2016 IL App (3d) 140848-U

Order filed January 19, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

LAUREN GARDNER,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant/Cross-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-14-0848
	)	Circuit No. 12-L-646
	)	
JOHN DOLAK,	)	Honorable
	)	Raymond E. Rossi,
Defendant-Appellee/Cross-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice O'Brien and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Judgment in favor of defendant is affirmed where the trial court properly found that plaintiff's claim was barred by *laches*.
(2) Court's partial award of attorney fees was not an abuse of discretion.

¶ 2 Plaintiff, Lauren Gardner, entered into a contract to purchase real estate owned by defendant, John Dolak. Seven years later, Gardner declined to purchase the property and filed suit for breach of contract, seeking to recover $55,000 in earnest money. The trial court concluded that Gardner forfeited the deposit and entered judgment in favor of Dolak. Gardner

appeals, claiming that the trial court's forfeiture finding is against the manifest weight of the evidence, and Dolak cross-appeals, arguing that the court erred in refusing to award him the full amount of attorney fees he incurred. We affirm.

¶ 3 Between 2004 and 2005, Dolak began selling parcels of his 10-acre residential lot to generate funds. When negotiations with one of the potential buyer's failed, Dolak's friends, Lauren and Michael Gardner, expressed an interest in purchasing one of the parcels. After several conversations, Dolak and the Gardners entered into a purchase agreement for the sale of the vacant lot. Under the terms of the agreement, Dolak agreed to sell 2½ acres to the Gardners for a purchase price of $130,000. At the time the agreement was executed, the Gardners agreed to pay Dolak $55,000 in two payments as a purchase price advancement. Although the advancement was to be applied against the purchase price at closing, the Gardners made the initial payments to Dolak in the form of an interest-free loan. In exchange for the loan, Dolak was to execute a promissory note secured by a mortgage in favor of the Gardners on the entire property.

¶ 4 Several provisions within the contract outlined the parties' responsibilities. Paragraph 2 of the agreement provided:

> "Simultaneous with the execution of the agreement by Buyer, Buyer shall deliver thirty thousand and 00/100 dollars ($30,000) to Seller. Within six (6) months of the Effective Date hereof, Buyer shall deliver an additional twenty-five thousand and 00/100 dollars ($25,000) to Seller. *** The "Loan" will be evidenced by a Promissory Note from Seller to Buyer in the form acceptable to Buyer and shall be secured by a second mortgage on the entire property."

¶ 5 The contract also included language for contingencies surrounding the county's approval process for subdividing the property:

> "3. Contingencies. This Agreement is contingent upon resolution of the following matter in Buyer's sole discretion any one of which may be waived by Buyer.
>
> (A) *** Buyer shall use its best efforts to obtain plat of subdivision approval of the Entire Property (into two parcels including the Property) from Will County (the "County"). To obtain such approval, Buyer shall diligently cooperate with the County and promptly provide at its sole expense *** such documents, studies and other governmental agency approvals as the County may deem necessary or desirable. If within the eighteen (18) month period following the Effective Date (the "Subdivision Approval Period"), Buyer is unable to obtain County approval for subdivision of the property, either party may elect to terminate this Agreement by giving the other party written notice of such election within ten (10) days following expiration of the Subdivision Approval Period; thereupon, this Agreement and the Price Advancement delivered by Buyer to Seller as set forth in paragraph 2(A) shall be returned to Buyer. *** If the Buyer does not close because of default by Buyer, the Purchase Price Advancement delivered to Seller shall be retained by the Seller, as liquidated damages, which the Buyer agrees as [sic] fair and equitable."

¶ 6 The agreement further provided that a topographical survey be completed 45 days following the effective date and delivered to the buyer at the seller's expense and that, within 90 days of delivery of the survey, the buyer procure a flood plain study for subdivision approval.

¶ 7 The last provision of the contract addressed remedial action in the event of default:

> "30. Default and Remedies. If Buyer defaults under this Agreement and such default is not cured within five days of written notice to Buyer thereof, Seller may terminate this Agreement and retain the Purchase Price Advancement as liquidated damages."

¶ 8 Both parties signed the agreement, effective September 22, 2005. The Gardners delivered the first $30,000 payment on September 22, 2005, and presented the second payment to Dolak six months later.

¶ 9 During their negotiations, Lauren Gardner, who is an engineer, told Dolak that the firm she worked for could survey the property. After the parties signed the purchase agreement, Gardner sent a survey crew to shoot elevations of the property on two separate occasions.

