

Nos. 1-11-2108 & 1-11-2488 (cons.)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARY HAAK, derivatively on behalf of LYONS)	Appeal from the Circuit Court
REDEVELOPMENT, LLC, and TAD)	of Cook County, Illinois
CHRISTENSEN, derivatively on behalf of LYONS)	
REDEVELOPMENT, LLC,)	
)	
Plaintiffs-Appellees/Appellants,)	
)	
v.)	05 CH 9238
)	
)	
REGER DEVELOPMENT, LLC, KEVIN REGER,)	
REGER DEVELOPMENT GROUP OF LYONS,)	
LLC, VILLAGE OF LYONS, INFILL MARKET)	
DEVELOPMENT CORPORATION, and TOM)	
WALSH,)	
)	
Defendants-Appellants/Appellees.)	Honorable Nancy Arnold, Judges Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justice Harris and Justice Connors concurred in the judgment.

ORDER

¶ 1 *HELD:* Where assignment by limited liability company clearly assigns "all of its rights, interest and obligations" relating to an agreement to assignee defendant, circuit court erred in finding that testimony that the assignment was merely cosmetic and did not change the relationship of the parties and the prior oral contract between members of the company concerning distribution of the proceeds of a redevelopment note controlled.

Nos. 1-11-2108 & 1-11-2488 (cons.)

¶ 2 *HELD*: Where this court reversed the underlying judgment in favor of plaintiffs, plaintiffs' appeal of circuit court's denial of the petition for attorney fees based on a successful judgment is rendered moot.

¶ 3 Plaintiffs Gary Haak and Tad Christensen brought suit derivatively as members of Lyons Redevelopment, LLC (Lyons Redevelopment), against defendants Kevin Reger, Reger Development, LLC, Reger Development Group of Lyons, LLC (Reger Development), the Village of Lyons (Village), Tom Walsh, and Infill Market Development Corporation (Infill). Plaintiffs alleged that Lyons Redevelopment had been fraudulently induced to transfer tax increment financing (TIF) redevelopment promissory notes to defendant Reger Development. Ultimately, the parties advanced to a bench trial on one count of plaintiffs' fourth amended complaint alleging that Lyons Redevelopment should have been the sole payee of the TIF promissory notes. All other counts were voluntarily dismissed. Plaintiffs were allowed to amend their complaint after trial to conform to the proof at trial. The circuit court entered judgment in favor of plaintiffs.

¶ 4 On appeal, defendants assert that: the circuit court erred in basing judgment on parol evidence of a prior oral agreement despite the existence of a written contract; the alleged oral agreement should have been barred by the statute of frauds; the circuit court erred in considering non-admitted evidence; and the circuit erred in allowing plaintiffs to assert a new cause of action in their fifth amended complaint.

¶ 5 Counsel for derivative plaintiffs also filed an appeal of the circuit court's denial of their petition for attorney fees. On appeal, they contend that the court erred in determining that the common fund doctrine upon which it relied did not apply because separate counsel appeared on behalf of Lyons Redevelopment at trial, but did not perform work on the company's behalf during the four year discovery and pretrial period. Derivative counsel also argue that the circuit

Nos. 1-11-2108 & 1-11-2488 (cons.)

court erred in basing its decision denying attorney fees partly on the fact that other claims were voluntarily dismissed subsequent to discovery without any factual inquiry into the percentage of work completed by counsel for plaintiffs related to the remaining successful claim.

¶ 6 These appeals were consolidated by this court and the parties submitted appellate briefs. Considering the entire record and for the following reasons, we reverse the judgment of the circuit court in favor of plaintiffs and affirm the denial of the petition for attorney fees.

¶ 7 I. BACKGROUND

¶ 8 On May 31, 2005, Haak filed a complaint for accounting and related relief derivatively as a member of Lyons Redevelopment against Reger, Reger Development, Reger Development Group of Lyons, LLC, and the Village. Haak asserted that Reger converted assets of Lyons Redevelopment by selling and buying real estate associated with the development underlying the agreement between the parties and the Village. Haak sought an accounting on behalf of Lyons Redevelopment and a declaration of rights of the parties. In addition, the complaint included counts for conversion and breach of fiduciary duty and also sought the establishment of a constructive trust.

