

No. 1-11-3681

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

THE CITY OF CHICAGO,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County
)	
v.)	No. 02 CH 21997
)	
A&C DEVELOPMENT and ARTHUR, INC.,)	Honorable
)	Stuart E. Palmer,
Defendants)	Judge Presiding.
)	
(Clarence, Inc.,)	
)	
Defendant and Third-Party Plaintiff-Appellant;)	
)	
Dave and Biz Corporation and Jenalica P, Inc.,)	
)	
Third-Party Defendants-Appellees).)	
)	
)	
)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err in granting third-party defendants' motion for

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summary judgment where, even if the filing of a third-party complaint constituted notice of default under the agreement, appellees responded within 30 days. Moreover, nothing in the conveyance agreement can be interpreted as a requirement to cure any default within a specified time limit, and the appellees ultimately satisfied their obligations under the agreement.

¶ 2 Plaintiff City of Chicago filed a breach of contract action against defendants A&C Development, Arthur, Inc., and Clarence, Inc., for failure to comply with the terms of a settlement agreement involving certain real property. Third-party plaintiff-appellant Clarence, Inc. then filed a breach of contract action against third-party defendants-appellees Dave & Biz Corporation and Jenalica P, Inc. for failure to pay a fine to the City, failure to remediate the property, and failure to indemnify Clarence for any loss or cause of action related to the fine or remediation. Clarence sought reconveyance of the real property at issue. The circuit court granted appellees' motion for summary judgment on the issues of reconveyance and indemnification but denied it as to the claim for attorney fees and costs. The circuit court subsequently granted appellees' motion for a directed finding and dismissed Clarence's claim for attorney fees and costs. On appeal, Clarence contends that the circuit court erred in granting appellees' motion for summary judgment where appellees did not perform their obligations under the conveyance agreement. Clarence further contends that the circuit court erred in granting appellees' motion to dismiss the claim for attorney fees where the conveyance agreement entitled Clarence to indemnification for all costs and fees incurred if appellees failed to pay the fine or remediate the site. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

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¶ 4 In March 1992, Clarence, Inc. and Arthur, Inc. were incorporated for the purpose of forming the partnership, A&C Development, in order to manage a parcel of real property located at 3305 South Lawndale Avenue in Chicago. Clarence and Arthur acquired beneficial ownership of the property in July 1992. The record owner of the property was Midwest Bank and Trust Company, as trustee under trust number 93-6579. In October 1993, the City of Chicago filed a lawsuit against A&C, Arthur and Clarence, alleging the illegal operation of a landfill on the property and illegal dumping at the site. In October 1999, the City entered into a settlement agreement with all three defendants. Under the agreement, the defendants agreed to pay a fine of \$200,000, with \$30,000 due within 30 days of the agreement, \$70,000 due on or before March 31, 2000, and \$100,000 due on or before September 30, 2000. The defendants further agreed to specific requirements related to the remediation of the site, including the submission of a remedial action plan. The activities contained in the plan were to be completed by June 30, 2000, and a remedial action completion report was to be submitted by August 15, 2000. In the event that the defendants did not comply with any of the terms of the settlement agreement, a fine of \$300 per day would accrue until the obligations and actions detailed in the agreement were satisfactorily executed or performed. The settlement agreement further provided that any sale or transfer of the property was to be made contingent on the buyer's or transferee's written agreement to the terms and conditions of the settlement agreement, the City was to be provided with a copy of such agreement, and the sale or transfer would not relieve the defendants of their obligations under the settlement agreement.

¶ 5 On or about November 13, 2000, Clarence, Arthur and A&C conveyed their beneficial

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interest in the property to appellees, Dave & Biz and Jenalica P. The parties entered into a conveyance agreement that provided that the appellees would pay the fine and remediate the property. The initial \$30,000 and \$70,000 payments were made at some point in time and, following the conveyance, the appellees engaged in negotiations with the City regarding the final \$100,000 payment and the remediation of the site. However, on December 9, 2002, the City filed a complaint against Clarence, Arthur and A&C, seeking immediate remediation of the site, the final \$100,000 payment, and penalties of \$300 per day from September 30, 2000, as per the original settlement agreement. The appellees were not named as defendants in the City's lawsuit.

