

¶ 2 This interlocutory appeal arises from a sale-and-leaseback agreement between plaintiff Insite Investment Partners I, LLC (Insite), and defendant Cooper's Hawk Orland Park Real Estate, LLC (Cooper). Pursuant to their contract, Insite would purchase from Cooper certain real estate located at 15690 South Harlem in Orland Park (the Property). Cooper would then lease the Property back from Insite to be operated as a restaurant. When Cooper ultimately refused to sell Insite the Property on the grounds that the contract had terminated, Insite commenced this action seeking specific performance and damages. The trial court granted summary judgment in favor of Cooper as to two of four counts as well as Cooper's counterclaim, finding that the contract lapsed by its own terms and released Cooper from any obligation to sell the Property to Insite. Specifically, the contract automatically terminated when Insite failed to provide notice that it was waiving Cooper's failure to correct certain defects regarding title and survey. On appeal, Insite asserts the trial court erred in granting summary judgment in favor of Cooper because the contract was ambiguous with respect to whether Insite was required to provide Cooper with notice of waiver and in any event, Insite complied by providing adequate notice. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to resolve the issues raised on appeal. In September 2011, the parties entered into a contract for Cooper to sell the Property to Insite for approximately \$3.875 million. The contract stated, in pertinent part, that the "Investigation Period" would begin upon the contract's execution and end 45 days after

No. 1-12-3796

Cooper delivered certain items to Insite. In addition, article 7 was titled with the similar, albeit different, term, "Purchaser's Investigation." Section 7.1, labeled "Purchaser's Right to Investigate, stated as follows:"

"During the Investigation Period, Purchaser will have the right, but not the obligation, to investigate the condition of the Property, including the conduct of such tests, assessments, studies, and interviews as Purchaser deems necessary (including non-intrusive environmental tests and assessments, physical condition inspections and assessments, *investigation of government requirements including zoning and other legal requirements*, assessments of the availability of utilities (such steps, 'Purchaser's Investigation'). " (Emphasis added.)

Thus, section 7.1 addressed Insite's right to investigate the Property but did not address the conditions for remedying any defects discovered during the investigation. Section 7.3, titled "Purchaser's Right to Extend," permitted Insite to extend the "Investigation Period" for 15 days upon written notice to Cooper and delivery of \$5,000 in additional earnest money to the escrow agent. Moreover, section 7.4, titled "Waiver or Termination," stated as follows:

"At any time prior to the end of the Investigation Period, Purchaser may give written notice to Seller to: (a) waive Purchaser's Investigation; or (b) terminate this Contract if Purchaser, [i]n its sole and absolute discretion, is not satisfied with the Property for any reason or for no reason whatsoever; provided that if Purchaser fails to give such notice, Purchaser will be deemed to have elected to terminate this Contract under (b) above. If Purchaser terminates this Contract,

No. 1-12-3796

*** neither party will have any further obligations or liabilities hereunder except as expressly provided for in this Contract."

¶ 5 Additional provisions in article 8 pertained to "Title and Survey." Central to this dispute, section 8.3, labeled "Title and Survey Objections," stated as follows:

"Purchaser will notify Seller of any liens, encumbrances, and other matters described in the Title Commitment, Title Documents, and Survey which are unacceptable to Purchaser (such matters, the 'Unpermitted Matters'; such notice, the 'Objection Notice'). *** Seller will then have until the date that is five (5) days after Seller's receipt of any Objection Notice (the 'Objection Cure Deadline') to remove such Unpermitted Matters or remedy same in a manner satisfactory to Purchaser [i]n [i]ts sole and absolute discretion. Seller will use its best, good faith efforts to cure all Unpermitted Matters. *If Seller fails or is unable to cure any such Unpermitted Matters or remedy same in a manner satisfactory to Purchaser, Purchaser will have the option, exercisable [i]n [i]ts sole discretion to terminate this Contract, [i]n which event *** neither party will have any further obligations or liabilities hereunder, except as expressly provided in this Contract. Purchaser will exercise one of these options by providing written notice thereof to Seller on or before the expiration of the Investigation Period, and, [i]f Purchaser fails to provide such notice within such time, then Purchaser will be deemed to have elected to terminate this Contract.*"

Although this section referred to Insite exercising one of multiple options, its language expressly

No. 1-12-3796

identified only the option of providing written notice of terminating the contract. Cooper contends the only reasonable interpretation to be drawn from section 8.3 is that Insite's other option was to send written notice to Cooper waiving its failure to cure Unpermitted Matters. Insite does not suggest another interpretation of Insite's "options."

