2016 IL App (3d) 140835-U

Order filed March 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

KAREN PERRA, PAULA KROHE and SALLY WENZEL, Plaintiffs-Appellants, v. JUNE WATSON, Individually, and as Trustee of the Residuary Trust under the Last Will and Testament of Roy V. Walter, and as Trustee of the Dorothy Walter Trust, and MARISA DOMINIC, Defendants-Appellees.	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois. Appeal Nos. 3-14-0835 3-14-0836 Circuit Nos. 13-L-141 13-MR-370
MARISA DOMINIC, Plaintiff-Appellant, and KAREN PERRA, PAULA KROHE, and SALLY WENZEL, Defendants-Appellants, v. JUNE WATSON, Individually, and as	Honorable Troy D. Holland, Judge, Presiding.

Trustee of the Residuary Trust under the Last Will and Testament of Roy V. Walter, and JUNE WATSON, as Trustee of the Dorothy Walter Trust Dated March 24, 1993,

Defendant-Appellee.

KAREN PERRA, PAULA KROHE, and SALLY WENZEL,

Plaintiffs,

v.

JUNE WATSON, Individually, and as Trustee of the Residuary Trust under the Last Will and Testament of Roy V. Walter, and as Trustee of the Dorothy Walter Trust Dated March 24, 1993,

Defendant-Appellee,

and

MARISA DOMINIC,

Defendant-Appellant.

MARISA DOMINIC,

Plaintiff,

v.

JUNE WATSON, Individually, and as Trustee of the Residuary Trust under the Last Will and Testament of Roy V. Walter, and as Trustee of the Dorothy Walter Trust Dated March 24, 1993,

Defendant-Appellee,

and

KAREN PERRA, PAULA KROHE, and

SALLY WENZEL,	)
	)
Defendants-Appellants.	)

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's grant of summary judgment in favor of defendant. Based on the record before this court, plaintiffs do not have the vested interest required to execute the contract they seek to enforce.

¶ 2 The parties or their predecessors are the children of Roy and Dorothy Walter. Both Roy and Dorothy had established land trusts, each of which contained 160 acres of land. Roy died in 1975. By the terms of the first trust, upon Roy's death, Dorothy was to receive all of the income from the trust for life. Upon Dorothy's death, their surviving children—or their descendants—were to receive equal portions of the land in the trust. In 1993, during Dorothy's lifetime, the three children, Mark, Wayne, and June, anticipated that they would each receive an undivided one-third interest in each of the two land trusts. The parcels of land abutted each other. Mark and Wayne were on less than friendly terms, so the three siblings agreed that upon Dorothy's death, the land would be partitioned into three equal parcels with June's in the middle to put some space between Mark and Wayne. During Dorothy's lifetime, both Mark and Wayne passed away. Dorothy then amended the second of the two trusts, leaving all the real estate in that trust to June. Mark had three daughters, Karen Perra, Paula Krohe, and Sally Wenzel. Wayne had no descendants. His girlfriend, Marisa Dominic, was the sole beneficiary of his estate.

¶ 3 In December 2013, plaintiffs (Mark's daughters collectively, and Marissa individually) filed separate complaints for declaratory judgment, seeking distribution of the parcels according to the terms of the 1993 agreement. Plaintiffs' cases were consolidated in May 2014. They

claimed the 1993 agreement was enforceable and entitled them to their respective predecessor's one-third interest in both tracts of land. Defendant raised affirmative defenses and filed a counterclaim for declaratory judgment, seeking distribution of the land according to the terms of the trusts. All parties subsequently filed cross-motions for summary judgment.

¶ 4 In September 2014, the trial court granted defendant's motion for summary judgment and denied plaintiffs'. The trial court ordered the parcels to be distributed according to the terms of their respective trusts. The trial court found the 1993 agreement unenforceable since Mark's and Wayne's interests in the property never fully vested.

¶ 5 Plaintiffs appeal, arguing: (1) the plain meaning of the 1993 agreement governs the distribution of the parcels; (2) the 1993 agreement is not subject to a condition precedent; and (3) the 1993 agreement is supported by consideration and is therefore enforceable. Defendant counters these arguments and asserts that the current terms of the trust should dictate the distribution of the parcels. We affirm the trial court's judgment.

¶ 6 BACKGROUND

¶ 7 No facts are at issue, only the legal conclusions flowing from the facts. The dispute centers solely on the terms of the distribution of approximately 320 acres of land contained in two tracts held in separate trusts. Parcel I contains approximately 160 acres and was conveyed into a residuary trust (Trust 1) established through Roy's will. Pursuant to the trust, Dorothy was to receive the income from Trust 1 for life and, upon her death, Parcel I was to be distributed equally among Roy's then living children. If a child failed to survive Dorothy, their portion of Parcel I was to be distributed to his or her descendants, *per stirpes*.

