

2012 IL App (2d) 111309-U
No. 2-11-1309
Order filed October 4, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TWINCREST, LLC,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-MR-0406
)	
NORTH JERSEY GASTROENTEROLOGY)	
ASSOCIATES, a partnership, and STEVEN)	
DAVID, M.D.,)	
)	
Defendants-Appellees)	
)	
(Robert H. Bleicher, M.D., Joseph A.)	Honorable
Zangara, M.D., Jonathan Stillman, M.D.,)	Jorge L. Ortiz,
and Bonnie K. Cheng, M.D., Defendants.))	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in interpreting the termination provision of agreement.
- ¶ 2 This dispute concerns the termination provision in an agreement between plaintiff, Twincrest, LLC, (TC) and defendants, North Jersey Gastroenterology Associates and its member physicians

(collectively, NJGA).¹ TC agreed to design, build, and operate a laboratory within NJGA's existing facility. NJGA would pay for the construction as well as fees for TC's services during the term of the agreement. The agreement specified an initial term of five years with automatic three-year renewal periods "unless terminated six months prior to the end of the then current term by either party." The agreement provided that either party could terminate the agreement "at any time for any or no reason during term." After TC built and operated the laboratory for more than a year, NJGA terminated the agreement, taking the position that it owned the laboratory and no longer needed TC's services, and therefore owed TC no more fees.

¶3 TC filed a complaint for declaratory judgment (735 ILCS 5/2-701 (West 2010)), alleging that NJGA is liable for the payments owed during the unexpired portion of the initial term of the agreement. The trial court granted NJGA a partial judgment on the pleadings, holding that the agreement is unambiguous and grants either party the right to terminate the agreement such that NJGA could terminate the agreement after one year without incurring any further financial obligation to TC. The court noted that TC's interpretation of the contract would render the termination provision meaningless and lead to an absurd result in that NJGA would be liable for payments for the entire five-year initial term, regardless of whether either party terminated the agreement after the first year. We agree with the trial court's analysis and affirm the partial judgment on the pleadings entered in favor of NJGA.

¹ The physician defendants denied the existence of an entity known as North Jersey Gastroenterology Associates and filed affidavits stating that TC mistakenly named that entity in the complaint. North Jersey Gastroenterology & Endoscopy Associates, P.A., was allowed to appear as the correct defendant, and we refer to that entity as NJGA.

¶ 4

FACTS

¶ 5 On April 4, 2008, the parties entered into an “Inter-Office Laboratory Agreement” whereby TC agreed to provide a pathology laboratory within NJGA’s facility and provide associated services. In exchange for the laboratory and services, NJGA would pay certain fees. Item 1 of the agreement provides that TC would perform work as set forth in Exhibit A, which was attached to the agreement. Item 3 provides that “[a]s compensation for TC’s services, NJGA shall pay the fees in Exhibit C (attached) within thirty (30) days upon receipt of billing.”

¶ 6 Exhibit A states that TC was obligated to (1) design and construct a laboratory, including workstations and benches; (2) select and install equipment, supplies, and materials needed to operate the laboratory based on test volumes that NJGA anticipated processing onsite; (3) recruit medical and technical staff to operate the laboratory; (4) and assure the laboratory received Clinical Laboratory Improvement Amendment (CLIA) registration before processing any patient specimens. Upon completion of the laboratory, TC was further obligated to (1) flowchart specimens and paperwork routing to ensure smooth workflow, including assuring that test results timely reach the physicians, test records reach the patients’ files, and paperwork flows into NJGA’s billing system and (2) review and report on laboratory operations one day per month for the first 12 months of operation and then at least one day per quarter thereafter during the term of the agreement.

¶ 7 Exhibit C states that NJGA was obligated to pay (1) about \$60,000 for a 300 square-foot “fully functional” laboratory; (2) \$150,000 for laboratory equipment and training of NJGA’s staff in the operation of the equipment; (3) a fee of \$10 per Current Procedural Terminology (CPT) code billed in the first year, \$9 per CPT code in the second year, \$8 per CPT code in the third year, \$7 per

CPT code billed in the fourth year, and \$6 per CPT code billed in the fifth year. NJGA further agreed to pay TC an additional \$15,000 in earnest money upon signing the agreement.