¶ 9 On August 31, 2007, plaintiffs filed a six-count fourth amended complaint. Plaintiffs' first count was against all defendants and sought declaratory judgment that Lyons Redevelopment was entitled to all payments due from development notes issued for the TIF redevelopment project. Plaintiffs also advanced causes of action for: conspiracy to defraud against Reger, Walsh, and Reger Development; breach of fiduciary duty against Reger Development and Reger Development, LLC; aiding and abetting breach of fiduciary duty against Reger, Walsh, and Infill; conversion against Reger Development; and a declaratory action for dissociation of Reger Development and Infill as members of Lyons Redevelopment. On

Nos. 1-11-2108 & 1-11-2488 (cons.)

December 2, 2010, the circuit court entered an order barring the parties from filing any further motions to amend the pleadings and the matter advanced to a bench trial on April 11, 2011.

¶ 10 Prior to opening arguments, plaintiffs dismissed count II of the fourth amended complaint for conspiracy to defraud against Reger, Walsh, and Reger Development. Plaintiffs also dismissed Walsh and Infill as defendants in the remaining counts. However, plaintiffs did not dismiss the remaining defendants or counts and asserted that they planned to present proof in support of each of these counts at trial. Walsh's attorney stayed on as trial counsel for Lyons Redevelopment.

¶ 11 At trial, the parties presented the testimony of the members of Lyons Redevelopment who testified to the creation of the LLC and the TIF project and the numerous documents produced regarding the project. Walsh testified that he had a little than less than a 50% ownership share in Lyons Redevelopment and, utilizing his years of experience working on TIF projects, he worked with the Village and Reger to develop and carry out the plan to redevelop the TIF property. Walsh testified that typically he would be the "master developer" or "entitler" of the project and that he would bring in developers, such as Reger, to be "end users" that physically developed or redeveloped properties.

¶ 12 TIF projects are authorized under the Illinois Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1, *et seq.* (West 2012)) whereby municipalities may freeze real estate taxes and offer developers future payments of property taxes to promote redevelopment of blighted areas. As such, these projects involve the political process and public participation. Therefore, the role of the master developer is to work with the municipality and end user to facilitate the process and get the project up and running. Typically, and in this case, a proposed project begins with a feasibility study authorized by the municipality followed by authorization

Nos. 1-11-2108 & 1-11-2488 (cons.)

from the municipality for designation of a TIF district; the ability to enter into a redevelopment agreement; and financing for the TIF district. Financing generally can be provided through the municipality in support of projects through the sale of bonds and issuance of redevelopment notes. Bonds can be sold by the municipality, the funds from which can be paid to the developer immediately for upfront costs such as land acquisition. Redevelopment notes are nonrecourse promissory notes whereby a municipality may reimburse a developer for TIF related expenses with payment contingent on the generation of funds from increased tax receipts directly related to the TIF project. Redevelopment notes typically mature 20 years from issuance. The sole dispute in this case is the distribution of the proceeds of the redevelopment note, which Lyons was, in part aided by Walsh, refinanced, enabling it to be paid off in half that time.

¶ 13 Specifically in this case, after successfully working on two other TIF districts, Walsh was contacted by the Village in 2002 about establishing a third TIF district in order to relocate a Walgreens store. Walsh agreed to set up a company to be the master developer and facilitate the proposed project. Walsh met Reger, who had worked on the development of other Walgreens stores, and they identified a parcel of land within the proposed TIF district. The property was owned by Suburban Mailing, Inc., which operated its headquarters out of a building on the parcel.

