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2013 IL App (4th) 130227-U

NO. 4-13-0227

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
November 21, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

FURLING-McCORMICK, LLC, an Illinois Limited Liability Company; and KIRK JEFFERIS,	)	Appeal from
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Sangamon County
TLG MOPAC, LLC, a Missouri Limited Liability Company; STEPHEN A. SMITH; PAUL C. DOERNER; and DAVID W. OHLEMEYER,	)	No. 11L43
Defendants-Appellees.	)	Honorable
	)	John Schmidt,
	)	Judge Presiding.

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JUSTICE HOLDER WHITE delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

### ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly granted summary judgment in favor of defendants because the transfer of property from Parkside Tower, LLC, to TLG MoPac, LLC, following the corporations' merger did not constitute a "property distribution" as intended by the parties' agreements.

¶ 2 In 2005, defendant TLG MoPac, LLC, entered into a series of agreements with plaintiff Furling-McCormick, LLC (Furling-McCormick), and its members, James Callahan III and plaintiff Kirk Jefferis, through which TLG MoPac became the sole member and owner of Parkside Tower, LLC (Parkside), a company previously owned by plaintiffs and Callahan. Parkside possessed a piece of real property in St. Louis, Missouri, commonly known as the Missouri Pacific Building (the Property). As part of the consideration for TLG MoPac's acquisition of Parkside, the parties executed Redevelopment Payout Agreements which entitled

each plaintiff to a "Seller's Payout Share," defined as, among other things, a percentage "of the value of any property distributions (*i.e.*[,] condominium units) received by Company's Affiliates from Company [Parkside]."

¶ 3 In 2008, Parkside and TLG MoPac merged, and TLG MoPac was designated as the surviving entity of the merger. In September 2011, plaintiffs filed a first amended complaint against defendants, asserting Parkside's merger with TLG MoPac and the resultant transfer of the Property to TLG MoPac constituted a "property distribution" to a company affiliate that triggered a payout obligation pursuant to the Payout Agreements. Thereafter, the parties filed cross-motions for summary judgment. Following a March 2013 hearing, the trial court granted defendants' motion for summary judgment and denied plaintiffs' cross-motion for summary judgment, finding no "property distribution" occurred as required by the Payout Agreements because no property was transferred, no cash was exchanged, and TLG MoPac already owned the property it received via the merger.

¶ 4 Plaintiffs appeal, arguing the trial court erred by denying their summary judgment motion and granting defendants' summary judgment motion because (1) the distribution of Parkside's property by merger to TLG MoPac, its company affiliate, triggered a Seller's Payout Share obligation, and (2) property was transferred as a result of the merger. Plaintiffs also raise claims regarding the specific amount of money to which they were entitled.

¶ 5 We affirm.

¶ 6 I. BACKGROUND

¶ 7 In 2004, plaintiffs and Callahan formed Parkside, an Illinois limited liability company. (Callahan is not a party on appeal.) In February 2005, Parkside purchased the

Property.

¶ 8 In June 2005, plaintiffs, Callahan, Parkside, TLG MoPac, and TLG MoPac's owners (William Furling, III and Dirk McCormick) entered into a written Membership Interest Redemption and Acquisition Agreement (Acquisition Agreement), pursuant to which TLG MoPac acquired Furling-McCormick's 60% membership interest in Parkside. In December 2005, TLG MoPac entered into two Membership Interest Redemption Agreements (Membership Agreements) with Jefferis and Callahan, under which Parkside redeemed each of Jefferis' and Callahan's 20% membership interests. Thus, TLG MoPac became the sole member and owner of Parkside. (Afterward, TLG MoPac changed its name to Parkside Tower, LLC; however, to avoid confusion, this order will refer to TLG MoPac by its original name.)

¶ 9 As part of the consideration for TLG MoPac's acquisition of Parkside, the parties executed Payout Agreements. The Payout Agreements stated that Parkside "agrees to share certain profits and other financial benefits which the Company [Parkside], its members, officers, owners, associates and affiliates ('Company Affiliates') may derive with respect to the development and operation of" the Property. Defendants Stephen A. Smith, Paul C. Doerner, and David W. Ohlemeyer signed the Payout Agreements as guarantors.

¶ 10 As to the specific amount of proceeds Parkside agreed to share, the Furling-McCormick Payout Agreement provided as follows:

"a. The Company [Parkside] shall pay the Seller's Payout Share.