¶ 8 Item 2 of the agreement defines the “term” of the agreement as 60 monthly billing cycles from the date of signing, with the first billing cycle starting when the laboratory achieves “steady-state” operations. The agreement provides for “[a]utomatic renewal for three-year periods unless terminated six months prior to the end of the then current term by either party.”

¶ 9 Item 4 of the agreement is the contested termination provision, which provides as follows:

¶ 10 “4. Termination. Either party shall have a right to terminate this Agreement at any time for any or no reason during term upon a minimum of sixty (60) days written notice to the other party. Termination shall encompass a full ending calendar month, not a partial month, reNJGAdless [*sic*] of when the notice of termination is delivered. Termination is subject to payments described in Exhibit C.”

¶ 11 In turn, Exhibit C provides that, if NJGA chooses to terminate the agreement, it must make certain payments depending on the date of the termination:

¶ 12 “5. Subject to item 3 of the agreement [Compensation], should ABC [*sic*]: (a) decide not to go forward with designing and building the laboratory after signing the agreement but before construction begins, the earnest money payment is non-refundable; (b) should NJGA terminate the agreement after the laboratory is built because NJGA decides not to operate a laboratory for at least two years, TC will be compensated in the amount of \$250,000, and (c) should NJGA terminate the agreement prior to its first year of operation (defined as 12 monthly billing cycles), TC will also be compensated as specified in Exhibit B (first year estimated TC fees [\$307,000]) and the laboratory will not operate for two (2) years

thereafter. Upon reaching the first year of operations, the agreement continues to its initial term.”

¶ 13 On January 27, 2010, which was more than one year after the laboratory became operational, NJGA sent TC a letter stating that it had elected to exercise its right to terminate the agreement pursuant to Item 4 of the agreement. NJGA stated that it intended the termination to take effect on April 1, 2010. TC responded on the same day, stating that “the agreement continues to its initial term [60 months] for purposes of payment but we cease providing services to you,” including quarterly inspections, monitoring of regulatory changes, Medicare reimbursement fees, and reporting of laboratory performance.

¶ 14 On March 12, 2010, TC filed a complaint for declaratory judgment against NJGA. The complaint seeks a declaration that “the Agreement continues to its initial term and the Defendants are jointly and severally liable to the Plaintiff on an on-going basis for the payment of the Plaintiff’s invoices to be rendered to the Defendants for the unexpired portion of the initial term of the Agreement, all in accord with the arithmetic calculation formulae governing such fees as specified in Section 3 of Exhibit C attached to the Agreement.”

¶ 15 On August 11, 2010, NJGA filed an answer and counterclaim. The counterclaim sought a declaratory judgment that “(1) Section 4 of the Agreement gives NJGA the right to terminate the Agreement at any time during the term of the Agreement and for any reason; (2) Exhibit C, Section 5 of the Agreement does not limit NJGA’s right, pursuant to Section 4 of the Agreement, to terminate the Agreement at any time and for any reason; (3) the last sentence of Exhibit C, Section 5 of the Agreement does not provide for further payments by NJGA if it terminates the Agreement after the first year of operations; and (4) NJGA may invoke its right to terminate the Agreement at

any time, upon sixty (60) days notice, after the first year of operation without being liable for any further payment to [TC].”

¶ 16 Defendants Bleicher, Zangara, Stillman, and Cheng denied the existence of the defendant partnership, and on October 20, 2010, the trial court dismissed these defendant physicians because they were neither signatories to the agreement nor partners in North Jersey Gastroenterology Associates.

¶ 17 On May 20, 2011, TC moved for partial judgment on the pleadings, arguing that the plain and ordinary meaning of the termination provision in Item 4 of the agreement is subject to the last sentence of section 5 of Exhibit C, which states that “[u]pon reaching the first year of operations, the agreement continues to its initial term.” TC advocated an interpretation that Item 4 of the agreement does not give NJGA the right to terminate the agreement after one year of operation without making all of the payments due during the unexpired term of the agreement. On June 22, 2011, NJGA filed an opposing motion for judgment on the pleadings, arguing that Item 4 granted both parties the unconditional right to terminate the agreement after one year of laboratory operation because termination is subject only to the payments specifically described in Section 5 of Exhibit C and TC’s interpretation would render the termination provision meaningless.