¶ 6 On October 11, 2011, Insite sent Cooper a letter reciting, "[i]n accordance with Section 8.3," "Purchaser's Objection Notice with respect to the condition of title and survey matters evidenced by the enclosed Title Commitment and Survey." The objections, or "Unpermitted Matters," included the Property's non-compliance with Village of Orland Park Ordinance 2004-0107 (the ordinance). Non-compliance with this zoning ordinance affected the number of seats permitted in the restaurant operated on the Property. The parties entered into subsequent amendments to the contract, apparently to provide additional time to cure these Unpermitted Matters. The parties' first amendment stated that "[t]he '*Inspection* Period', as defined in the Contract, is amended to end on that date which is thirty (30) days after the Effective Date of this First Amendment." (Emphasis added.) We note that while the original contract referred to both the *Investigation* Period and the Purchaser's *Investigation*, the contract did not refer to an *Inspection* Period. Cooper has maintained throughout proceedings that the amendment's use of the word "Inspection" instead of "Investigation" was a mere scrivener's error, an error that was repeated through the several amendments that followed. Ultimately, the sixth amendment extended the "Inspection Period" to April 16, 2012.

No. 1-12-3796

¶ 7 On the same date, Insite sent Cooper the following letter (April Waiver Notice):

"By way of this letter and pursuant to Section 7.3 of the Contract, Purchaser hereby exercises its right to extend the Investigation Period for a period of fifteen (15) days. Purchaser is concurrently depositing \$5,000 with the Escrow Agent, which represents its additional Earnest Money Deposit."

Fifteen days later, on April 30, 2012, Insite sent Cooper another letter stating as follows:

"By way of this letter and pursuant to Section 7.4 of the Contract, Purchaser hereby waives Purchaser's Investigation. Pursuant to the provisions of the First Amendment to Purchase Contract, the 'Closing Date' was amended to be the date fifteen days after the end of the Investigation Period; so the Closing Date shall be May 16, 2012."

We note that Insite's aforementioned April 2012 letters referenced neither section 8.3, the Objection Notice, nor the Unpermitted Matters.

¶ 8 On May 2, 2012, Cooper's attorney, Michael Moline, responded:

"I understand that your client has forwarded notice that it is willing to waive all title issues and proceed to closing on May 15, 2012, with regard to the Orland Park, Illinois Cooper's Hawk location.

The purchase agreement expired on April 16, 2012, when your client failed to provide notice of waiver and intent to close as of that date. Further, had your client provided the requisite notice of waiver and intent to close by that date, the closing was to have been completed by May 1, 2012. Because your client did

not provide timely notice of waiver and intent to close, and failed to schedule a timely closing, the purchase agreement expired according to its terms."

- ¶ 9 Insite commenced this action against Cooper two days later. Count I sought a declaration that the contract remained in effect and thus, Cooper was required to sell the Property to Insite. Count II similarly sought specific performance. Insite alleged, among other things, that Cooper had not used its best efforts to cure non-compliance with the ordinance. Insite also alleged that in April, it exercised its contractual right to unilaterally extend the Investigation Period by 15 days pursuant to section 7.3 and deposited \$5,000 in Earnest Money. Insite also alleged that it subsequently sent Cooper the April Waiver Notice waiving "Investigation Contingency" pursuant to section 7.4. Moreover, the complaint alleged that the contract was "clear, definite, and unequivocal."
- ¶ 10 Cooper then filed a combined answer to the complaint and a counterclaim seeking a declaratory judgment that the contract terminated, as well as a motion for summary judgment. Cooper disputed several of Insite's allegations but argued that Insite's failure to elect one of the options under section 8.3 resulted in the contract's automatic termination. Specifically, Cooper's counterclaim alleged that section 8.3 of the contract required Insite, before the end of the Investigation Period, to either (1) waive any objection to the ordinance issues; or (2) terminate the contract. Cooper also alleged that failure to elect one of those options would result in the automatic termination of the contract. Cooper further argued that regardless of when the Investigation Period ended, at no time did Insite inform Cooper of waiver under section 8.3 and thus, the contract terminated.

