these requirements also. Rakesh, Harish, and Kamlesh Patel all testified plaintiff would not close the contract and buy the business from defendant if it did not have a liquor license.

¶ 26 Koos testified in his role as liquor commissioner he relied on the town clerk to handle the application process and insure all necessary and required forms were properly completed and filed. He did not want any application presented to the town council until it was in a final and complete form. He would not expect the clerk to set the application on an agenda for a special meeting without all required forms. He never saw the application filed by plaintiff until his deposition was taken. He did not know if the application was complete at that point, stating he relied on Briggs. The liquor license application filed by plaintiff was never placed on a council agenda at any time.

¶ 27 Koos first learned from Briggs that Cutler was selling his business. Koos asked Cutler how the sale was progressing. Cutler voiced his frustration with the process of the sale and stated, in his judgment, things were not being done in a timely manner. It appeared Cutler was frustrated by the buyer's delay in carrying out things it was required to do under the contract.

Cutler never approached Koos and said he had problems with his contract. He never told him he had changed his mind and was not going to sell the business or he wanted out of the contract. Cutler never stated he was not happy with the deal itself and had made a bad decision. Koos stated Cutler never asked him to do anything to prevent the sale from going through.

¶ 28 After talking with Cutler, Koos instructed Karplus to send an E-mail to Briggs about plaintiff's application. Cutler did not ask him to send this E-mail. Koos never told Karplus to use the phrase "completed deal" in the E-mail. Koos stated his reason for having the E-mail sent was he wanted assurances from both parties the sale of the business was going through. This was his policy on all liquor license applications. The Town did not want to issue licenses to entities until he was certain the deal would go through. The only reason June 1 was noted in the E-mail was because that was the next date for a council meeting. Koos stated Cutler had no control over the agenda for council meetings and did not cause a special meeting to consider plaintiff's application to be cancelled.

¶ 29 After the close of plaintiff's case, defendant moved for a directed verdict, which was allowed by the trial court. The court found plaintiff failed to prove its case by clear and convincing evidence. It noted paragraph 4 of the complaint alleged defendant frustrated plaintiff's efforts to get a liquor license hearing by contacting the town and cancelling the hearing. The evidence was clear Cutler did not cancel the hearing. The court found there was no evidence to show the closing did not occur because of the action of the seller. Cutler spoke briefly on two occasions to Koos and expressed frustration about financing and plaintiff not acting in a timely manner. Cutler had nothing to do with the fact plaintiff's application never reached a special meeting agenda. It never made an agenda because all necessary papers had not

been filed and the application was not complete. There was no evidence it was ever completed. The court noted the mayor's actions may have slowed down the setting of plaintiff's licensing hearing but it was not Cutler's fault if it did.

¶ 30 No evidence showed plaintiff, as buyer, ever notified defendant in writing by May 15 it was unable to obtain, or timely obtain, a liquor license as required by the contract. The contract was contingent on plaintiff obtaining a liquor license and it was to make a good faith effort to do so. The plaintiff could have bought the property and closed on June 1 without a liquor license if it chose to do so. Plaintiff's owners were not willing to do that because they wanted to make sure they had the license before spending \$1.2 million on the business and the bank would not lend the needed money without the license.

¶ 31 After the trial court entered its order, defendant's counterclaim for attorney's fees and costs was considered and continued. On March 18, 2011, a written judgment order granting the motion for directed verdict was entered. On March 25, 2011, the court entered a summary judgment order on defendant's counterclaim when plaintiff elected not to contest the amount or reasonableness of the attorney fees and costs incurred by defendant and due under the contract. The judgment entered was in the amount of \$77,509.65.

¶ 32 II. ANALYSIS

¶ 33 On appeal, plaintiff seeks a reversal of the directed verdict finding and the entry of judgment in its favor granting specific performance of the contract, asserting defendant interfered with its ability to obtain a liquor license thus preventing the closing of the contract on June 1, 2009. It argues the directed verdict resulted from an error of law, was an abuse of discretion, and was against the manifest weight of the evidence. Plaintiff contends the summary

judgment should not have been entered in favor of defendant for attorney's fees and costs because Cutler interfered with its ability to complete its contractual obligations.

¶ 34 Although defendant asked for and was granted a directed verdict, a directed verdict is not possible in bench trial. *Barnes v. Michalski*, 399 Ill. App. 3d 254, 262, 925 N.E.2d 323, 331 (2010). The relief available to defendant was a judgment in its favor at the close of plaintiff's case, pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2010)), if the trial court grants a defendant's motion for a judgment at the conclusion of the plaintiff's case, it is for one of two reasons: (1) the plaintiff failed to present at least some evidence on each element of the *prima facie* case, or (2) the plaintiff failed to carry the ultimate burden of proof. *In re Estate of Etherton*, 284 Ill. App. 3d 64, 68, 671 N.E.2d 364, 367 (1996). The court performs a two-phase analysis. The court must first consider whether the plaintiff has presented at least some evidence on each element it is required to prove. If so, the court must weigh the evidence as to whether it is convincing enough to qualify as proof meeting the standard of evidence required. *Barnes*, 399 Ill. App. 3d at 263-64, 925 N.E.2d at 333.