¶ 14 Reger approached Walgreens about the proposed site and Walgreens indicated it was interested in leasing a facility on that site. After the Village approved the feasibility study, Walsh secured investors and they formed Lyons Redevelopment on October 18, 2002. Reger did not invest funds, but was granted a 5% percentage ownership interest and named manager of Lyons Redevelopment. In March 2003, Reger negotiated and entered into a real estate contract

Nos. 1-11-2108 & 1-11-2488 (cons.)

on behalf of Lyons Redevelopment with Suburban Mailing to purchase the subject property for \$2.6 million.

¶ 15 On August 19, 2003, the Village passed an ordinance approving the TIF district, the issuance of TIF bonds, and requiring a \$1.5 million investment from the developer toward the purchase of the land. The Village formally adopted the redevelopment agreement on November 25, 2003, in an ordinance that named Lyons Redevelopment as the developer and also provided specific details of financial terms. The Village restated the developer's required \$1.5 million investment, as well as a required donation to the Village out of the bond proceeds that were to total \$1.3 million if only the Walgreens was built or \$1.6 million if proposed industrial condominiums were also constructed. In addition, the Village provided for a \$1.25 million redevelopment note to the developer with a maximum interest rate of 7% to be paid subject to submission of appropriate documentation of eligible reimbursement expenses from the developer, Lyons Redevelopment.

¶ 16 The members of Lyons Redevelopment all testified to a company meeting in February or March 2004 that was held at the Wolf's Head Inn restaurant in Indianhead Park, Illinois (Wolf's Head). At that meeting, Walsh presented a handout to the members titled "Lyons Redevelopment, LLC" with two subtitles of "Summary of Bonds" and "Summary of Developers Note." Each summary contained numbers for whether the project was for the Walgreens store only, or if it also included the industrial condominiums. Relevant to the ultimate project in this case, under the summary of bonds, the handout listed income of \$1.6 million with expenses of \$1.1 million to Reger for the land, \$220,000 to the Village, and \$280,000 to Lyons Redevelopment. Under the redevelopment note summary, the handout provided that the note would be \$1.25 million with 7% interest if not tax exempt and 6% if tax exempt. Finally, the

Nos. 1-11-2108 & 1-11-2488 (cons.)

handout stated "Reger to receive \$200,000 plus the stated interest at a rate of 60% to Reger and 40% to Lyons Redevelopment until paid in full, thereafter Lyons Redevelopment receives 100% of the Note."

¶ 17 Reger testified that he did not object to the handout numbers during the Wolf's Head meeting. Walsh and the other members of Lyons Redevelopment testified that these were the terms of their deal. On March 16, 2004, Reger reached agreement with Walgreens on a lease for the subject property. On March 25, 2004, Walsh and Haak signed a resolution of the members of Lyons Redevelopment memorializing that Reger Development was to receive \$1.1 million from the bond sale and that Reger Development was to receive \$200,000 of the redevelopment note "to offset it's [*sic*] extraordinary land costs." The resolution also authorized Lyons Redevelopment to assign the real estate contract between Lyons Redevelopment and Suburban Mailing Services to Reger Development, voiding the original \$2 million contract.

¶ 18 The assignment of the real estate agreement was entered into on March 26, 2004, signed by Reger as manager for Reger Development and as manager for Lyons Redevelopment. Reger Development assumed and agreed to perform all of Lyons Redevelopment's obligations, duties and responsibilities under the real estate contract. Reger Development agreed to indemnify and hold harmless Lyons Redevelopment and all its members against any and all claims and liabilities.

¶ 19 Based on issues with a Shell gasoline station on the property and increased costs Walsh was able to secure additional funding from the Village. On August 17, 2004, the Village entered an ordinance increasing the amount of the TIF bonds to \$2.05 million. The Village also amended the redevelopment agreement to include language that it would agree to the assignment of the agreement to Reger Development as the sole developer.

Nos. 1-11-2108 & 1-11-2488 (cons.)

¶ 20 Walsh testified that prior to this August 17, 2004, ordinance, he spoke with the Village about substituting Reger Development with Lyons Redevelopment on the redevelopment agreement. The Village had indicated that if Reger Development was going to be the end user, it wanted the agreement to flow through Reger Development. Walsh testified that he did not object to the idea, "because it had no material change to our understanding. So it didn't bother me in the least."