¶ 18 On September 21, 2011, the trial court granted NJGA a partial judgment on the pleadings, holding that (1) the agreement is unambiguous, (2) the termination provision grants either party the right to terminate the agreement at any time for any or no reason during the term upon at least 60 days written notice to the other party, (3) although the agreement provided that NJGA would be liable for certain payments if NJGA terminated the agreement within the first year of the initial term of laboratory operation, NJGA owed no more payments because it terminated the agreement after

one year; (4) TC's interpretation of the contract would render the termination provision meaningless and lead to an absurd result in that NJGA would be liable for payments for the entire five-year initial term, regardless of whether either party terminated the agreement after the first year; and (5) there was no just reason to delay enforcement or appeal of the order pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan 1, 2006)).

¶ 19 On October, 21, 2011, TC filed a motion to reconsider, which was denied on November 22, 2011. TC filed a timely notice of appeal on December 21, 2011.

¶ 20 ANALYSIS

¶ 21 TC filed a complaint for declaratory judgment under section 2-701 of the Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2010)), and the complaint incorporated the agreement and the parties' subsequent correspondence by reference. NJGA answered the complaint and filed a counterclaim for declaratory judgment, alleging that the agreement gave NJGA the right to terminate without incurring any further financial obligation.

¶ 22 "In the context of a declaratory judgment action, 'there must be an actual controversy between adverse parties, with the party requesting the declaration possessing some personal claim, status, or right which is capable of being affected by the grant of such relief.'" *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 420 (2005) (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 493 (1988)). "The declaratory judgment procedure was designed to settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right." *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 174 (1995). In this case, there is an actual, justiciable controversy in that the parties seek a determination of whether the agreement allows NJGA to terminate it after one year of operation

without being liable for all payments due over the five-year term. Neither party seeks damages yet, but declaratory judgment is appropriate because a true controversy exists regarding the parties' rights under the termination provision.

¶ 23 The parties filed cross-motions for judgment on the pleadings under section 2-615(e) of the Code. See 735 ILCS 5/2-615(e) (West 2010). Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). “In ruling on a motion for judgment on the pleadings, the court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record.” *Gillen*, 215 Ill. 2d at 385. A motion for judgment on the pleadings requires that the trial court consider the motion, the underlying pleadings, and the exhibits attached to the pleadings. *Parkway Bank and Trust Company v. Meseljevic*, 406 Ill. App. 3d 435, 444 (2010).

¶ 24 “A motion for judgment on the pleadings is akin to a motion for summary judgment limited to the pleadings.” *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 772 (2000). On review, we must examine the pleadings to determine whether any genuine issue of material fact exists and, if not, whether the movant is entitled to judgment as a matter of law. *Kim*, 312 Ill. App. 3d at 772. We review a circuit court's order granting judgment on the pleadings *de novo*. *Kim*, 312 Ill. App. 3d at 772. Mindful of our standard of review, we address the meaning of the agreement's termination provision.

¶ 25 The basic rules of contract interpretation are well settled. In construing a contract, the primary objective is to give effect to the intention of the parties. *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011). A court will first look to the language of the contract itself to determine the parties'

intent. *Thompson*, 241 Ill. 2d at 441. A contract must be construed as a whole, viewing each provision in light of the other provisions. *Thompson*, 241 Ill. 2d at 441. The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract. *Thompson*, 241 Ill. 2d at 441.

¶ 26 If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Thompson*, 241 Ill. 2d at 441. However, if the language of the contract is susceptible to more than one meaning, it is ambiguous and a court can consider extrinsic evidence to determine the parties' intent. *Thompson*, 241 Ill. 2d at 441.

¶ 27 We agree with the trial court that the plain and ordinary meaning of the termination provision of Item 4 unambiguously grants each of the parties an unconditional right to terminate the agreement after one year of operation. Item 4 provides that either party shall have a right to terminate the agreement "at any time for any or no reason during term upon a minimum of sixty (60) days written notice to the other party." The parties agree that NJGA provided TC with timely notice of its intent to terminate the agreement.

