2015 IL App (1st) 131717-U

SECOND DIVISION
February 10, 2015

No. 1-13-1717

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

HARLEM AND FOSTER, INC., an Illinois Corporation, Plaintiff-Appellant, v. BUCHANAN ENERGY (S), LLC, a Delaware Corporation, and EXXONMOBIL OIL CORPORATION, a New York Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 12 CH 11623 Honorable Joan E. Powell, Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of breach of contract claim was proper where parties' franchise and lease agreements clearly provided for maintenance obligations to the parties, a credit to plaintiff to meet maintenance obligations, and a provision for defendant to complete repairs plaintiff fails to make and to debit costs from plaintiff's account.

¶ 2 Plaintiff Harlem and Foster, Inc. sought declaratory judgment and damages for breach of contract related to its franchise agreement and operating lease against defendants Buchanan Energy (S), LLC (Buchanan) and ExxonMobil Oil Corporation (ExxonMobil). Defendants

sought dismissal of plaintiff's first amended complaint pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012). On April 24, 2013, the trial court dismissed plaintiff's first amended complaint with prejudice and this appeal followed. On appeal, plaintiff argues that the circuit court erred in finding that the parties' franchise agreement provided that ExxonMobil was not responsible for the repairs and barred the breach of contract claim. Plaintiff also asserts that the parties' course of dealing demonstrated that plaintiff's claims against ExxonMobil were not precluded by the franchise agreement. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff is an Illinois corporation operating a Mobil branded gasoline station franchise located at 1602 Des Plaines Ave, Des Plaines, Illinois. The gasoline station and property were originally owned by ExxonMobil. On or about, June 5, 2009, plaintiff and ExxonMobil renewed a Petroleum Marketing Practices Act (PMPA) franchise agreement (franchise agreement) between the parties, effective January 1, 2010, and ending December 31, 2012. Also effective for the same three year term, the parties executed a Company Owned Dealer Operated (CODO) lease agreement (lease agreement) that was incorporated into the franchise agreement (the agreements will be collectively referred to as "2010 Agreement"). Through the extensive 2010 Agreement, the detailed terms for plaintiff's purchase of gasoline, lease of the property, and occupation, operation and maintenance of the gasoline station from ExxonMobil were set. In late 2010, ExxonMobil sold the real property underlying the gasoline station and assigned all its rights under the 2010 Agreement to Buchanan.

¶ 5 Among the relevant provisions of the 2010 Agreement, plaintiff agreed to pay a monthly rent for the property and terms for credit and purchase of gasoline were set. Significant to the

instant matter, maintenance and repair responsibilities for the property were divided among plaintiff and ExxonMobil under Article IV of the lease agreement. Pursuant to section 4.1, the parties are to maintain certain equipment and property listed in an attached and incorporated "maintenance schedule." ExxonMobil reserved the right to modify the maintenance schedule at its sole discretion.

¶ 6 Under section 4.2, ExxonMobil agreed to repair or replace equipment allocated to it in the maintenance schedule to keep it in good operating condition. This section requires plaintiff to notify ExxonMobil by telephone if equipment needed repair and ExxonMobil would determine if any repair was necessary within five days. If ExxonMobil did not commence repairs or notify plaintiff within five days, written notice is required. Section 4.3 requires plaintiff to maintain and operate all equipment in good working order and implement a maintenance program.

¶ 7 Section 4.4 allows ExxonMobil the option to, in lieu of meeting its maintenance obligations under section 4.2, issue a credit against plaintiff's monthly rent as a contribution toward plaintiff's undertaking maintenance assigned to ExxonMobil. The section requires that any adjustment credit be applied only to maintenance and any overages are to be carried over to cover a month that the adjustment might be deficient. Plaintiff agreed to perform all maintenance in a safe and workmanlike manner in compliance with all laws, codes and ordinances. In response, the parties attached and incorporated into the 2010 Agreement a maintenance schedule providing an annual maintenance adjustment of $4,016.04 to be credited against plaintiff's rent monthly. Under section 4.4(f), if plaintiff fails to meet its obligations, ExxonMobil could, at its discretion, complete repairs and debit or offset amounts owed for completing the repair.

¶ 8 On or about March 2008, the city of Des Plaines, Illinois, notified plaintiff and ExxonMobil that the leased property was in violation of the city building code regarding various

problems, including a leaking canopy. Plaintiff alleges that ExxonMobil agreed to make repairs at its expense that were necessary to bring the property within applicable code requirements. Despite the maintenance schedule, ExxonMobil made some of these required repairs at its expense, but did not make all of the required repairs. ExxonMobil informed plaintiff it would make the remaining repairs at a later date.

¶ 9 However, no further repairs were made before ExxonMobil sold the property and assigned its interests to Buchanan. After it purchased the property, Buchanan refused to make the repairs at its expense. Buchanan completed the repairs when plaintiff refused and then issued a January 5, 2012, letter informing plaintiff that Buchanan was debiting plaintiff's account $1,829.16 to cover the expense of repairs.

¶ 10 Plaintiff originally filed its complaint for declaratory judgment and other relief on March 30, 2012, naming only Buchanan as defendant and attaching the relevant sections of the 2010 Agreement entered into with ExxonMobil. Plaintiff sought a declaration that Buchanan was required to meet its obligations under the maintenance schedule and any rent credits given to plaintiff were not in lieu of Buchanan's obligations. Plaintiff also sought damages for Buchanan's alleged breach of the lease agreement in failing to make the repairs to bring the property into compliance with the building code.