¶ 8 Parcel II contains approximately 160 acres of land as well and abuts Parcel I. Roy's will conveyed Parcel II into a marital trust. Pursuant to the terms of the trust, Dorothy was to receive

the income and principal she requested from the trust for life. Upon her death, the remaining property in the trust was to be distributed to Dorothy's estate, or in accordance with her will.

¶ 9 Roy passed away in 1975. In 1981, the trustees of the marital trust conveyed Parcel II to Dorothy. In March 1993, Dorothy created a revocable living trust known as the Dorothy Walter Trust (Trust 2) and conveyed Parcel II to the trust. Pursuant to the terms of Trust 2, upon Dorothy's death, Mark, Wayne, and June were to receive equal shares of Parcel II, if living. If Mark or June was not living, their portion was to go to their descendants, *per stirpes*. If Wayne was not living, his portion of the parcel was to go to whomever he appointed by his will.

¶ 10 In April 1993, Mark, Wayne, and June executed an agreement in anticipation of becoming owners of one-third of Parcel I and Parcel II upon Dorothy's death. The agreement was predicated on the assumption that each party would receive a one-third interest in both parcels, which equated to one-third of the combined total. By the terms of the agreement, upon Dorothy's death, Mark, Wayne, and June would each convey their respective interests so they could divide the whole in such a way that June's portion of the property would separate Wayne's portion from Mark's portion.

¶ 11 The 1993 agreement is as follows:

> "THIS AGREEMENT made and entered into this 13th day of April, 1993, by and between June Watson, hereinafter referred to as 'June'; Wayne Walter, hereinafter referred to as 'Wayne'; and Mark Walter, hereinafter referred to as 'Mark', WITNESSETH:
>
> THAT WHEREAS, the parties are brothers and sister, being the children of Roy V. Walter and Dorothy Walter; and,

WHEREAS, the parties are the owners of the following described real property which shall be designated as Parcel I:

> The Southeast Quarter of Section 15, Township 32 North, Range 3 East of Third Principal Meridian, in Farm Ridge Township, LaSalle County, Illinois, excepting therefrom the two parcels which were previously conveyed to Mark Walter, subject to the life estate of Dorothy Walter; and,

WHEREAS, the parties have an expectancy that they will inherit from their mother the following described real property which shall be designated as Parcel II:

> The Northwest Quarter of Section 22, Township 32 North, Range 3 East of the Third Principal Meridian, in LaSalle County, Illinois,

and Mark anticipates that he specifically will receive the western one third of Parcel II; Wayne anticipates that he will receive the middle one third of Parcel II; and June anticipates that she will receive the eastern one third of Parcell II; and,

WHEREAS, the eastern one third of Parcel I and the middle one third of Parcel II are improved with buildings; and,

WHEREAS, it is the desire of Mark to own as his separate property the eastern two thirds of Parcel I; and,

WHEREAS, it is the desire of Wayne to own as his separate property the western two thirds of Parcel II; and,

WHEREAS, it is the desire of June to own as her separate property the western one third of Parcel I and the eastern one third of Parcel II; and,

WHEREAS, the parties believe it is in each of their best interests to agree amongst themselves as to how their interests in both parcels of real property will be held and disposed of following their mother's death, whenever that may occur.

WHEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. That following the death of Dorothy Walter, as to Parcel I, the parties shall:

a) convey all of their interest in the eastern one third of Parcel I to Mark; and,

b) convey all of their interest in the middle one third of Parcel I to Wayne; and,

c) convey all of their interest in the western one third of Parcel I to June.

2. That contemporaneous with the conveyances described in Paragraph 1, above, Mark shall pay to each Wayne and June an amount equal to one third of the fair market value of the buildings which are situated on Parcel I, such fair market value to be determined in accordance with Paragraph 6, below.

3. That following the death of Dorothy Walter, as to Parcel II, the parties shall:

a) convey all of their interest in the western one third of Parcel

II to Mark; and,

b) convey all of their interest in the middle one third of Parcel II to Wayne; and,

c) convey all of their interest in the eastern one third of Parcel II to June.

***

5. That following the conveyances described above:

a) Wayne shall convey all of his interest in the middle one third of Parcel I to Mark; and,

b) Mark shall convey all of his interest in the western one third of Parcel II to Wayne.

***

7. That in the event one or more of the parties fail to survive Dorothy Walter, or are not living at the time any of the events described in Paragraphs 1 through 6, inclusive, are to take place, then the holder(s) of the interest of such deceased party, collectively, shall stand in such deceased party's stead and shall be bound by the terms of this Agreement.

