2015 IL App (1st) 132995-U

No. 1-13-2995

SIXTH DIVISION
June 30, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NECK & BACK CLINIC, LTD.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CH 33468
	)	
DAVID TRAVIS,	)	The Honorable
	)	Raymond W. Mitchell,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Hoffman specially concurred.

O R D E R

¶1 *HELD*: The circuit court erred in entering summary judgment where genuine issues of material fact remained as to whether defendant had an obligation to obtain permits for wall spaces leased to plaintiff for purposes of advertising.

¶2 Defendant, David Travis, appeals the circuit court's order granting summary judgment in favor of plaintiff, Neck & Back Clinic, Ltd., finding him liable for breach of contract and finding that he necessarily could not establish his counterclaim for breach of contract. Defendant also

appeals the circuit court's damage award following trial. Defendant contends there were genuine issues of material fact, which prevented the court from entering summary judgment and that the circuit court erred in finding his counterclaim was "defeated." Defendant further contends the manifest weight of the evidence did not support the circuit court's damage award where the damages at issue were paid by a company not named in the lawsuit. Based on the following, we reverse and remand for further proceedings.

¶3 FACTS

¶4 Plaintiff is a corporation that provides physical medical services to patients. According to its amended complaint, plaintiff also does business as Marque Medicos. Defendant, according to his deposition, operated a business called Travisign that leased advertising space to other businesses. Beginning in 1998, plaintiff and defendant entered into a series of multi-year leases for wall space on buildings situated throughout Chicago. In its amended complaint, plaintiff alleged defendant represented that he was authorized to lease certain walls for advertising and that he had secured the requisite permits to place advertisements on the designated walls. Plaintiff leased from defendant wall space at 22 different locations. According to plaintiff's amended complaint, it would "either paint its message or hang a banner with its message" on the leased walls.

¶5 Sometime in 2009, plaintiff received a notice of a violation of section 13-20-550 of the Chicago Municipal Code (Municipal Code) from the City of Chicago (City), which, in relevant part, states that, "[u]nless a valid permit has been obtained from the department of buildings," it is unlawful "to own, maintain, erect, install, alter, repair or enlarge any sign, city digital sign, or associated sign structure covered by the provisions of this article," "to commence to erect, install, alter, repair or enlarge any sign, city digital sign, or associated sign structure," or "to cause any

sign, city digital sign, or associated sign structure *** to be erected, installed, altered, repaired or enlarged." Chicago Municipal Code § 13-20-550(a) (amended Dec. 17, 2008). Pursuant to subsection (c), the "owner or lessee of the real property and the sign erector shall be jointly and severally liable for any violation of this section." Chicago Municipal Code § 13-20-550(c) (amended Dec. 17, 2008). The violation was linked to wall space leased at 6019 S. Kedzie Avenue (Kedzie property). Plaintiff received a $3,000 fine. The following year, plaintiff received another notice of a violation for a second wall space leased at 2433 S. Pulaski Road (Pulaski property).[1] According to plaintiff's amended complaint, it incurred attorney fees in order to contest the violations and incurred fees to obtain the requisite permits on its own.

¶6 On June 26, 2011, plaintiff filed a two-count amended complaint against defendant for breach of contract and fraud. Plaintiff also named Hispanic Marketing Associations in its breach of contract claim.

¶7 On October 27, 2011, defendant filed a motion to dismiss plaintiff's amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)) for failing to state a claim for breach of contract and fraud. On January 3, 2012, defendant's section 2-615 motion to dismiss was denied.

¶8 On January 27, 2012, defendant filed an answer to the amended complaint and a counterclaim for breach of contract against plaintiff for failing to pay the rent for "at least fourteen of the leases" for the "final year or the final two years of the lease terms."

¶9 On March 21, 2013, plaintiff filed a motion for summary judgment for its breach of contract claim and a memorandum of law in support of that motion. Attached to the motion and memorandum was an affidavit authored by Dr. Derrick Wallery. The affidavit provided that Wallery became the president of plaintiff-company in 2005. According to Wallery, defendant

[1] The city agreed not to assess a fee for the permit violation in exchange for plaintiff removing the sign.

represented that his company would provide lawful spaces for advertising purposes and that each space possessed the necessary permits for the contemplated signage. Wallery attested that defendant represented "on numerous occasions that each advertising space that he leased was 'advertising-ready.' " According to Wallery's affidavit, he signed the leases with defendant "so that no one from Neck & Back Clinic, Ltd. would have to spend time or resources securing the requisite permits from the City of Chicago."