¶ 11 Buchanan moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012). Buchanan argued that the terms of the 2010 Agreement clearly provide that plaintiff is responsible for maintenance of the property and receives an annual credit to its account to recover the costs of maintenance in lieu of Buchanan performing those obligations. Buchanan asserted that the terms also provide that if plaintiff fails to meet its obligations, Buchanan may undertake repairs and debit plaintiff's account.

Furthermore, Buchanan argued that the 2010 Agreement was fully integrated pursuant to section 20.8 of the franchise agreement and any modification of the terms was forbidden.

¶ 12 Plaintiff argued that Buchanan and ExxonMobil agreed to make the repairs and that the terms of the maintenance provisions granted Buchanan and ExxonMobil discretion to make repairs and/or debit or credit plaintiff's account when deemed necessary thereby establishing that the integration clause did not bar relief. The trial court dismissed the complaint but granted plaintiff leave to amend.

¶ 13 Plaintiff filed its first amended complaint on October 17, 2012, adding ExxonMobil as a defendant and attaching the same documents as exhibits. In the amended complaint, plaintiff reasserted its two prior claims, noting in the complaint under the heading for each of these two claims that they were "(previously dismissed)." Plaintiff added a third claim against ExxonMobil for breach of contract that mirrored the breach of contract claim against Buchanan.

¶ 14 Plaintiff further alleged that it had met all of its obligations under its agreement with ExxonMobil and ExxonMobil breached the agreement for failing to make the required repairs to the property to bring it into compliance with the City of Des Plaines building code. ExxonMobil filed a motion to dismiss the first amended complaint pursuant to section 2-615 of the Code of Civil Procedure, asserting that the same reasons that supported the earlier dismissal of the claims against Buchanan required dismissal of the amended complaint.

¶ 15 Plaintiff again argued that ExxonMobil was granted discretion to make certain choices concerning maintenance and repair of the property and gasoline station and the integration clause of the 2010 Agreement did not bar ExxonMobil from agreeing to undertake the repairs at its own expense. Plaintiff also asserted that the parties' custom and practice explained how the 2010 Agreement was to be interpreted and that ExxonMobil's course of conduct demonstrated that the

repairs were intended to be in addition to the annual credit granted to plaintiff. The trial court found that the 2010 Agreement was clear and unambiguous and that the parties' course of conduct did not directly contradict the terms of the written contract and granted ExxonMobil's motion to dismiss. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A motion to dismiss under section 2-615 of the Code of Civil Procedure challenges the legal sufficiency of a complaint based on facial defects of the complaint. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 413 (2004). This court conducts a *de novo* review of a trial court's ruling on the sufficiency of a complaint when granting a motion to dismiss. *U.S. Bank National Ass'n v. Clark*, 216 Ill. 2d 334, 342 (2005). While allegations in the complaint are viewed in a light most favorable to the plaintiff, the decision to dismiss a case may be affirmed on any basis contained in the record. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 196 (1999). Exhibits attached to complaints become a part of the complaint and are controlling. *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Company*, 358 Ill. App. 3d 912, 921-22 (2005). An affirmative defense may be properly asserted in a 2-615 motion only if the defense is apparent from the face of the complaint. *Id.* Sections 4.2 and 4.4, which provide the affirmative defense, are incorporated in the attached 2010 Agreement.

¶ 18 This matter involves an issue of contract interpretation. It is well recognized that the primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms. *Palm v. 2800 Lake Shore Drive Condominium Association*, 2014 IL App (1st) 111290 (2014). If there is no ambiguity in the language of a contract, a determination of the intent of the parties is governed solely by the language of that agreement. *Law Offices of Colleen M. McLaughlin v.*

First Star Financial Corp., 2011 IL App (1st) 101849, ¶18. Where the language of a contract is clear and unambiguous, the construction of that contract is a matter of law subject to *de novo* review. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 684 (2009).

¶ 19 Plaintiff asserts that ExxonMobil's course of conduct merely supplements the terms of the 2010 Agreement and explains how it applied the maintenance adjustment. Plaintiff argues that this is admissible so long as it is not utilized to contradict the terms of the agreement but, rather, to explain, supplement or add to the agreement. *Scott v. Assurance Company of America*, 253 Ill. App. 3d 813, 818 (1993). Plaintiff maintains that ExxonMobil's course of conduct demonstrates that ExxonMobil followed the discretion allowed by the 2010 Agreement and treated the maintenance adjustment as a supplement to its maintenance obligations, not as a substitute for those obligations, and that it subsequently breached the agreement to make the repairs to remedy the building code violations.

¶ 20 We agree that the trial court properly found that the terms of the 2010 Agreement clearly and unambiguously support ExxonMobil's interpretation and dismissal in this case. Section 4.4 provides that, "in lieu of directly meeting its maintenance obligations under section 4.2," ExxonMobil may issue a credit against plaintiff's monthly rent as a contribution toward plaintiff's undertaking maintenance assigned to ExxonMobil. ExxonMobil exercised this option and the parties attached and incorporated into the 2010 Agreement a maintenance schedule providing an annual maintenance adjustment of $4,016.04 to be credited against plaintiff's monthly rent.

¶ 21 Under section 4.4(f), if plaintiff fails to meet its obligations, at its discretion, ExxonMobil, or Buchanan as assignee, may complete repairs and debit or offset amounts owed for completing the repair. These terms are clear and unambiguous. ExxonMobil and Buchanan,

clearly followed these terms by exercising the option to credit plaintiff in lieu of performing its maintenance obligation and, when plaintiff failed to perform the required maintenance, Buchanan followed the terms of the 2010 Agreement in performing the maintenance and debiting plaintiff's account. The course of dealing of ExxonMobil does not contradict these terms and may not be utilized to overcome the clear terms of the parties' agreement and dismissal was proper.

¶ 22 III. CONCLUSION

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

¶ 24 Affirmed.