Cooper's motion for summary judgment presented substantially the same argument and asserted that this was dispositive of Insite's claims.

¶ 11 In response to the summary judgment motion, Insite argued that the April Waiver notice stated that Insite waived its "title objections." Although that notice did not specifically reference section 8.3 of the contract, Insite argued that a key term included in the notice was "Inspection Period," a term "which is expressly incorporated into Section 8.3." Insite also argued that sections 7.4 and 8.3 were "intrinsically tied to the contractually defined 'Investigation Period,' " and that when Insite waived the "Investigation Period," Insite also waived title objections. We note that contrary to Insite's allegation, the term "Inspection Period" appears nowhere in the contract, and neither that term nor "Investigation Period" appeared in Insite's April Waiver Notice. Finally, Insite argued that Cooper's counsel acknowledged in his May 2012 letter that Insite was waiving all title issues.

¶ 12 In reply, Cooper argued that Insite's April waiver notice purported to waive the Purchaser's Investigation governed by section 7.1, rather than the Investigation Period. Cooper also argued that its attorney's understanding was irrelevant to whether Insite sent the notice required by section 8.3. Attached was the affidavit of Cooper's attorney Moline, who stated that he neither considered Insite's April Waiver notice nor reviewed the entire case file before he sent the May 2012 letter. Thus, it was only his "understanding" was that Insite had "forwarded notice" that Insite was willing to waive all title issues. Moline later realized upon reviewing the file that his understanding was mistaken and that Insite had never provided notice waiving remaining title and survey

objections.

- ¶ 13 The trial court subsequently granted Insite leave to file an amended complaint, which repeated Counts I and II from the original complaint. The motion for summary judgment pleadings were adopted with respect to those counts. In addition, the amended complaint added Count III, which alleged that Cooper breached the contract by (1) negotiating a sale of the Property to Store Capital Corporation (Store); (2) entering into a letter of intent agreement with Store; and (3) negotiating material lease terms with Store. Count IV added defendant Tim McEnery, Cooper's manager, and alleged that he tortiously interfered with Insite's contract with Cooper. Counts III and IV each sought a judgment in the amount of \$1.7 million.
- ¶ 14 On September 19, 2012, the trial court granted summary judgment in favor of Cooper on counts I and II of the complaint as well as Cooper's counterclaim seeking a declaratory judgment. The court found that section 8.3 required Insite to provide notice by the end of the Investigation Period that it was waiving uncured Unpermitted Matters, or the contract would terminate. The court also found that "[c]ontrary to Insite's interpretation of the Contract, a waiver of the Purchaser's Investigation under §7.4 of the Contract does not also qualify as a waiver of Unpermitted matter." In addition, the court found the fact "[t]hat §8.3 used the end of the Investigation Period as a deadline for waiving uncured Unpermitted Matter does not mean that waiver of the Investigation Period constituted waiver of uncured Unpermitted Matter." Because Insite did not expressly waive uncured Unpermitted Matter, the contract ended by its own terms under section 8.3. The trial

court subsequently denied Insite's motion to reconsider and found there was no just reason for delaying enforcement or appeal.