¶ 28 Item 4 further provides that "[t]ermination is subject to payments described in Exhibit C." Section 5 of Exhibit C describes three different payments due upon NJGA's termination of the agreement, depending on the date of termination. First, if NJGA "decide[s] not to go forward with designing and building the laboratory after signing the agreement but before construction begins," NJGA would forfeit the \$15,000 in earnest money paid to TC. Second, if NJGA "terminate[s] the agreement after the laboratory is built because [NJGA] decides not to operate a laboratory for at least two years," NJGA would owe TC \$250,000 and be barred from operating the laboratory for two years. Third, if NJGA terminates the agreement "prior to the first year of operation (defined as 12

monthly billing cycles), TC [would] also be compensated” its estimated fees for the first year, specified as \$307,000 in Exhibit B, and NJGA would be barred from operating the laboratory for two years. TC concedes that none of three compensation provisions in section 5 of Exhibit C apply because the laboratory had been in operation for more than a year when NJGA gave notice of the termination.

¶ 29 Exhibit C describes no payments to which TC would be entitled if NJGA elected to terminate the agreement after one year of operation. Instead, section 5 of Exhibit C provides that “[u]pon reaching the first year of operation, the agreement continues to its initial term.” The initial term is governed by Items 1 through 10 of the agreement, including the termination provision contained in Item 4, which grants either party the right to terminate the agreement “at any time for any or no reason during term.” Item 4 states that “[t]ermination is subject to payments described in Exhibit C,” but NJGA owed no further payments after one year of operation because Section 5 of Exhibit C described no payment due upon termination at that time.

¶ 30 Moreover, “[a] court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used. [Citation.] Further, when parties agree to and insert language into a contract, it is presumed that it was done purposefully, so that the language employed is to be given effect.” *Thompson*, 241 Ill. 2d at 442. TC asserts that, after one year of laboratory operation, NJGA became liable for the payments owed during the unexpired portion of the initial term of the agreement. However, Item 4 plainly states that either party shall have a right to terminate the agreement “at any time for any or no reason during term.” The agreement lacks a specific provision governing termination for cause. Therefore, according to TC’s interpretation, if NJGA terminated the agreement after one year of

operation because TC failed to perform under its terms, NJGA still would be obligated to pay TC the same compensation which would have been due had NJGA not terminated the agreement. Accepting TC's interpretation of the agreement would render the termination provision meaningless, which is contrary to the rules of contract interpretation.

¶ 31 Furthermore, TC's interpretation of the agreement would make its promise to perform illusory. An illusory promise appears to be a promise, but on closer examination, reveals that the promisor has not promised to do anything. *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 229 (2009). An illusory promise is also defined as one in which the performance is optional, and such a promise is not sufficient consideration to support a contract. *Keefe*, 393 Ill. App. 3d at 229-30. Under TC's interpretation of the agreement, NJGA would remain liable through the five-year initial term even if TC terminated the agreement for any or no reason. Thus, TC itself could terminate the agreement at any time, ending its own obligation to provide services, yet NJGA still would be obligated to continue making payments during the entire five-year term. TC's position would make its promise to supply services illusory because performance would be optional.

¶ 32 "Where an instrument is 'susceptible to one of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not likely enter into, the interpretation which makes a rational and probable agreement must be preferred.'" *Sears, Roebuck and Co. v. Charwil Associates Ltd. Partnership*, 371 Ill. App. 3d 1071, 1076 (2007) (quoting *NutraSweet Co. v. American National Bank & Trust Co. of Chicago*, 262 Ill. App. 3d 688, 695 (1994)). Also, courts will construe a contract reasonably to avoid absurd results. *Health Professionals, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 1036 (2003). We reject TC's interpretation as inequitable and leading to absurd results.

¶ 33

B. Alleged Waiver of Ambiguity

¶ 34 In their cross-motions for judgment on the pleadings, the parties agreed that the agreement is unambiguous, even though they disputed the plain and ordinary meaning of the language. In its motion to reconsider, TC argued for the first time that the termination provision was ambiguous and that the trial court had failed to attempt to reconcile the ambiguity. In denying the motion, the trial court persisted in its determination that the agreement is unambiguous. The court also found that TC procedurally defaulted its ambiguity argument by failing to raise it in the motion for judgment on the pleadings. On appeal, TC argues that a trial court owes a duty to resolve an ambiguity when interpreting a contract, regardless of procedural default by the parties. TC contends that the trial court breached that duty in this case. We need not address TC's allegation of error because we conclude that the agreement is unambiguous.

¶ 35

III. CONCLUSION

¶ 36 For the preceding reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 37 Affirmed.