¶ 6 On September 9, 2003, Clarence filed a third-party complaint against the appellees, seeking indemnification in the award of judgment and costs to the City in the underlying suit and all costs and attorney fees incurred. The defendants did not file a response to the City's motion for summary judgment in the underlying suit and judgment was entered for the City in the amount of \$856,200 against the defendants in August 2004. Clarence filed an amended third-party complaint in August 2007, additionally seeking reconveyance of the property. In August 2009, the appellees filed a combined motion for summary judgment and motion to dismiss Clarence's third-party complaint on the grounds that they had entered into an agreement with the City that the 2004 judgment against the defendants in the underlying suit would be deemed fully satisfied in consideration for a payment of \$325,000. Pursuant to the terms of the agreement, the City released the defendants from the judgment against them in return for financial consideration tendered by Jenalica P and an agreed remediation plan. The appellees further argued that Clarence was not entitled to reconveyance of the property where it did not provide notice of

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default as required under the conveyance agreement.

¶ 7 On March 16, 2010, the circuit court granted appellees' motion for summary judgment with regard to Clarence's claims for indemnification and reconveyance of the property, but denied it as to Clarence's claim for attorney fees and costs. An evidentiary hearing on the remaining issue of attorney fees and costs was scheduled for July 2011. Following the presentation of Clarence's evidence related to costs and fees incurred in the filing of the third-party complaint, appellees filed a motion to dismiss, arguing that the conveyance agreement did not provide for indemnification in an action seeking reconveyance of the property. Moreover, Clarence did not suffer any loss, damage or liability expense. Appellees further argued that the attorney fees sought were paid by a separate entity and Clarence, an uncapitalized shell corporation with no assets, produced no evidence that it was obligated to reimburse a separate entity for any attorney fees paid on its behalf. Finally, appellees argued that Clarence failed to mitigate damages by refusing appellees' tender of defense offer and failing to respond to the City's motion for summary judgment.

¶ 8 On November 14, 2011, the circuit court granted appellees' motion to dismiss, finding that the indemnification provisions of the conveyance agreement provided for indemnification for any fees incurred as a result of legal actions over the appellees' failure to perform under the settlement agreement, but not for fees incurred in an attempt to enforce the conveyance agreement. Clarence timely filed this appeal.

¶ 9 ANALYSIS

¶ 10 As an initial matter, appellees request that this court dismiss the appeal because

Clarence's brief does not comply with Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005) in that the appendix to the brief does not contain a complete table of contents to the record on appeal, with missing pages, dates, and information regarding examination of witnesses. When an appellant's brief does not comply with the provisions set forth in Rule 342(a), it is within this court's discretion to dismiss the appeal. *In re Marriage of Hluska*, 2011 IL App (1st) 092636 ¶ 57. We agree that the table of contents in Clarence's appendix does not fully comply with Rule 342(a). However, because the argument section of Clarence's appellant brief provides citations to the record and because we can ascertain the arguments, we will reach the merits of the appeal.

¶ 11 We first address Clarence's arguments that the circuit court erred in granting summary judgment on the issues of reconveyance and indemnification. Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits demonstrate that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). Our review of an order granting summary judgment is *de novo*. *Id.* at 163. In considering a motion for summary judgment, the court must construe the record strictly against the movant and liberally in favor of the nonmoving party. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). A motion for summary judgment should only be granted where the moving party's right to judgment is clear and free from doubt. *Id.*

¶ 12 Clarence first contends that the trial court erred in granting summary judgment on the

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issue of reconveyance of the property because Clarence gave the appellees notice of default and appellees did not cure the default within 30 days of receiving notice. Alternatively, Clarence contends that there is a genuine issue of material fact as to whether it gave notice and whether the appellees breached the conveyance agreement. Clarence further contends that even if there was no genuine issue of material fact regarding notice or compliance, it is still entitled to reconveyance of the property.