'Seller's Payout Share' means an amount equal to:

i. 25% of the value of any property distributions (*i.e.*[,] condominium units) received by Company's Affiliates from

Company;

ii. 33 1/3% of any cash distributions, including development fees, received by any of the company's members, exclusive of the reimbursements to members and managers from time to time for expenditures relating to the Property, debt service and expenditures for capital assets. EXAMPLE: Assume the Company pays a development fee to one of its members in the amount of \$75,000, Seller would be entitled to \$25,000.

iii. 12.5% of the value of any In-Kind Benefits. 'In-Kind Benefits' for purposes of this Agreement shall be an amount equal to any and all payments made by the Company to the company, the guarantors individually, and/or any entity owned in whole or in part by the Company, the Members of the Company, and/or any of the Guarantors or Members of the Company as fees for property and/or services for any architectural, interior design, and construction management fees for the Project, exclusive of any payments that are direct costs advanced by Company or Company Affiliates that are included in any bills for services to Company."

The Jefferis Payout Agreement contained the same provisions, but used the following percentages in the subsections: 8.33% in subsection (i), 11.11% in subsection (ii), and 4.1667% in subsection (iii).

¶ 11 The Payout Agreements limited Furling-McCormick to a maximum payout of

\$1.5 million and limited Jefferis to a maximum payout of \$666,666. Both Payout Agreements required that the Seller's Payout Share be paid within 10 days of any cash distribution, property distribution, or payment of any In-Kind Benefit as described in section 1(a)(iii); any late payments bore an 8% interest rate.

¶ 12 When the parties executed the Payout Agreements, they understood the Property would be developed into a condominium project. However, the real estate market subsequently declined and the project's lenders withdrew their financing commitments, forcing TLG MoPac to redesign the project into a mixed-use residential and commercial rental project. To receive financing insured by the Department of Housing and Urban Development (HUD), Parkside needed to be converted from an Illinois limited liability company to a Missouri limited liability company. Thus, in 2008, Parkside merged with TLG MoPac, with TLG MoPac designated as the survivor of the merger. At the time of the merger and resultant transfer of the Property to TLG MoPac, the Property carried an unencumbered fair market value of \$11,500,000 but was encumbered by \$13,673,655 of debt.

¶ 13 The merger was treated as a nonevent for federal income tax purposes and did not create any tax liability for either of the parties. Before the merger, Parkside was considered a "disregarded entity" that was not recognized as a separate organization from TLG MoPac for federal income tax purposes. After the merger, TLG MoPac continued to use the same federal taxpayer identification number.

¶ 14 In September 2011, plaintiffs filed a first amended complaint against defendants, arguing TLG MoPac's merger with Parkside constituted a "property distribution" triggering a payment obligation under section 1(a)(i) of the Payout Agreements. Plaintiffs asserted claims for

breach of contract (counts I and III) and also sought declaratory relief (counts II and IV).

¶ 15 In October 2012, defendants filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2012)), contending they were entitled to judgment as a matter of law because (1) under the plain language of the Payout Agreements, the merger was not a "property distribution" triggering a payment obligation; (2) the parties never intended for section 1(a)(i) of the Payout Agreements to apply to a mere change of corporate form; and (3) the alleged "property distribution" had no value and therefore, plaintiffs were not entitled to any payment as a result of the merger. The following month, plaintiffs filed a cross-motion for summary judgment.

¶ 16 In March 2013, the parties appeared before the court at a hearing on their cross-motions for summary judgment. Before the hearing commenced, plaintiffs sought leave to file a second amended complaint, adding claims related to two other payout provisions in the Payout Agreements that were unrelated to the merger. The trial court allowed plaintiffs leave to amend and, thereafter, the hearing on the parties' cross-motions for summary judgment—which related only to the four counts in plaintiffs' first amended complaint—commenced.

¶ 17 Following the hearing, the trial court entered a docket entry granting defendants' motion for summary judgment on all four counts and denying plaintiffs' cross-motion for summary judgment. Specifically, the court found no "property distribution" occurred as required by section 1(a)(i) of the Payout Agreements because no property was transferred, no money was exchanged, and TLG MoPac already owned the property it received via the merger. The court made a finding that its order was final and appealable and no just cause existed to delay the order's enforcement.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiffs contend the trial court erred by denying their summary judgment motion and granting defendants' summary judgment motion because (1) the distribution of Parkside's property by merger to TLG MoPac, its company affiliate, triggered a Seller's Payout Share obligation, and (2) property was transferred as a result of the merger. Plaintiffs also raise claims regarding the specific amount of money to which they were entitled. Because we conclude the merger did not result in a property distribution as intended by the Payout Agreements, we affirm.

¶ 21 A. Standard of Review and Applicable Law

¶ 22 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). We review a trial court's ruling on a motion for summary judgment *de novo*. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 41, 978 N.E.2d 1132.

