

2015 IL App (1st) 132322-U
No. 1-13-2322
Order Filed August 21, 2015

SIXTH DIVISION

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 DISTRICT

C.R. NELSON, LLC, an Illinois Limited Liability Company,)	Appeal from the Circuit Court of Cook County.
)	
Plaintiff-Appellant,)	
)	
v.)	
)	No. 09 CH 29599
THE CITY OF CHICAGO, an Illinois Municipal Corporation,)	
)	
Defendant-Appellee,)	
)	
(The Taxman Corporation, an Illinois Corporation, Near West-Western, a dissolved Illinois Company, and Seymour Taxman,)	Honorable
)	Sophia Hall,
Defendants).)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* This court affirmed the grant of summary judgment to the defendant. The plaintiff failed to establish a factual basis demonstrating that it could have succeeded on its complaint. In the absence of sufficient allegations and/or proof of fraud, accident or mutual mistake, equity did not permit this court to reform an unambiguous contract.

¶ 2 The plaintiff, C.R. Nelson, LLC, appeals from an order of the circuit court of Cook County granting summary judgment to the defendant, the City of Chicago (the City), and dismissing its first amended complaint for specific performance and damages. On appeal, the plaintiff contends that there were genuine issues of material fact precluding summary judgment. On review, we determine that there were no genuine issues of material fact and that the City was entitled to summary judgment as a matter of law.¹

¶ 3 **BACKGROUND**

¶ 4 The following facts are taken from the pleadings, depositions and other relevant materials contained in the record on appeal.

¶ 5 On August 23, 1999, the City and Near West-Western Company (Near West or the Purchaser) entered into an agreement (the Agreement) for the sale and redevelopment of land owned by the City. Pursuant to the Agreement, Near West would construct a shopping center on the land, which would include a building for a Walgreens store, an ancillary retail building and parking for the shopping center (the improvements). Several sections of the Agreement are relevant to the issue on appeal and are set forth below.

¶ 6 Section 9 of the Agreement provided in pertinent part as follows:

"Promptly after completion of the remainder of the Improvements ***in accordance with this Agreement, the City shall furnish the Purchaser with a

¹The other named defendants were dismissed from the suit and are not parties to this appeal.

Certificate of Completion ('Certificate'). The Certificate shall be a conclusive determination of satisfaction and termination of the covenants in this Agreement and the Deed with respect to the obligations of the Purchaser to construct the Improvements. The Certificate shall be in recordable form. Within forty-five (45) days after receipt of a written request by the Purchaser for a Certificate, the City shall provide the Purchaser with either the Certificate or a written statement indicating in adequate detail how the Purchaser failed to complete the Improvements in conformity with the Plan, or this Agreement, or is otherwise in default ***."

Section 11 of the Agreement provided in pertinent part as follows:

"Prior to the issuance of the Certificate by the City with regard to the completion of the Improvements, the Purchaser or its successors in interest shall not, without the prior written consent of the City: (a) sell or convey the Property or any part thereof or any interest therein; or (b) create any assignment with respect to this Agreement or the Property that would take effect prior to the issuance of the Certificate by the City in accordance with Section 9, above; or (c) contract or agree to: (1) sell or convey the Property or any part thereof or interest therein, or (2) create any assignment with respect to this Agreement or the Property that would take effect prior to the issuance of the Certificate by the City in accordance with Section 9, above."

Section 18 of the Agreement provided in pertinent part as follows:

"The City agrees to remove the underground storage tanks currently on the Property and to undertake any other action necessary to put the Property in a condition which is in accordance with the standards of the Illinois Environmental Protection Agency ('IEPA') for the intended use. The City shall be responsible for the

filing of all reports required to obtain a 'No Further Remediation' letter from the IEPA. The City agrees to indemnify Purchaser from any claims and liabilities relating to or arising from the presence of any hazardous substances, as noted in the Phase II Environmental Site Assessment Report of May, 1995, that existed on the Property prior to the Closing."

Section 23 provided that the Agreement could not be "modified or amended in any manner other than by supplemental written agreement executed by the parties."

¶ 7 On October 22, 2002, Near West entered into a contract with the plaintiff to purchase the building Near West constructed for Walgreens. Pursuant to the terms of the contract between Near West and the plaintiff, Near West assigned its rights to the City's environmental obligations under section 18 of the Agreement to the plaintiff.

¶ 8 Subsequently, the plaintiff attempted to refinance the property but was unable to do so because the City had not corrected the environmental problems created when it removed underground storage tanks from the property, and hazardous materials from the tanks leaked into the soil.