¶10 Also attached to the summary judgment motion was a transcript from defendant's deposition. Defendant testified that he did business under the name Travisign, but he never formally incorporated the business. Defendant stated that the prior owner of plaintiff company contacted defendant around 1998 requesting to rent advertising space. According to defendant, his "obligation" under the parties' leases was "to provide [plaintiff] with a spot that was valid.*** to make sure that I have a full right to that wall. That is that the landlord of the building has *** signed a lease with me so that I'm not renting something that I don't have a right to rent." Defendant testified that he was aware the City required permits for the placement of signs on the wall spaces leased by him. Defendant testified that, in the past, he might have contacted the City regarding the permits for wall space. However, when asked whether he ever got any permits for plaintiff, defendant responded, "no." Defendant further stated that he did not inform Wallery that he needed to obtain permits to advertise on the wall spaces. Defendant testified that it was his understanding that the subcontractor who was hired to actually paint the sign on the wall was in charge of obtaining the necessary permit. Defendant stated that he had been a codefendant in three administrative hearings brought by the City for failing to possess the requisite permits to erect signs. Defendant paid fines to the City as a result. Defendant further stated that he had paid fines on behalf of property owners in relation to permit violations brought by the City

against the property owners. Defendant admitted that he did not secure the requisite permits for the wall spaces he leased to plaintiff.

¶11 On May 2, 2013, defendant filed a motion to strike Wallery's affidavit and the associated exhibits with the affidavit as a violation of Illinois Supreme Court Rule 191(a).

¶12 On May 6, 2013, the circuit court granted summary judgment in favor of plaintiff on its breach of contract claim against defendant. In its written order, the circuit court found that "the evidence on file shows that Travis never secured the proper permits for [plaintiff's] advertisements," which was a breach of contract. The circuit court further found that its "finding of liability against Travis defeats his counterclaim. It has been determined that Travis did not perform his contractual obligations and, thus, he cannot make out a claim for breach of contract." In addition, the circuit court found Wallery's affidavit complied with Rule 191 and was "legally sufficient." A bench trial was set to determine damages.

¶13 After the close of trial, on June 12, 2013, the circuit court entered a written order awarding damages in favor of plaintiff and against defendant d/b/a Travisign in the amount of $10,071.75. In the order, the circuit court stated that:

> "[a]t trial, [p]laintiff proved to a legal certainty the following damages: (1) fees paid to the City of Chicago for violating the Chicago Municipal Code in the amount of $3,040, (2) reasonable attorney's fees associated with hearings before the City of Chicago Department of Administrative Hearings for violations of the Chicago Municipal Code in the amount of $6,093.75, and (3) consulting fees associated with hearings before the City of Chicago Department of Administrative Hearings for violations of the Chicago Municipal Code in the amount of $450."

The circuit court further stated that "[t]his is a final judgment that disposes of the case in its entirety."

¶14 On July 12, 2013, defendant's counsel filed a posttrial motion pursuant to section 2-1203 of the Code (735 ILCS 5/2-1203 (West 2012)) via the circuit court's electronic filing system. Defendant's counsel received an "e-file receipt" and a confirmation email after submitting the filing. The "e-file receipt" provided that the posttrial motion was "spindled" for July 23, 2013, at 9:30 a.m. However, on July 18, 2013, defendant's counsel received an automated email informing him that "the document received on 07/12/2013 at 7:46 PM was rejected by the Clerk of the Circuit Court of Cook County."

¶15 On July 23, 2013, plaintiff filed a citation to discover defendant's assets to Cole Taylor Bank. On August 16, 2013, defendant filed a motion to strike the citation. In defendant's counsel's affidavit attached to the motion, he explained that, on July 12, 2013, he timely filed defendant's posttrial motion, which, in relevant part, challenged the circuit court's finding regarding damages, using the court's e-filing system and paid the filing fee via credit card on that date. In the affidavit, defendant's counsel averred that, on July 18, 2013, he learned the motion had been "rejected" without explanation. He attested that he "rushed to the clerk's office" and found the individual who had processed the filing. The clerk informed defendant's counsel that she was unable to print the motion because the electronic file was "damaged" or "corrupted." Ultimately, defendant's counsel was assured that the posttrial motion would be manually filed and "accepted" as of July 12, 2013, as that was the last date for filing the motion. A copy of the motion stamped with the July 12, 2013, date was attached to the affidavit. Defendant's counsel further attested that he did not learn that the spindling of the motion for July 23, 2013, had also been

cancelled until after July 22, 2013. According to defendant's counsel, he "elected to delay noticing the motion for another date until [he] returned from a trip out of the country which was starting on August 2."