¶ 23 As a preliminary matter, we note that the parties' agreements specified they would be governed by the laws of Missouri. Thus, we look to Missouri law when considering plaintiffs' substantive arguments. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 581, 948 N.E.2d 132, 148 (2011) (This court gives effect to a contract's choice-of-law provision unless the contract chooses a foreign law that is "dangerous, inconvenient, immoral, [or] contrary to the public policy of the local government." (Internal quotations omitted.)).

¶ 24 B. Whether the Merger Triggered the Accrual of a Sellers Payout

¶ 25 Plaintiffs first argue the trial court erred by granting summary judgment in favor of defendants because the transfer of Parkside's property to TLG MoPac, its company affiliate, by merger unambiguously triggered the accrual of a Seller's Payout Share under section 1(a)(i) of the Payout Agreements. Alternatively, plaintiffs contend the Payout Agreements were ambiguous such that summary judgment was inappropriate. Defendants respond the court properly granted summary judgment because the merger did not constitute a "property distribution" as intended by the parties under the terms of the Payout Agreements.

¶ 26 The purpose of contract interpretation is to ascertain and give effect to the parties' intent. *Trimble v. Pracna*, 167 S.W.3d 706, 714 (Mo. 2005). When the language of a contract is clear and unambiguous, we gather the intent of the parties from the contract alone.

*Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226-27 (Mo. 2013). A contract is ambiguous only where "its terms are reasonably open to more than one meaning, or the meaning of the language used is uncertain." *Newco Atlas, Inc. v. Park Range Construction, Inc.*, 272 S.W.3d 886, 891 (Mo. App. W.D.2008) (Internal quotations omitted). We "will construe a contract as a whole so as not to render any terms meaningless." *Chochorowski*, 404 S.W.3d at 229. When several documents make up an agreement between the parties, the parties' intent and the meaning of those documents must be determined from the entire transaction. *J.H. Berra Construction Co., Inc. v. Missouri Highway & Transportation Comm'n*, 14 S.W.3d 276, 279 (Mo. App. W.D. 2000). Summary judgment may be granted " 'when the meaning of that portion of the contract in issue is so clear that it may be determined from the four corners of the contract.' " *J.H. Berra Construction Co.*, 14 S.W.3d at 279 (quoting *Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 452 (Mo. App. 1993)).

¶ 27 Plaintiffs assert that, in this case, the transfer of the Property to TLG MoPac after Parkside's merger with TLG MoPac triggered a Seller's Payout Share obligation. Plaintiffs point out that in both Illinois, where Parkside was formed, and Missouri, where the Property was located, members of an LLC have no interest in the property of the LLC. See 805 ILCS 180/30-1(a) (West 2012); § 347.061, RSMo 1994. Thus, plaintiffs' theory is that although TLG MoPac owned Parkside prior to the merger, it did not own the Property. When Parkside subsequently merged with TLG MoPac, ownership of the Property transferred to TLG MoPac pursuant to the Missouri Limited Liability Company Act (Liability Act), which provides that "[t]he assets of each party to the merger or consolidation \*\*\* transfer to, vest in and devolve on the surviving entity without further act or deed." § 347.133(2), RSMo 1997. Accordingly, plaintiffs assert the parties intended for a Seller's Payout Share obligation to accrue when the Property transferred to TLG MoPac for the first time during the merger.

¶ 28 Defendants respond that whether the merger led to a "transfer" or "receipt" of the Property is irrelevant, as the Payout Agreements specify it is the *distribution* of property that triggers a Seller's Payout Share. Defendants posit no "property distribution" took place as intended by the Payout Agreements because (1) the "property distributions" contemplated by the agreements referred to condominium units, and (2) the parties never intended for a change in corporate form, without the transfer of any profits or financial benefits, to trigger a payout obligation.

¶ 29 We agree that, pursuant to the Payout Agreements, the event triggering a Seller's Payout Share is the "distribution" of property, as the Agreements define the Seller's Payout Share as, among other things, a percentage of "any property distributions." Thus, we must consider

whether the merger of Parkside into its sole member, TLG MoPac, constituted a "property distribution" as intended by the parties under the terms of their agreements.

¶ 30 Plaintiffs rely on the seventh edition of Black's Law Dictionary to define "distribution," pointing out that "distribution" references "delivery," which in turn is defined as "[t]he formal act of transferring or conveying something, such as a deed; the giving or yielding possession or control of something to another." Black's Law Dictionary 440 (7th ed. 1999). However, the more recent eighth edition of Black's Law Dictionary defines "distribution" as the "act or process of apportioning or giving out." Black's Law Dictionary 508 (8th ed. 2004). Similarly, Merriam-Webster's defines "distribute" as synonymous with "dispense, divide, deal, [and] dole out." Merriam-Webster's Collegiate Dictionary 338 (10th ed. 2000). By contrast, Black's defines "transfer" as "[t]o convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." Black's Law Dictionary 1536 (8th ed. 2004).