¶ 21 On August 27, 2004, as manager of both Reger Development and Lyons Redevelopment Reger signed the assignment at issue in this case. Under the assignment agreement, Lyons Redevelopment assigned "all of its rights, interest and obligations relating to the execution of Phase II of the Agreement to [Reger Development], including, but not limited to the following: fees and expenses, requisite insurance, requisite performance bond, and compliance with applicable laws." Further, the assignment noted that Lyons Redevelopment had been designated as the exclusive developer for the development, construction, financing, completion, and furtherance of the TIF project and had entered into a real estate purchase agreement pursuant to that agreement. The assignment listed Reger Development's assumption of these rights and obligations and its agreement to purchase the real property as consideration for the assignment of Lyons Redevelopment's rights, interest and obligations.

¶ 22 Walsh testified that while he knew the assignment would be completed, Reger did not inform him that he was entering into the agreement. Walsh opined that the assignment was not wrongful and that he had discussed the issue with Haak and others. He stated that he would not have signed a covenant not to sue Reger if Reger stated that he was going to receive the proceeds of the entire redevelopment note. Walsh also stated the assignment did not concern him because the assignment did not change the parties' relationship.

Nos. 1-11-2108 & 1-11-2488 (cons.)

¶ 23 On August 30, 2004, the sale of the bonds was completed and the proceeds were distributed to Reger Development. Reger testified that \$1.1 million was kept by Reger Development to pay for the Suburban Mailing property. Of the remaining proceeds, the donation to the Village was made per the agreement, additional funds were paid to Shell, and \$209,500 was paid to Lyons Redevelopment. The members of Lyons Redevelopment received distributions from the payout allowing the members to recoup their investments and also a *pro rata* share of a roughly \$55,000 profit.

¶ 24 On September 16, 2004, Reger submitted a resignation letter, stating that Reger Development was resigning as manager of Lyons Redevelopment. The project was subsequently completed. In 2010, Walsh assisted the Village in refinancing debt and the redevelopment note which was paid out to Reger Development per the amended redevelopment agreement and assignment. Reger testified that this was proper not only pursuant to the assignment, but also because he had documented TIF expenses that were to be reimbursed in that amount and that the costs and parameters of the project had changed since the Wolf's Head meeting. Reger further testified that the Wolf's Head meeting only involved discussion of projections and that intervening events and increased costs altered the amount of money required to complete the project and due the parties.

¶ 25 Following the close of trial on April 15, 2011, the circuit court entered a written order granting plaintiffs leave to file a fifth amended complaint to conform to the proof at trial. The court noted that plaintiffs dismissed count II and all claims in count IV against all defendants except Reger and all claims in count VI against all defendants except Reger Development. The court further clarified that, in closing argument, plaintiffs only sought judgment on their count for declaratory judgment.

Nos. 1-11-2108 & 1-11-2488 (cons.)

¶ 26 In plaintiffs' fifth amended complaint, plaintiffs advanced only the count for declaratory judgment. Plaintiffs alleged that there was an oral agreement between Reger and Lyons Redevelopment that Reger Development would receive \$1.1 million of the TIF bond proceeds and Lyons Redevelopment would receive the remainder of the proceeds after certain expenses were paid. They also alleged that the parties had an oral agreement that Reger Development would be entitled to \$200,000 of the redevelopment note if it was paid out and that Lyons Redevelopment would receive the remaining \$1.05 million.

¶ 27 On May 24, 2011, the circuit court entered a 22-page order finding for plaintiffs. The court determined that the members of Lyons Redevelopment entered into an oral agreement consistent with the terms outlined during the Wolf's Head meeting in February or March 2004 and as alleged in plaintiffs' fifth amended complaint. It opined that "[i]t was an oral agreement that was memorialized in three writings, one not formalized at all, one formalized in a 'corporate' resolution, and one fully executed but not admitted into evidence. Notwithstanding the lack of a formal executed document in evidence, the court finds that there was no doubt as to the existence and terms of the parties['] agreement, and that it remains in place to this date."