¶ 35 If the court decides the motion based on the lack of a *prima facie* case, our standard of review is *de novo*. *Barnes*, 399 Ill. App. 3d at 264, 925 N.E.2d at 333. If it decides the motion after weighing the evidence, our standard of review is whether the ruling is against the manifest weight of the evidence. *Barnes*, 399 Ill. App. 3d at 264, 925 N.E.2d at 333-34. Under either standard, our finding in this case is the same.

¶ 36 To obtain specific performance of the contract at issue, plaintiff was required to plead and prove (1) the existence of a valid, binding, and enforceable contract; (2) plaintiff had either complied with the terms of the contract or was ready, willing, and able to perform its part

of the contract; and (3) defendant failed or refused to perform its part of the contract. *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d 980, 1008, 625 N.E.2d 1056, 1078 (1993). Each of these elements must be proved by clear and convincing evidence. *Butler v. Kent*, 275 Ill. App. 3d 217, 227, 655 N.E.2d 1120, 1126 (1995). In the context of a complaint for specific performance, "clear and convincing evidence" means evidence greater than a preponderance of the evidence but not quite as high as the evidence necessary for a criminal conviction. *Badzydlo v. Volant*, 164 Ill. 2d 207, 213, 647 N.E.2d 273, 276 (1995).

¶ 37 Plaintiff argues specific performance of a contract is triggered automatically when one party to a contract interferes with the other party's ability to perform its obligations under the contract and cites several Illinois cases pertinent to this point. In support of this theory, plaintiff alleged in its verified complaint, "Defendant frustrated Plaintiff's effort to get a liquor license hearing by contacting the Town of Normal and canceling the hearing." There was no evidence at trial supporting this point. Uncontroverted testimony from Briggs and Koos showed Cutler never contacted the town or canceled a hearing on plaintiff's liquor license application. No hearing was ever scheduled and none was ever cancelled.

¶ 38 Plaintiff essentially admitted it had not proved this allegation because near the close of its case at trial it offered an amendment to its complaint to delete the "canceling the hearing" portion of the allegation. The amendment was not allowed. The court concluded it would be prejudicial to defendant who had conducted over a year of discovery, including many depositions, in which it had specifically asked all witnesses of their knowledge of Cutler canceling the hearing and geared its defense to defeating this claim.

¶ 39 Plaintiff argues under the case law it cited (*Cummings v. Beaton & Associates*,

*Inc.*, 249 Ill. App. 3d 287, 618 N.E.2d 292 (1992); *Prudential Insurance Co. of America v. Van Matre*, 158 Ill. App. 3d 298, 511 N.E.2d 740 (1987); *Hansen v. Johnston*, 111 Ill. App. 2d 88, 249 N.E.2d 133 (1969); *Jordan v. Busch*, 285 Ill. App. 217, 1 N.E.2d 745 (1936)) it need not prove defendant took an actual affirmative action to interfere with its complying with its obligations under the contract but only that actions by defendant caused such interference to occur.

¶ 40 Plaintiff failed to prove any interference on the part of Cutler in plaintiff fulfilling its obligations. Plaintiff did not complete its liquor license application which was the condition upon which a hearing on its application was predicated. Plaintiff's liquor license application was never on a special meeting agenda in order to have a hearing. Therefore, Cutler could not have had it removed. There was no evidence Cutler contacted the town in an attempt to interfere with plaintiff obtaining a liquor license. Koos took action on his own to remind the town clerk not to schedule a hearing until the application was in order and the town was assured the sale of the business was going to go through. Koos testified Cutler did not ask him to take this action and the action was not taken until after the May 18 meeting date. The most timely meeting dates for the liquor license hearing prior to the contract closing date of June 1, 2009, passed before Koos took any action at all.

¶ 41 Of the three required elements to be proved for specific performance, plaintiff only proved a valid and enforceable contract existed. The evidence indicated defendant ~~had~~ performed all of its obligations under the contract and was ready, willing, and able to close on June 1, 2009. The evidence indicated plaintiff was not ready, willing, and able to close on June 1, 2009. The evidence was plaintiff would not close without a liquor license and it did not have

one. Further, plaintiff would not close without the requisite financing and it did not have that as it was contingent on an appraisal and a liquor license. Plaintiff had neither. Plaintiff asked for an extension beyond the June 1 closing date. This is further evidence it was not ready to close on that date. Plaintiff did not send written notice to defendant by May 15 of its inability to obtain a liquor license which, under the contract, would have resulted in voiding the contract and an automatic refund of its down payment. Despite the lack of written notice, defendant was willing to give plaintiff its deposit back at the time it denied plaintiff's request for an extension. Defendant never stated it was no longer willing to close on June 1. In fact, that was the most preferable outcome to Cutler as he had taken steps for his life after the sale based on the June 1 closing date.

¶ 42 We found the trial court's analysis of the evidence helpful. The conclusion plaintiff failed to prove by clear and convincing evidence its failure to obtain a liquor license in time to close the contract on June 1, 2009, was the result of Cutler's conduct was not arbitrary or unreasonable nor was the opposite result clear. The court's order in favor of defendant was not against the manifest weight of the evidence.

¶ 43 Based on our decision the directed verdict against plaintiff was correct, we also find the summary judgment entered in favor of defendant for attorney fees and costs was also correctly decided as the contract provided this result in the event of litigation in regard to the contract.

¶ 44 III. CONCLUSION

¶ 45 We affirm the trial court's judgment.

¶ 46 Affirmed.