¶ 15

II. ANALYSIS

¶ 16

On appeal, Insite asserts the trial court erred in granting summary judgment in favor of Cooper because the contract was ambiguous with respect to whether Insite was required to provide Cooper with notice of waiver and in any event, Insite complied by providing adequate notice. As a threshold matter, however, Cooper asserts that Insite's appeal is moot. Although this court has already denied Cooper's separate motion to dismiss the appeal on that basis, we address Cooper's assertion once more. An appeal is moot when intervening events have made it impossible for the reviewing court to grant effectual relief. *Felzak v. Hruby*, 226 Ill. 2d 382, 391 (2007). Here, the Property that Insite seeks in Counts I and II has already been sold to another buyer, Store Master Funding II, LLC. In addition, Cooper's Hawk asserts that because Insite failed to obtain a stay pursuant to Supreme Court Rule 305(k) (eff. July 1, 2004), Insite cannot obtain any relief against the buyer. Insite does not dispute that this court cannot effectively grant Insite relief with respect to Counts I and II, which sought the Property itself as relief. Nonetheless, Insite, relying on *Mohanty v. St. John Heart Clinic*, 225 Ill. 2d 52 (2007), contends that the underlying determination with respect to Insite's contractual rights affects its request for money damages in Counts III and IV.

¶ 17

In *Mohanty*, the plaintiffs challenged restrictive covenants contained in their employment contracts. *Id.* at 56. The restrictive covenant that applied to plaintiff Dr. Ramadurai

limited his practice of medicine for three years. *Id.* at 63. Even though the three-year period had expired by the time of Dr. Ramadurai's interlocutory appeal, the supreme court found Dr. Ramadurai's appeal was not moot because the court's decision could nonetheless directly impact the parties' rights and duties. *Id.* at 62-63. Specifically, the defendants' counterclaim sought money damages for alleged violations of the restricted covenant. *Id.* at 63-64.

¶ 18 Similarly, although we cannot grant Insite the Property it sought in Counts I and II, the trial court's determination that summary judgment was warranted on those counts was based on the determination that Insite had no contractual right to the Property, a finding that may impact the trial court's resolution of Counts III and IV seeking money damages. In addition, Cooper does not suggest that it is impossible for the trial court to award the money damages Insite requests in those counts. *Cf. Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 516, 522-532 (2001) (holding that the appeal was moot where the trial court entered an order confirming the sale of property at issue in the complaint, where apparently no money damages were sought in the complaint, and where the plaintiff's failure to request a stay eliminated the ability to recover the Property from the third-party purchaser). Because the decision before us could directly impact the parties' rights and duties in this case, the appeal is not moot.

¶ 19 Contract interpretation presents a question of law that may be decided on a motion for summary judgment. *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 205 (2005). We review the trial court's order granting summary judgment *de novo*. *Bruns v.*

City of Centralia, 2013 IL App (5th) 130094, ¶ 6. Thus, we must consider only whether the trial court reached the correct result, not the trial court's reasoning, and may affirm the judgment on any basis in the record. *Santa's Best Craft, LLC v. Zurich America Insurance Co.*, 408 Ill. App. 3d 173, 180 (2010). Furthermore, summary judgment is proper where the pleadings, depositions, affidavits and admissions on file, viewed in the light most favorable to the nonmovant, demonstrate there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Bruns*, 2013 IL App (5th) 130094, ¶ 6. Summary judgment is improper, however, where it is possible to draw multiple *reasonable* inferences from undisputed facts. *Id.*

¶ 20 The court's primary objective in construing a contract is to give effect to the parties' intent, as demonstrated by the contract's language. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009). "[C]ontracts are interpreted objectively and must be construed in accordance with the ordinary expectations of reasonable people." *Suburban Auto Rebuilders, Inc. v. Associated Title Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009). In determining whether a contract is ambiguous, the court considers only the contract itself. *Lease Management Equipment Corp.*, 392 Ill. App. 3d at 685. If the contract's language is facially unambiguous, the court will interpret the contract without extrinsic evidence. *Reda v. Estate of Reda*, 408 Ill. App. 3d 379, 384 (2009). A contract is ambiguous, however, if susceptible to multiple meanings, in which case parol evidence may be considered in resolving the ambiguity. *Lease Management Equipment Corp.*, 392 Ill. App. 3d at 685.