¶ 28 The court detailed that there was no ambiguity or disagreement concerning the discussions that constituted the oral agreement. The court highlighted the terms stated in the handout from the Wolf's Head meeting and the consistencies with the March 25, 2004, resolution of the members of Lyons Redevelopment. The court also discussed the consistency with the evidence that was not admitted at trial. It did not find the assignment improper or unenforceable, but found Reger's testimony to be incredible, particularly his claim that the assignment rendered the oral agreement unsupported as there were "no documents anywhere referencing any such modification." The circuit court further stated that Walsh credibly testified that the assignment

Nos. 1-11-2108 & 1-11-2488 (cons.)

had no effect on the parties' relative undertakings and expenses. Accordingly, the circuit court entered judgment in favor of plaintiffs and ordered payment of \$200,000 plus interest to Reger Development and the remainder to be paid to Lyons Redevelopment. This appeal followed the circuit court's denial of defendant's motion to reconsider.

¶ 29 On August 5, 2011, the circuit court also denied plaintiffs' petition for attorney fees. While not assigned to the case until six months prior to trial, the court noted that Walsh's counsel was active and instrumental in securing favorable judgment on the only count that survived through trial and plaintiffs' fifth amended complaint, so the common fund doctrine did not apply. In addition, the circuit court noted that plaintiffs had a contingency agreement with derivative counsel and the parties should be left to the terms of that agreement. That order was appealed and, as stated above, this court consolidated these two appeals.

¶ 30 II. ANALYSIS

¶ 31 A. Declaratory Judgment

¶ 32 Defendants argue that the circuit court erred in even entertaining evidence of the parties' oral agreement because there was a subsequent written agreement that controls. They assert that the terms of the redevelopment agreement and the assignment of all of Lyons Redevelopment's rights, interest and obligations to Reger Development concerning the completion of the Walgreens portion of the TIF project are clear and resort to parol evidence was improper. We agree.

¶ 33 As noted above, the sole ultimate issue at trial and on appeal is the payout of the redevelopment note. Plaintiffs' fifth amended complaint simply sought a declaration that Lyons Redevelopment was to receive \$1.05 million of the \$1.25 million redevelopment note pursuant to the oral agreement of the members of Lyons Redevelopment. All prior allegations of fraud

Nos. 1-11-2108 & 1-11-2488 (cons.)

and breach of fiduciary duty were abandoned. Therefore, we are left with a written assignment agreement and a claim that a prior oral agreement controls over the written agreement.

¶ 34 Our review from a trial court's interpretation of a contract is *de novo*. *Asset Recovery Contracting, LLC v. Walsh Construction Company of Illinois*, 2012 IL App (1st) 101226, ¶ 57.

In considering the language of an agreement, we follow Illinois' "four corners rule." This means that we initially look solely at the language within the four corners of the document and "[a]ll conversations and parol agreements between the parties prior to the written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement."

Id. at ¶ 58, quoting *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 106 (1921). If the language of the agreement is found to be unambiguous, it is interpreted without parol evidence and solely by the written terms. *Id.* Where objection to the consideration of parol evidence is not made before the circuit court, a reviewing court may consider such evidence as waived as objection may not be made for the first time on appeal. *Tolbird v. Howard*, 43 Ill. 2d 357, 362-63 (1969).

¶ 35 We do not find that the issue of the consideration of parol evidence was waived below. As addressed above, the parties advanced to trial on plaintiffs' fourth amended complaint. The crux of their declaratory judgment claim under the fourth amended complaint rested on the argument that no assignment existed and the redevelopment agreement required distribution of the redevelopment note proceeds to Lyons Redevelopment. Plaintiffs' oral agreement argument was presented in the fifth amended complaint, which was drafted after trial to conform with the proof at trial. Defendants objected to this claim and argued against it in their answer, affirmative defenses and counterclaim to the fifth amended complaint. Defendants also assert that the

Nos. 1-11-2108 & 1-11-2488 (cons.)

presentation of such parole evidence was objected to during trial when objections were made to the admission of statements that allegedly formed the oral agreement. Whether the objections at trial were sufficient is not important as we find that the parole evidence issue was not waived because defendants specifically objected to plaintiffs' claims in their answer and affirmative defenses. Accordingly, we consider the declaratory judgment issue *de novo*.