¶ 31 Thus, a "transfer" is different than a "distribution" in that a transfer does not implicate the dispensing of or apportioning out of assets. In this case, ownership of the Property transferred to TLG MoPac pursuant to Missouri's merger statute; however, beyond the transfer of legal title, nothing more changed. Before the merger, TLG MoPac, the sole owner of Parkside, treated Parkside as a disregarded entity. TLG MoPac then treated the merger as a nonevent for federal income tax purposes, with TLG MoPac continuing to use the same federal income tax identification number after the merger. We conclude the word "distribution," as used by the parties in their Agreements, unambiguously contemplated something more than the type of change in business structure and legal transfer of property that occurred here.

¶ 32 We find support for our conclusion when considering the entirety of the Payout Agreements. In particular, we note that in addition to defining the "Seller's Payout Share" as a percentage of any property distributions, the Payout Agreements also define a "Seller's Payout Share" as a percentage of (1) "any cash distributions" Parkside makes to its members and (2) any payments Parkside makes to its members, guarantors, or any entity owned by Parkside, its members, or its guarantors "as fees for property and/or services for any architectural, interior design, and construction management fees for the Project." Both of these provisions relate to compensating plaintiffs if Parkside's members, guarantors, or other entities derived a future economic benefit from Parkside.

¶ 33 Here, TLG MoPac did not derive the same type of benefit. We acknowledge that, pursuant to Missouri and Illinois law, a member of an LLC has no interest in the property of the LLC. However, in practice, TLG MoPac *did* essentially own the Property prior to the merger by virtue of being the sole member of—and therefore exerting complete control over—Parkside, which in turn was the sole owner of the Property. As plaintiffs acknowledge in their brief, following the execution of the Redemption Agreements, "100% of the membership and therefore complete control over Parkside vested in the Defendant TLG [MoPac]." Thus, the subsequent legal transfer of the Property by merger did not bestow on TLG MoPac a new, tangible benefit like those benefits contemplated in the other definitions of a "Seller's Payout Share." Rather, the merger simply effectuated a change in TLG MoPac's corporate form, with Parkside removed as the layer between TLG MoPac and the Property.

¶ 34 Plaintiffs point out that the recitals of both the Furling-McCormick and Jefferis Payout Agreements specify Parkside "agrees to share certain profits and other financial benefits

which [Parkside], its members, officers, owners, associates and affiliates ('Company Affiliates') may derive with respect to the development and operation of" the Property. Pursuant to this language, plaintiffs assert the event triggering a Seller's Payout Share is not the *means* by which TLG MoPac receives profits and financial benefits, but the fact of that receipt.

¶ 35 We agree with plaintiffs that the recitals of a contract can aid in interpreting the parties' intent when the operative language of the contract is ambiguous. See *State ex rel. Missouri Highway and Transportation Comm'n v. Maryville Land Partnership*, 62 S.W.3d 485, 492 (Mo. App. E.D. 2001) (the recitals of contracts "are frequently intended to, and often do, shed light on the circumstances the parties wished to have considered in the interpretation of the contract."). In this case, however, we find the contract's language unambiguous. Moreover, the recitals only further convince us that the parties did not intend for the merger with Parkside and legal transfer of the Property to TLG MoPac to constitute a "distribution," as the recitals provide Parkside "agrees to share certain *profits and other financial benefits*" which Parkside and its affiliates may derive. (Emphasis added.) As previously detailed, TLG MoPac derived no such "financial benefit" from the merger because TLG MoPac, although not the legal owner of the Property, was essentially the *de facto* owner of the Property prior to the merger by virtue of its status as the sole member of Parkside.

¶ 36 Plaintiffs also point out that Missouri courts use the terms "distribution" and "transfer" interchangeably. See *Short v. Short*, 356 S.W.3d 235, 244 (Mo. App. E.D. 2011) ("A liquidating distribution includes a transfer of money by a corporation to its shareholders in liquidation of all or a portion of its assets."). Further, plaintiffs note that the seventh edition of Black's Law Dictionary defines a "corporate distribution" as "[a] corporation's direct or indirect

transfer of money or other property[.]" Black's Law Dictionary 488 (7th ed. 1999). Nonetheless, given the other provisions of the Payout Agreements, we are not persuaded that the parties intended for their use of the word "distribution" to signify the type of transfer that took place here.

¶ 37 In sum, we conclude the "property distribution" intended by the parties in their Payout Agreements did not encompass the transaction at issue here. Because we have concluded TLG MoPac's merger with Parkside did not constitute a "distribution" triggering a Seller's Payout Share, we need not address TLG MoPac's other contentions.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.