¶16 On August 21, 2013, plaintiff filed a motion to strike defendant's posttrial motion, arguing that the motion was untimely since it had been rejected by the clerk's office. Citing Cook County Circuit Court General Administrative Order (GAO) 2013-07, plaintiff argued that the clerk is not liable for malfunctions or errors occurring in the electronic transmission or receipt of filed documents. Plaintiff further argued that defendant failed to comply with the e-filing requirements by failing to resolve the filing and service errors in a timely fashion and failing to serve the notice of filing or motion on plaintiff.

¶17 On August 26, 2013, after considering the motion on its merits, the circuit court denied defendant's motion to reconsider.

¶18 On September 16, 2013, defendant filed a notice of appeal. In the notice, defendant acknowledged that the circuit court's July 12, 2013, order stated that "all matters were final and the order was final and appealable;" however, no order was ever entered disposing of count II for fraud or with respect to Hispanic Marketing Associates, LLC for count I for breach of contract.

¶19 On September 19, 2013, defendant filed a "motion to dismiss" requesting the dismissal of Hispanic Marketing Associates, LLC with prejudice, judgment in favor of him on plaintiff's fraud claim, and a finding that the court's citation to discover assets was not proper because the court's June 12, 2013, order was not final and appealable where all of plaintiff's claims from its amended complaint were not disposed of. On September 23, 2013, the circuit court entered an

order wherein "plaintiff voluntarily dismisse[d] its claim against Hispanic Marketing Associates, L.L.C. without prejudice pursuant to 735 ILCS 5/2-1009" and "plaintiff voluntarily dismisse[d] its claim for fraud (count II) against Defendant David Travis without prejudice pursuant to 735 ILCS 5/2-1009, with each party to bear its own costs and attorney fees."[2] Defendant filed an amended notice of appeal on September 30, 2013.

¶20 ANALYSIS

¶21 I. Jurisdiction

¶22 Plaintiff contends this court lacks jurisdiction to consider defendant's appeal because defendant failed to timely file his posttrial motion pursuant to section 2-1203 of the Code where defendant's e-filed posttrial motion was rejected by the clerk's office and defendant failed to comply with the applicable GAOs for using the e-filing system.

¶23 Pursuant to section 2-1203 of the Code, in non-jury cases:

> "[A]ny party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or a modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203(a) (West 2012).

Judgment is defined as "a court's final determination of the rights and obligations of the parties in a case." Black's Law Dictionary (9th ed. 2009). A final judgment disposes of the rights of the parties. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 524 (2001). In other words, a final judgment " 'decides the controversies between the parties on the merits and fixes their rights, so that, if the judgment is affirmed, nothing remains for the trial court to do but to proceed with its execution.' " *Id*. (quoting *In re J.N.*, 91 Ill. 2d 122, 127 (1982)).

[2] No transcript appears in the record to clarify whether plaintiff requested entry of the order.

¶24 Despite the court's language that its June 12, 2013, judgment entering damages in favor of plaintiff for defendant's breach of contract was "a final judgment that disposes of the case in its entirety," there were issues remaining as to the fraud claim against defendant and the breach of contract claim against Hispanic Marketing Associates, LLC. Therefore, the circuit court's June 12, 2013, judgment was not final and appealable, especially where it lacked language pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Ill. S. Ct. R. 304(a) (where multiple parties and claims are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if there is an express written finding by the trial court that there is no just reason for delaying either enforcement or appeal or both). Not until the circuit court's September 23, 2013, order, disposing of count II for fraud and dismissing without prejudice the remaining named defendant in count I, were all claims against all parties as raised in the amended complaint finally adjudicated. Therefore, the 30-day time period for filing a posttrial motion did not begin to run until September 23, 2013. As a result, even assuming, *arguendo*, that defendant's July 12, 2013, posttrial motion complied with the rules for e-filing, the motion was not properly before the circuit court because there was not an appealable judgment prior to September 23, 2013.

¶25 Instead, defendant's failure to file a posttrial motion within 30 days of entry of the September 23, 2013, order resulted in waiver. *Gillespie v. University of Chicago Hospitals*, 387 Ill. App. 3d 540, 546 (2008) (to preserve an issue for review, an objection must be made at trial and the issue must be raised in a posttrial motion); *Graves v. North Shore Gas Co.*, 98 Ill. App. 3d 964, 969-70 (it is well-established that the failure to specifically allege error in the post-trial motion waives the issue for review). Despite waiver, in an effort to alleviate the substantial confusion caused by the procedural events in the present case, we will review defendant's

contentions raised on appeal. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 64 (the doctrine of waiver is a limitation on the parties and not this court).