¶ 36 We agree with defendants that the circuit court should not have discussed the document that was not entered into evidence as supportive of its finding of an oral contract, but do not reverse on that ground as the discussion of that document was ancillary to the court's conclusion that the testimony at trial and other documents evidenced the oral agreement. We do, however, reverse the circuit court because we find that there was no ambiguity in the assignment agreement and that written document controls. Lyons Redevelopment assigned "all of its rights, interest and obligations" to Reger Development in consideration for Reger Development's acceptance of those rights, interests and obligations and taking over the real estate purchase agreement for the property. Accordingly, the existence of pertinent written documents made the circuit court's consideration of parole evidence improper.

¶ 37 The circuit court explicitly found Reger to be a witness lacking credibility, who frequently had trouble explaining his testimony and "was finally cornered into admitting" that the summary presented at the Wolf's Head meeting reflected that Lyons Redevelopment was to receive the redevelopment note. While we do not challenge the court's assessment of Reger's testimony, we note that Reger's admission cited by the circuit court was to the contents of the exhibit and he testified elsewhere that many factors changed after that meeting that modified the project costs and projections. Further, that Reger's assertions that the terms discussed at Wolf's Head and thereafter were in flux, are supported by the distribution of \$209,500 to Lyons

Nos. 1-11-2108 & 1-11-2488 (cons.)

Redevelopment from the initial bond sale rather than the \$280,000 that plaintiffs claim is the controlling agreement from the Wolf's Head meeting. Reger Development argued in its answer, affirmative defense and counterclaim, and again on appeal, that the assignment is an unambiguous contract that controls and testimony of the parties cannot overcome that document.

¶ 38 The circuit court's reliance on Walsh's statement that the assignment did not change the relationship of the parties is unavailing. The terms of the assignment are clear and Walsh's statement does not overcome the words of the assignment. The assignment was contemplated by the parties, and also discussed among representatives of the Village, Walsh and others. The Village also expressly acknowledged the assignment in the amended redevelopment agreement. There was no challenge to the assignment or its terms by Walsh or any other party. As manager of Lyons Redevelopment, Reger Development had authority to enter into agreements necessary to complete the project pursuant to the operating agreement and subsequent resolutions. In fact, Walsh plainly testified that the assignment was not wrongful, and claimed that it did not bother him because it did not change the relationship of the parties.

¶ 39 The parties' operating agreement and subsequent resolutions granted the manager, Reger Development, the authority to enter into agreements and sign documents as necessary. There is no dispute that this authority extended to the assignment. Because the language of the assignment is clear, we find the circuit erred in determining that the testimony and evidence at trial established that a prior oral agreement controlled. Accordingly, the funds from the redevelopment note should be distributed to Reger Development as assignee.

¶ 40 **B. Attorney Fees**

¶ 41 Derivative plaintiffs' consolidated appeal sought reversal of the circuit court's denial of

Nos. 1-11-2108 & 1-11-2488 (cons.)

the request for attorney fees pursuant to 805 ILCS 180/40-15 (West 2012). That section states, in full, "[i]f a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney fees, and shall direct the plaintiff to remit to the limited liability company the remainder of those proceeds received by the plaintiff." *Id.* As we have determined that the circuit court erred in granting plaintiffs judgment and have reversed that order, there was not a successful derivative action and the appeal of the petition for attorney fees has been rendered moot.

¶ 42

III. CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court is affirmed in part and reversed in part and the funds placed in escrow are to be disbursed to Reger Development.

¶ 44 Affirmed in part, reversed in part.