¶ 9 On August 21, 2009, the plaintiff filed a complaint seeking specific performance of the City's environmental obligations under section 18 of the Agreement and damages for breach of its contractual obligation under section 18 of the Agreement, which had been assigned to the plaintiff. Subsequently, the plaintiff filed its first amended complaint

¶ 10 The City filed a motion for summary judgment. The City maintained that it was entitled to summary judgment because the plaintiff could not establish that the assignment of the rights under section 18 of the Agreement complied with the requirements of section 11 of the Agreement, namely, that the City had issued the Certificate of Completion (the Certificate) to

Near West prior to the assignment to the plaintiff. The City supported its motion with the affidavit of Kimberly Cook. Prior to 2007, Ms. Cook was the coordinating planner for the City's Department of Planning and Development. In the course of her duties, she served as the manager of the project which was the subject of the August 23, 1999 Agreement between the City and Near West. In her affidavit, Ms. Cook averred as follows:

"5. Near West Western, LLC did not submit a written request for the City to issue a Certificate of Completion under the Agreement.

6. The City did not issue a Certificate of Completion to Near West Western, LLC under the Agreement.

7. The City did not provide written consent to Near West Western, LLC to create any assignment of Section 18 of the Agreement to C.R. Nelson LLC."

¶ 11 The City further maintained that it was entitled to summary judgment because Near West had released the City from its obligations under section 18 of the Agreement, as evidenced by an exchange of letters between Near West and the City. The City asserted that since Near West could not assign rights it no longer had, the assignment of the City's obligations under section 18 of the Agreement was void.

¶ 12 In its response to the motion for summary judgment, the plaintiff maintained that Ms. Cook's averments in her affidavit were contradicted by her deposition testimony. In her testimony, Ms. Cook acknowledged that the construction of the Improvements required for the issuance of the Certificate was completed. She did not recall having the signed Certificate or giving out the Certificate. Ms. Cook acknowledged that her lack of recollection did not mean that the Certificate was never issued. Ms. Cook had no specific recollection of whether Near West requested the Certificate.

¶ 13 The plaintiff also relied on documentation provided by the City in discovery, including an unsigned Certificate and an unsigned cover letter from Rosemary S. Andolino, the first deputy commissioner of the department of planning and development. The letter, dated October 18, 2002, was to Margie Georgopoulos at Near West, and stated that "an executed and notarized Certificate of Completion," was enclosed. The plaintiff also relied on a certificate of occupancy for the Walgreens building, as evidence that the construction of the Improvements had been completed.

¶ 14 On the basis of Ms. Cook's deposition testimony and the existence of the unsigned certificate and cover letter the plaintiff maintained that the Certificate must have been issued. In the alternative, even if the Certificate had not been issued, all of the requirements for the issuance of the certificate had been complied with, and equity principles would excuse the signing of the documents.

¶ 15 With regard to the City's second basis for summary judgment, the plaintiff denied that Near West had released the City from its obligations under section 18 of the Agreement. It maintained that the exchange of letters between Near West and the City did not release the City from its environmental obligations because to do so would require a written amendment to the Agreement.

¶ 16 On June 18, 2013, the circuit court heard argument on the City's motion for summary judgment. In response to the court's question regarding the foundation for the court to consider Ms. Andolino's unsigned letter as evidence that the Certificate was issued, the plaintiff's attorney stated as follows:

"Well, I'll call Ms. Albolini [*sic*] to the stand. I'll call the - -

See, this is a document which is an admission that - - it's sent by a City officer and on City stationary.

THE COURT: All right. Now, Ms. Albolini's [sic] deposition has not been taken yet?

MR. BALSON (the plaintiff's attorney): No, it hasn't been taken.

THE COURT: And the discovery is closed?

MR. BALSON: Yes."

¶ 17 The circuit court granted summary judgment to the City finding that the plaintiff failed to provide a basis for the assignment. When the plaintiff's attorney sought clarification, the court responded, "The assignment is invalid as it was not issued in accordance with Section 11."

¶ 18 The plaintiff appeals.

¶ 19 ANALYSIS

¶ 20 I. Standard of Review

¶ 21 A court reviews the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 22 II. Discussion

¶ 23 Our review is guided by the well-settled principle that "[s]ummary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). The purpose of summary judgment is not to try an issue of fact but to determine if one exists. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993). In

determining whether a genuine issue of material fact exists, a court must construe the pleadings, admissions and affidavits strictly against the movant and liberally in favor of the opponent. *Gilbert*, 156 Ill. 2d at 518. A triable issue of fact precluding summary judgment exists where the material facts are disputed or where reasonable persons might draw different inferences from the undisputed facts. *Gilbert*, 156 Ill. 2d at 518. Because summary judgment is a drastic measure, it should be granted only when the movant's right to judgment is free and clear from doubt. *Bourgonjie v. Machev*, 362 Ill. App. 3d 984, 994 (2005).

¶ 24 In its complaint, the plaintiff alleged it was the assignee of Near West's rights under section 18 of the Agreement, which required the City to remedy the environmental problems on the property the plaintiff purchased from Near West. In its motion for summary judgment, the City relied on section 11 of the Agreement, under which Near West was barred from executing any assignment with respect to the Agreement prior to the issuance of the Certificate by the City. The City maintained that the Certificate was never issued, and therefore, there was no valid assignment of Near West's rights under section 18 of the Agreement.