¶26 We further note that defendant's September 16, 2013, notice of appeal did not divest the circuit court of jurisdiction because the July 12, 2013, judgment and August 26, 2013, order denying defendant's posttrial motion were not final and appealable as all matters presented in plaintiff's amended complaint had not been adjudicated. "The filing of a notice of appeal from an order or judgment which the supreme court rules do not make appealable neither deprives the trial court of jurisdiction to proceed with the case nor vests the appellate court with jurisdiction to consider it." *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 24.

¶27 II. Summary Judgment

¶28 Turning to the merits of defendant's appeal, he contends the circuit court erred in granting summary judgment in favor of plaintiff on its breach of contract claim where there were genuine issues of material fact preventing entry of the judgment.

¶29 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2010). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A triable issue of fact exists "where there is a dispute as to material facts, or where, the material facts being undisputed, reasonable persons might draw different inferences from the facts." (Internal

quotation marks omitted.) *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 215 (2001). We review a trial court's decision granting summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶30 Defendant argues plaintiff did not establish its claim for breach of contract where there was no express language in the parties' leases imposing a duty upon him to secure permits for the erection of signs on the leased wall spaces. Moreover, defendant argues that such a duty could not be inferred. Plaintiff responds that summary judgment was proper where the evidence demonstrated defendant was obligated to provide legally valid wall spaces for purposes of advertising and failed to do so. Plaintiff argues the parties' contract contained an implied covenant that obligated defendant to obtain permits for advertising on the leased wall spaces, as advertising was the purpose of the leases. Without the implied covenant to provide legally permitted wall space, plaintiff posits that the purpose of the parties' leases would be illegal, thereby creating void and unenforceable contracts.

¶31 A lease agreement is a contract; therefore, the rules for contract interpretation equally apply to the interpretation of leases. *Midway Park Saver v. Sarco Putty Co*., 2012 IL App (1st) 110849, ¶ 13. The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the language of the contract using the plain and ordinary meaning of unambiguous terms. *Id*. If the contract is clear and unambiguous, the parties' intent must be determined solely from the plain language of the contract. *Suburban Insurance Services, Inc. v. Virginia Surety Co.*, 322 Ill. App. 3d 688, 691 (2001). Under those circumstances, a court may not consider extrinsic evidence outside of the "four corners" of the document. *Id*. "The reviewing court will not strain to find ambiguity where none exists, and disagreements as to interpretation of a contract must be reasonable." *Midway Park Saver*, 2012 IL App (1st) 110849, ¶ 13.

¶32 Based on our review of the summary judgment motion, the leases, affidavits, and transcript from defendant's deposition, we find there are genuine issues of material fact that prevented the entry of judgment in plaintiff's favor. The language of the leases themselves was devoid of any obligation on defendant to provide permitted wall space. Instead, as standard language, the leases stated that plaintiff leased to "Neck and Back Clinic LTD." with regard to the Pulaski property and "Marque Medicos" with regard to the Kedzie property the properties as described, for the length of time stated therein. In exchange, according to the language of the leases, the lessee agreed to pay plaintiff the agreed amount per year, along with the following:

> "SECOND. – That he [the lessee] has examined and knows the condition of the Premises; and has received the same in good order and repair, and that he will keep the Premises in good repair during the term of this lease, at his own expense; and upon the termination of this lease will yield up the Premises to Lessor in good condition and repair (loss by fire and ordinary wear excepted).
>
> THIRD.—That he will not sublet the Premises, nor any part thereof, nor assign this lease without the prior written consent of Lessor.
>
> FOURTH.—*Default; Lessor's Remedies*. In the event of a default in any of the terms herein, the parties agree that the Lessee shall be liable for any and all reasonable attorney's fees, costs and interest at the statutory rate. It is further expressly agreed between the parties hereto, that if default shall be made in the payment of the rent above reserved, or any part thereof, or any of the covenants or agreements herein contained to be kept by the Lessee, it shall be lawful for Lessor or Lessor's legal representatives, into and upon said premises or any part thereof,

> either with or without process of law, to reenter and repossess the same at the election of Lessor. ***.
>
> All parties to this lease agree that the covenants and agreements herein contained shall be binding upon, apply and inure to, their respective heirs, executors, administrators and assigns."