¶ 13 The conveyance agreement provides, in relevant part:

"In the event any enforcement of the Settlement Agreement is sought by the City of Chicago, or any other person or entity acting on behalf of the City of Chicago against Clarence, Inc. or A & C Development, Inc. [*sic*] If Buyers fail to respond within 30 days of notice of default from Clarence, Inc., Arthur Inc., or A & C Development, Inc., then and in that case, within 30 days of such notice of default, Buyers shall execute an assignment of beneficial interest back to Clarence, Inc. and Arthur, Inc., as beneficiaries of the Trust or otherwise effectively reconvey the Property to Clarence Inc. or Arthur Inc. in the same condition as it now exists."

¶ 14 Clarence argues that it provided appellees with a notice of default when it filed its third-party complaint on September 9, 2003, and when it amended the third-party complaint on August 28, 2007, seeking reconveyance of the property. In the alternative, Clarence argues that there is a genuine issue of material fact as to whether its filings constituted notice under the conveyance agreement. Clarence also argues that appellees breached the conveyance agreement when they

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failed to cure the default within 30 days of receiving notice, or that there is a genuine issue of material fact as to whether "respond" means "cure."

¶ 15 We note that the circuit court correctly observed that Clarence was in receipt of a poorly drafted conveyance agreement. The above quoted portion of the agreement contains an incomplete sentence regarding what is required in the event that the City attempts to enforce the agreement. We can presume from the following sentence that the intent was to include language in the preceding sentence to the effect that Clarence, *et al.*, was to provide notice of default to appellees. The following sentence merely required appellees to respond to a notice of default within 30 days, and provided that reconveyance was only required if appellees failed to timely respond. The conveyance agreement contains no language that could be interpreted as a requirement to cure a default within a specified time limit. Consequently, the reconveyance provision of the agreement is essentially meaningless. Even if we were to agree with Clarence that the filing of a third-party complaint constituted notice of default, appellees clearly responded to the filing within 30 days.

¶ 16 Moreover, we note that the circuit court correctly observed that what was contemplated was that if appellees did not fulfill their obligations and Clarence was forced to satisfy those obligations, Clarence at least deserved the return of the property. A poorly drafted reconveyance provision does not create a genuine issue of material fact where, regardless of whether or not a third-party complaint satisfies the notice requirement and whether a response to that complaint satisfies the requirements of the agreement as drafted, the record shows that Clarence did not pay any portion of the \$200,000 fine or the judgment obtained by the City and did not perform any

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remediation activities at the site. Thus, the circuit court did not err in granting summary judgment in favor of the appellees on the issue of reconveyance.

¶ 17 Clarence argues that even if there is no genuine issue of material fact, the circuit court should have either ordered that the property be reconveyed or awarded appellant monetary damages and/or other relief. This argument has no merit and Clarence cites no authority that would support the award of such relief. Appellees filed a motion for summary judgment. Because there was no genuine issue of material fact, the circuit court properly granted the motion. The circuit court had no basis for providing the relief sought by Clarence where no genuine issue of material fact existed.

¶ 18 Clarence further contends that the trial court erred in granting summary judgment on the issue of indemnification where appellees did not enter into an agreement with the City to satisfy the obligations under the settlement agreement until 2009, Clarence was forced to defend itself against the City's lawsuit in the meantime, and was therefore entitled to recover attorney fees and costs in that defense. Appellees respond that Clarence never tendered its defense to appellees, refused appellees' offers of assistance in defense of the City's lawsuit, failed to file a response to the City's summary judgment motion, and subsequently argued that appellees lacked standing to challenge the judgment entered against Clarence.

¶ 19 As previously noted, summary judgment is appropriate where no genuine issue of material fact exists. Clarence's opening brief contains one paragraph of argument on this issue, with no citation to relevant authority, and does not contain any reference to a genuine issue of material fact that would preclude the entry of summary judgment. In contrast, appellees'

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response contains 12 pages devoted to this issue, including citations to authority. Clarence has waived this issue for purposes of appeal by failing to develop its argument properly. See *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) (holding that "[a] reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments"). See also *People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 208 (2008) (holding that an argument is waived where a party merely states a proposition and makes no attempt to support it with analysis or authority). In the case *sub judice*, Clarence merely states that it is entitled to indemnification on the issue of attorney fees and costs, because appellees did not satisfy Clarence's duties to the City for more than eight years and Clarence had to defend itself against the City "at a great expense," with no analysis and no citations to relevant authority.