¶ 25 When a party moves for summary judgment, it bears the initial burden of production. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 604 (2009). "That burden may be met by either affirmatively showing that some element of the case must be resolved in the defendant's favor or by establishing that there is no evidence to support the nonmovant's case." *Brouillette*, 389 Ill. App. 3d at 604. Once the defendant satisfies the initial burden, the burden shifts to the plaintiff to present a factual basis entitling it to a favorable judgment. *Brouillette*, 389 Ill. App. 3d at 605. Where a defendant seeks to establish that the plaintiff lacks sufficient evidence to prove an essential element, the defendant is required to do more

than "point out" the absence of the evidence. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The failure of the defendant to meet the burden of production entitles the plaintiff to rely on his pleadings to create an issue of material fact. *Nedzvekas*, 374 Ill. App. 3d at 625.

¶ 26 The City supported its motion for summary judgment with Ms. Cook's affidavit stating that no Certificate was issued to Near West by the City. Since the validity of the assignment by Near West to the plaintiff depended upon the issuance of the Certificate and the validity of assignment was crucial to the plaintiff's complaint to enforce it, the City met its initial burden of production. The burden of production then shifted to the plaintiff.

¶ 27 In support of its argument that genuine issues of material fact exist, the plaintiff points out that it was undisputed that the construction of the improvements had been completed as required for the issuance of the Certificate. The plaintiff asserts that contrary to her affidavit, Ms. Cook's deposition testimony was inconclusive as to whether the Certificate was issued. In addition, the plaintiff relied on an unsigned and unnotarized Certificate, accompanied by an unsigned cover letter from Ms. Andolino.

¶ 28 Section 11 of the Agreement required the issuance of the signed and notarized Certificate prior to any assignment of the provisions of the Agreement. Before the circuit court, the plaintiff acknowledged that Ms. Andolino had not been deposed and that discovery was closed. Moreover, the plaintiff failed to allege in its complaint that the City issued the executed and notarized Certificate or that in accordance with section 9 of the Assignment, it had requested that the City issue the Certificate, and the City failed or refused to do so.

¶ 29 Nonetheless, the plaintiff argues that since there was no dispute that the construction was completed, in accordance with equitable principles, the City's failure to issue the Certificate did not invalidate the assignment from Near West to the plaintiff. The plaintiff relies on the

principle that "equity regards as done that which ought to be done." *Cox v. Supreme Savings & Loan Ass'n*, 126 Ill. App. 2d 293, 295 (1970). The reviewing court noted that the doctrine of equitable conversion was a legal fiction designed to accomplish the parties' intent and to ensure justice where it otherwise might be precluded by the technical rules of law. The doctrine was "bottomed" on the equitable principle, relied on by the plaintiff in the present case. The issue before the court in *Cox* was whether based on equitable conversion, the contract purchasers of real property had "equitable title" to the property prior to issuance of the warranty deed, rendering them responsible for the payment of the work necessitated by building code violations. *Cox*, 126 Ill. App. 2d at 299-300. Moreover, the court did not rely totally on equitable conversion or speculation as to the parties' intent, but relied as well on the language of the contract and the rider to the contract. *Cox*, 126 Ill. App. 2d at 300-01. Therefore, *Cox* is distinguishable from the present case both on its legal issues and its facts.

¶ 30 "It is a cardinal principle of the law that equity will not lend its aid to reform a written instrument in the absence of fraud, accident, or mutual mistake, sufficiently alleged and clearly proved." *Darst v. Lang*, 367 Ill. 119, 122 (1937). In *Henry v. Waller*, 2012 IL App (1st) 102068, in construing an indemnification agreement, this court noted that unless a contract is ambiguous, its meaning must be determined from the words used, and the court would not read into the contract provisions not otherwise contained in the contract to achieve a more equitable result. *Henry*, 2012 IL App (1st) 102068, ¶ 21 (citing *Tatar v. Maxon Construction Co.*, 54 Ill. 2d 64, 67 (1973)).

¶ 31 The plaintiff has not alleged and/or proved sufficiently that the provisions of the Agreement were ambiguous or that the City was guilty of fraud or that reformation of the Agreement was required due to accident or mutual mistake of the parties. Therefore, this

court may not ignore the plain language of section 11 of the Agreement requiring the signed and notarized Certificate prior to any assignment of the provisions of the Agreement.

¶ 32 The plaintiff failed to carry its burden of production by either establishing the existence of a signed and notarized certificate of completion or by raising a genuine issue of material fact as to its issuance. Since the issuance of the Certificate was necessary to establish the validity of the assignment from Near West, the plaintiff failed to prove a factual basis for succeeding on its complaint. The grant of summary judgment to the City was proper.

¶ 33 The order of the circuit court granting summary judgment to the City is affirmed. Deciding the case as we do, we need not address whether Near West released the City from its environmental obligations under section 18 of the Agreement.

¶ 34 Affirmed.