¶ 21 In its original and amended complaints, Insite alleged that the contract was clear, definite and unequivocal. Insite now takes the contrary position that the contract is ambiguous. Specifically, Insite contends that while section 8.3 required Insite to "exercise *one of these options* by providing written notice thereof to [Cooper] before the expiration of the Investigation Period (emphasis added)" or face the automatic termination of the contract, section 8.3 identified only one option: to expressly terminate the contract. Despite this suggestion, Cooper has presented the reasonable interpretation that when section 8.3 is read in its entirety, the other option contemplated by section 8.3 is clearly the waiver of Cooper's failure to cure Unpermitted Matters. Insite has identified no other meaning to which section 8.3 is susceptible. Accordingly, Insite has not shown section 8.3 is ambiguous.

¶ 22 Insite also contends that assuming section 8.3 required Insite to waive Cooper's failure to cure Unpermitted Matters, Insite's notice of waiver was not required to use the language "Unpermitted Matters"; rather, section 8.3 does not specify what language is required to be included in the waiver notice. Thus, Insite contends a question of fact exists.

Nonetheless, we find no *genuine* issue of *material* fact exists, where no language included in the letter in any way referenced the notice contemplated by section 8.3.

Insite correctly observes that its notice of waiver referred to the Purchaser's Investigation, which, pursuant to section 7.1, includes "investigation of government requirements including zoning, and other requirements." Insite fails to acknowledge that it had already investigated the zoning issue pursuant to the Purchaser's Investigation and discovered noncompliance with the

ordinance. Thus, the issue here was not Insite's right to investigate, but, rather, Insite's right pursuant to section 8.3 to have Cooper cure the noncompliance with the zoning ordinance, *i.e.*, an Unpermitted Matter discovered during investigation. Accordingly, Insite's April Waiver Notice, waving the "Purchaser's Investigation" pursuant to section 7.4, can in no way be deemed to waive Insite's rights to have Cooper cure Unpermitted Matters under section 8.3. *Cf. Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830, 834-36 (1991) (service provision was ambiguous where both parties presented feasible interpretations of the provision and the defendant adequately complied by using one of those methods). Moreover, Insite's letter did not refer to section 8.3, Unpermitted Matters, or title and survey issues.

¶ 23 We further reject Insite's assertion that the letter of Cooper's attorney, describing his understanding, creates a genuine issue of material fact. Insite presented no evidence produced in discovery to rebut counsel's affidavit stating that he did not consider Insite's waiver letter prior to expressing his "understanding" that Insite had sent Cooper "forwarded notice that Insite was willing to waive all title issues." Counsel's explanatory affidavit in no way conflicted with his May 2012 letter. To the extent Insite is concerned with its opportunity to challenge counsel's credibility, it does not appear that Insite attempted to depose counsel during discovery. Even assuming that counsel had read Insite's letter and understood it to be a waiver of Insite's right to have Cooper cure Unpermitted Matters, that understanding would be entirely unreasonable under these circumstances.

¶ 24 Moreover, we are unpersuaded by defendant's reliance on *Donahue v. Rockford Showcase*

& Fixture Co., 87 Ill. App. 2d 47 (1967). In *Donahue*, the reviewing court stated that a contract, where unclear or ambiguous, will be construed to give effect to the parties' intention, and the court will consider the practical construction that the parties gave to the contract as evidenced by their conduct. *Id.* at 51-52. As stated, Insite has not demonstrated that the contract was ambiguous. See also *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 59 (disagreeing with appellate court cases indicating that the provisional admission of parol evidence is allowed when determining whether a contract is ambiguous); *Lease Management Equipment Corp.*, 392 Ill. App. 3d at 686 (same). In any event, the letter written by Cooper's counsel at most reflected his understanding of Insite's letter, not his understanding of the contract. Accordingly, *Donahue* provides Insite no relief.

¶ 25

III. CONCLUSION

¶ 26 Here, the trial court properly granted summary judgment, as no genuine issue of material fact exists. Insite was required to provide timely written notice of Cooper's failure to cure Unpermitted Matters pursuant to section 8.3 or face termination of the contract. Insite has not demonstrated any ability to prove that it provided such notice. Accordingly, the contract terminated and Insite was not entitled to specific performance.

¶ 27 For the foregoing reasons, we affirm the trial court's judgment.

¶ 28 Affirmed.