The leases also provided descriptions of the actual spaces being leased. For example, with regard to the Pulaski property, the lease stated: "the upper section of the North wall of the Building at 2433 S. Pulaski Rd. Measuring Approx. 16' wide and from the top of the Building on down for 18' " and with regard to the Kedzie property, the lease stated: "the upper section of the South wall of the Building at 6019 S. Kedzie; Measuring Approx. 34' wide and from the top of the Building on down 14'." The leases made no reference to permits or even to "legal" wall space.

¶33 Notwithstanding, plaintiff maintains that the duty to provide permitted wall space was an implied covenant in the parties' leases without which the contracts would be void and unenforceable where the purpose of the leases would be illegal because erecting signs on unpermitted wall spaces would violate the Chicago Municipal Code. Plaintiff cites, *inter alia*, *Seidelman v. Kouvavus*, 57 Ill. App. 3d 350 (1978), for support. In particular, plaintiff relies on the following language: "the general rule is that before a covenant will be implied it must appear that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it either orally or in writing or that such an implied covenant is necessary in order to give effect to the purpose of the contract as a whole." *Id*. at 352-53. Based on *Seidelman*, the question is what was the purpose of the parties' contract as a whole? There is no dispute that defendant was in the business of providing "outdoor advertising" and "brickwall lease space" as

designated under its company name on its leases and as testified to during Travis' deposition. The language of the parties' leases confirms that the purpose of the leases was for defendant to provide plaintiff with leased wall spaces. We agree that it was within the contemplation of the parties that plaintiff's reason for leasing the wall spaces was for purposes of advertising. However, it was not clear that the parties agreed that the wall spaces leased to plaintiff by defendant already would have received the requisite permits. That said, plaintiff's purpose for obtaining the wall space to advertise would be frustrated if it was unable to obtain the requisite permit, *e.g.*, because of a denial by the City. We, therefore, find there was an ambiguity in the parties' leases with regard to who was obligated to obtain the permits to advertise on the leased wall space and any remedies if the permits were prohibited.

¶34 Turning to parol evidence because the circumstances prove that the terms of the lease were ambiguous (*Air Safety, Inc. v. Teachers Realty Corp*., 185 Ill. 2d 457, 462-63 (1999)), we conclude that there are genuine issues of material fact preventing the summary judgment, in that each party states that it was the other party's responsibility to obtain the requisite permits. Plaintiff's reliance on a lease between defendant and a third-party building owner, in which defendant leased the east side wall of the building located at 3268 W. Fullerton Avenue in Chicago, Illinois, from the owner of the building, does not negate the existing issues of fact. That lease was for neither of the properties for which plaintiff received violations from the City (the Pulaski property and the Kedzie property) and for which the circuit court entered judgment. Moreover, plaintiff was not a party to the Fullerton Avenue lease. Therefore, the fact that the lease between defendant and the building owner provided defendant with the right to cancel the lease if he failed to obtain a permit to erect or maintain signs on the property does not demonstrate that defendant had an unexpressed obligation to obtain advertising permits for the

Pulaski property and the Kedzie property. Essentially, the evidence presented boils down to a "he said, she said" challenge, or in this case "it said, he said," and the facts, as they stand in the record before us, are not developed enough to establish the intent of the parties at the time of contracting.

¶35 In sum, we conclude the circuit court erred in granting summary judgment in favor of plaintiff on its breach of contract claim against defendant where there were genuine issues of material fact that prevented entry of that judgment.

¶36 III. Counterclaim

¶37 Because the circuit court expressly dismissed defendant's counterclaim on the basis that he could not establish a claim for breach of contract where he failed to satisfy his duties under the parties' contract and we have determined that, at this stage of review, genuine issues of material fact remain as to whether defendant in fact breached the parties' contract, we reverse the dismissal of defendant's counterclaim and remand for further proceedings.

¶38 IV. Remaining Issues

¶39 Based on our finding, we need not consider whether the circuit court's damage award was against the manifest weight of the evidence or whether the admission of challenged evidence was an abuse of discretion.

¶40 CONCLUSION

¶41 We conclude the circuit court erred in granting summary judgment. We reverse the circuit court's June 12, 2013, order and all subsequent orders based thereon and remand this cause for further proceedings.

¶42 Reversed and remanded.

¶43 PRESIDING JUSTICE HOFFMAN, specially concurring:

¶44 I agree with the majority's conclusion that the parties' contracts are ambiguous on the issue of the responsibility to obtain permits, creating an issue of fact precluding the entry of summary judgment in favor of the plaintiff. It is for this reason that I concur in the result reached by the majority.