8. That in the event all of the parties fail to survive Dorothy Walter, this Agreement shall become null and void.

9. That this Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties thereto."

¶ 12 During Dorothy's life, however, Mark died in 2007, followed by Wayne in 2008. Wayne's interest in Trust 1 therefore lapsed when he passed away without descendants. Mark's interest in Trust 1 (now 50% instead of one-third) went to his daughters Karen, Paula, and Sally. Shortly after Wayne's death, Dorothy amended Trust 2's distribution plan. Upon her death, Parcel II was to be distributed solely to June. The amendment also provided that Karen, Paula, and Sally were to each receive $25,000 cash from the trust. Dorothy passed away in March 2013.

¶ 13 In December 2013, plaintiffs filed the complaints in this action, seeking declaratory judgments to enforce the 1993 agreement. Plaintiffs argued they were entitled to a one-third share of each of the parcels, per the 1993 agreement, as successors in interest to Mark and Wayne. The parties did not dispute the validity of the trusts, the subsequent amendments to Trust 2 by Dorothy, or that the 1993 agreement was executed by Mark, Wayne, and June. The sole issue before the trial court was the effect of the 1993 agreement.

¶ 14 Plaintiffs filed motions for summary judgment, urging the trial court to declare the 1993 agreement enforceable, requiring the parcels to be conveyed in accordance with the agreement's terms. Likewise, defendant sought summary judgment to declare her one-half interest in Parcel I and her whole interest in Parcel II, free and clear of any interest asserted by the plaintiffs.

¶ 15 The trial court ruled in favor of defendant, issuing a written order in September 2014. The trial court reasoned that Wayne never had a vested interest in either parcel. The court noted Wayne's death without descendants eliminated his interest in Parcel I and Dorothy's amendments to Trust 2 eliminated his interest in Parcel II. With no interest vesting in Wayne, the trial court reasoned that Marisa, Wayne's sole beneficiary, did not have the ability to convey any interest in the disputed parcels as required to execute the 1993 agreement. The trial court

further found that Mark's daughters inherited his one-half interest in Parcel I. Dorothy's amendments to Trust 2, however, left them with no vested interest in Parcel II. Instead, Mark's daughters were each entitled to the lump sum payment of $25,000 cash from the trust, per its amended terms. The court concluded that the failure of all expectancies to vest as anticipated and the impossibility of two parties to convey or exchange interests in the parcels as contemplated by the agreement rendered the 1993 agreement a nullity.

¶ 16 For the following reasons, we affirm.

¶ 17 ANALYSIS

¶ 18 A. Standard of Review

¶ 19 The parties concede and we agree that this case is a question of law. We review questions of law *de novo*. *O'Neill v. Director of the Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶ 21.

¶ 20 B. Plaintiffs' Plain Meaning Argument

¶ 21 Plaintiffs insist that the plain meaning of the 1993 written agreement is controlling in this case. We agree with the plaintiffs, but reach the opposite result. By the plain meaning of the contract, it is unenforceable. Unlike the plaintiffs, we cannot ignore the fact that their predecessors' interests never vested in the parcels at issue. The parties to the 1993 agreement are not each entitled to a one-third interest in the properties.

¶ 22 The 1993 agreement preamble states that "the parties are the owners of [Parcel I] *** subject to the life estate of Dorothy Walter." The transfer of Parcel I after Dorothy's death was limited to those children, or their descendants, who survived Dorothy. Therefore the parties, during Dorothy's lifetime, were the owners of a contingent remainder. See *Schlosser v. Schlosser*, 247 Ill. App. 3d 1044, 1049 (1993) (quoting *Murphy v. Westhoff*, 386 Ill. 136, 142

(1944)) (noting that a contingent remainder is defined as " 'one limited to take effect either to an uncertain person or upon an uncertain event.' ").

¶ 23 Generally, courts interpret contracts in order to give effect to the intent of the parties, as evidenced by the language in the contract itself, and look to extrinsic evidence only when there is ambiguity. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 13. Courts, furthermore, will "construe a contract reasonably to avoid absurd results. [Citation.]" *Health Professionals, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 1036 (2003).

¶ 24 "An expectancy interest is the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent *** or of a beneficiary designated by a living insured who has a right to change the beneficiary. [Citations.] " (Internal quotation marks omitted.) *In re Estate of Michalak*, 404 Ill. App. 3d 75, 83 (2010) (quoting *In re Marriage of Centioli*, 335 Ill. App. 3d 650, 656 (2002)). Parties have long been allowed to make contracts based upon their expectancies. *Bolin v. Bolin*, 245 Ill. 613, 615 (1910) ("We have held in a number of cases that an estate in expectancy is an appropriate subject of contract, and that agreements by expectant heirs in regard to their future contingent estates, when fairly made upon a valuable consideration, will be enforced in equity. [Citations.]").