¶ 20 Even if we were to review this issue, the record supports appellees' contentions that they attempted to assist in the defense of the lawsuit from its inception. Clarence never tendered its defense and failed to file a response to the City's motion for summary judgment. Moreover, due to the agreement between appellees and the City, Clarence was released from all claims under the settlement agreement. Thus, the circuit court correctly granted appellees' motion for summary judgment on the issue of indemnification.

¶ 21 We now turn to Clarence's argument that the circuit court erred in granting appellee's motion to dismiss on the issue of attorney costs and fees incurred in the filing of its third-party complaint to enforce the conveyance agreement. Appellees filed a motion to dismiss pursuant to section 2-1110 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1110 (West 2010)). Although both parties and the order below refer to it as a motion to dismiss, a motion under

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section 2-1110 is a motion for a directed finding in a non-jury case at the close of the nonmoving party's evidence.¹ "In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the [movant], a judgment dismissing the action shall be entered." 735 ILCS 5/2-1110 (West 2010). In ruling on a motion for a directed finding, a court must engage in a two-step analysis. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 52 (2010) (citing *Kokinis v. Kotrich*, 81 Ill. 2d 151, 155 (1980)). The court must first determine, as a matter of law, whether the plaintiff has established a *prima facie* case. *Id.* (citing *Zannini v. Reliance Insurance Co. of Illinois*, 147 Ill. 2d 437, 449 (1992)). If the plaintiff has presented some evidence on each element essential to the cause of action, the court must then consider and weigh the totality of the evidence. *Id.* (citing *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275-76 (2003)). After weighing all of the evidence, the court must then determine whether sufficient evidence remains to establish the plaintiff's *prima facie* case. *Id.*

¶ 22 This court's standard of review is dependent upon the court's findings below. If the circuit court finds that the plaintiff failed to establish a *prima facie* case as a matter of law, the standard of review is *de novo*. *Id.* If the court determines that no *prima facie* case remains after considering the weight and quality of the evidence, its decision will not be disturbed unless it is

¹Although referring to the motion in question as a motion to dismiss in the argument section, Clarence includes the standard of review for a ruling on a motion for a directed verdict at the beginning of its brief. However, a party moves for a directed verdict in a jury trial (735 ILCS 5/2-1202 (West 2010)), but a directed finding in a bench trial (735 ILCS 5/2-1110 (West 2010)).

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against the manifest weight of the evidence. *Id.* at 53. In granting appellees' motion for a directed finding, the circuit court found that the fees and costs sought fell outside of the scope of the agreement relied upon. The circuit court did not make any credibility findings in reaching this conclusion and appears to have construed the conveyance agreement as a matter of law. Therefore, we review the circuit court's ruling *de novo*.

¶ 23 Once again, Clarence has failed to provide sufficient analysis and argument on this issue. After quoting extensively from case law outlining the two-step analysis the circuit court must engage in when ruling on a motion for a directed finding, Clarence merely states that it presented a *prima facie* case and provides a bullet list of the evidence it presented. Consequently, Clarence has waived this issue for purposes of appeal.

¶ 24 However, even if we were to review this issue, the circuit court correctly concluded that the conveyance agreement did not provide for the indemnification of Clarence for any fees incurred as a result of attempting to enforce the conveyance agreement. Paragraphs 3 and 5 of the conveyance agreement provided indemnification for attorney fees and costs incurred as a result of appellees' failure to pay the fine or meet the remediation obligations under the settlement agreement. There is no provision in the conveyance agreement that provides for indemnification of attorney fees and costs incurred as a result of an attempt to enforce the agreement itself. As the circuit court noted, Illinois courts follow the American Rule that a successful litigant may not recover attorney fees "in the absence of a statute or agreement." See *Saskill v. 4-B Acceptance*, 139 Ill. App. 3d 143, 144 (1985). Thus, the circuit court did not err in granting the motion for a directed finding and entering judgment in favor of the appellees.

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¶ 25 For the reasons stated herein, we affirm the judgment of the circuit court.

¶ 26 Affirmed.