¶ 25 It is equally well established that the failure of an expectancy to vest renders an agreement legally unenforceable. *Donough v. Garland*, 269 Ill. 565, 572 (1915). Although plaintiffs imply as much, the plain meaning of the 1993 agreement does not eclipse the failure of the parties' interest in the expectancies to vest as anticipated. Contrary to plaintiffs' assertion, defendant is not attempting to rewrite the 1993 agreement. Rather, read within its plain meaning, the agreement has been nullified by circumstances that rendered it factually impossible to execute. Wayne died without descendents. His rights to Parcel I were extinguished. Mark's

interest in Parcel I passed to his daughters upon his death. Furthermore, Trust 2 was amended, leaving June the only inheritor of its land. Thus, Wayne and Mark—or their successors in interest—cannot convey the interest required (one-third of each parcel) to execute the 1993 agreement because their interest in the property never vested.

¶ 26 C. Plaintiffs' Condition Precedent Argument

¶ 27 Plaintiffs next argue that the 1993 written agreement is not subject to a condition precedent. Plaintiffs assert that the reference to the expectancy inheritance in the agreement is not in the operative portions of the agreement but, rather, in the preamble, which means it is secondary to the language in the body of the contract. They rely heavily on the general rule that "the obligations and promises of the parties in the operative portion of a contract prevail over a preliminary recital or preamble." *Brookens v. Peabody Coal Co.*, 11 Ill. 2d 322, 325 (1957) (citing *Chicago Daily News, Inc. v. Kohler*, 360 Ill. 351, 362-63 (1935)). Receipt of equal shares was a condition precedent of the contract and plaintiffs' narrow reading of the contract ignores the intent of the parties. Furthermore, relevant case law does not support plaintiffs' position.

¶ 28 A condition precedent is a condition for which performance by one party is required before another party is obligated to perform. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 282 (2007). In this case, the vesting of the parties' interest in the parcels meets the criteria of a condition precedent. The general rule announced in *Brookens* applies when there is a contradiction, qualification, or derogation at issue between the operative and precedential language of a contract. *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204, 211-12 (1979). Otherwise "[t]he operative clauses of the contract simply provide, in specific ways, for the implementation of the purposes set out in the preamble." *Id.* at 212; see also *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 170-71 (2003) (supporting the same

argument). As an explicit assumption entering into a bargain, conditions precedent should be in the preamble (or preliminary recital) of a contract. Accordingly, we find the necessity of the vesting of an interest in property in this case is entirely independent of where that language is placed within the bounds of the contract. Indeed, all three parties inheriting one-third of the land at issue is a condition precedent to the 1993 agreement.

¶ 29 Furthermore, while the preamble of the 1993 agreement exclusively contains the expectancy language, the remainder of the agreement repeatedly references "their interest" when referring to the separate parties. As discussed previously, Walter and Mark never obtained "their interest" in the parcels as contemplated and, therefore, cannot perform their obligations under the terms of the contract.

¶ 30 Plaintiffs further argue the 1993 agreement "convert[s] the 'expectancy' into a 'certainty' by guaranteeing each child (or his successors and assigns) would receive the real estate." Plaintiffs make this assertion without citing any authority. Accordingly, plaintiffs have waived this argument by not complying with Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). Moreover, defendant cites authority for the opposite proposition: the formation of a contract, which intends to convey an expectancy, does not automatically convert the expectancy into a vested right. *Kaiser v. Cobbey*, 400 Ill. 214, 223 (1948). Thus, we affirm the trial court's ruling on this basis as well.

¶ 31 D. Plaintiffs' Consideration Argument

¶ 32 Lastly, plaintiffs argue the 1993 agreement contains the necessary consideration to be enforced. Defendant concedes that there was consideration at the time the agreement was executed, but asserts that consideration has since failed. Specifically, defendant claims that any

consideration existing at the time the agreement was executed is irrelevant because the required interests never vested. Again, we agree with the defendant.

¶ 33 "Failure of consideration *** refers to transactions in which consideration was anticipated but did not materialize." *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222 (1984). Courts may rescind or cancel a contract when there is a failure of consideration. *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715 (1990). Wayne's interest in both parcels never vested.[1] Additionally, Mark's expectancy interest in Parcel II never vested. This is sufficient for the trial court to rule that there was a failure of consideration in the 1993 agreement. Accordingly, we reject plaintiffs' argument on this issue.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of La Salle County.

¶ 36 Affirmed.

[1] Whether Wayne's interest in Parcel 1 at Roy's death was a contingent interest or a vested interest subject to divestment is irrelevant for our purposes here. Either way, it failed when Wayne predeceased Dorothy without issue.