¶ 10 Between the fall of 2005 and the spring of 2006, Dolak and Gardner sent emails to each other regarding the surveys, elevation points and preliminary flood plain study. On February 10, 2006, Dolak emailed Gardner and asked, "Are you getting anywhere on the hydrological study? It is very important that I get an answer as soon as possible so I know what's going to happen to me over the next few months. I'm afraid the subdivision process is going to take longer than you think." In response, Gardner wrote, "As for the flood study, I already started working on it. There is a ton of little information you have to put together to get the model set up. *** I know how important this is to you."

¶ 11 In August of 2007, Lauren and Michael Gardner divorced. Pursuant to the dissolution judgment, Lauren obtained all the rights in the contract with Dolak.

¶ 12 In the spring of 2009, Gardner verbally informed Dolak that she no longer wished to purchase the property and wanted her earnest money back. Dolak told Gardner that she had defaulted under the terms of the contract and he would not return the money.

¶ 13 On April 12, 2011, Gardner sent Dolak an email asking him to return the purchase price advancement of $55,000. Dolak again refused on the basis that Gardner had legally forfeited the money.

¶ 14 In August 2012, Gardner filed a breach of contract suit against Dolak, seeking to reclaim the earnest money payments. In her complaint, she alleged that Dolak breached the agreement by failing to execute a promissory note and mortgage and neglecting to deliver a topographic survey within 45 days of the effective date of the agreement. Dolak answered the complaint and asserted several affirmative defenses, including *laches*, estoppel and waiver.

¶ 15 Prior to trial, Dolak filed a petition for attorney fees pursuant to contract provisions which provided for the collection of fees by the successful party. Attached to the petition was a sworn and subscribed affidavit from Dolak's attorney for $21,787.50 for attorney fees, $506.25 for paralegal time, and $721.70 for court costs and expenditures.

¶ 16 At trial, Dolak testified that although his attorney drafted a note and mortgage and sent it to him, he never signed it. After he and the Gardners signed the purchase agreement, Lauren told him that her firm could do the topographic survey. He assumed that she was handling it. Dolak testified that Gardner sent a crew from her engineering firm to survey the property on two separate occasions. After the crew conducted the surveys, Gardner sent Dolak an email asking him to clarify some of the elevations and verify their locations.

¶ 17 Dolak further testified that the value of the 2.5-acre parcel had significantly diminished from 2005 to 2011 and that during the 18-month subdivision approval period another potential

buyer expressed interest in purchasing the property. He also testified that he has continued to maintain the property for the years in question.

¶ 18 Gardner testified that she understood that the $55,000 could be lost if she failed to act on the terms as outlined in the contract. She stated that she could not complete the flood plain study because she never received the topographical survey from Dolak. She was under the impression that Dolak would provide the survey and that she would do the flood plain study through her employer. Using the elevations her survey crew gave her, Gardner did a few preliminary calculations and determined that the buildable area of the lot outside the flood plain was 4,600 square feet. She testified that the area required to build a home would be close to 10,000 square feet, including the septic field.

¶ 19 On cross-examination, she acknowledged that around September 22, 2005, she told Dolak her firm could do the survey and that Dolak said, "I want your company to do it." After that conversation, she sent surveyors from her firm to the property, and she emailed Dolak a topographical map of the northeast corner of the property to clarify an elevation question. Gardner admitted that she never asked Dolak for a topographic survey and that she never submitted a request for subdivision approval to the county.

¶ 20 Gardner testified that during the 18-month period after the purchase agreement was signed, she intended to purchase the property, and it was only after 18 months had passed that she no longer wanted the parcel. She stated that she did not submit anything to the county because she did not have the documents she needed for the flood plain study. She did not ask her firm to complete the topographical survey.

¶ 21 In the spring of 2009, Gardner ran into Dolak at a neighborhood bar and told him that she no longer wanted the property. She said she needed her money back, and Dolak said, "No, you defaulted on the deal."

¶ 22 The trial court found that Gardner forfeited the money under the liquidated damages clause and that the affirmative defenses of *laches*, waiver and estoppels were supported by the record. It entered judgment in favor of Dolak and reserved the issue of attorney fees.

¶ 23 Dolak's attorney presented a revised affidavit requesting $23,015.45 in attorney fees. Following a fee hearing, the court awarding Dolak attorney fees in the amount of $13,073 and court costs in the amount of $721.70.

¶ 24 ANALYSIS

¶ 25 I

¶ 26 Gardner claims that the affirmative defenses raised by Dolak do not apply to the facts in this case and that the trial court's forfeiture ruling was against the manifest weight of the evidence.

¶ 27 *Laches* in an equitable doctrine that precludes the assertion of a claim by a party whose unreasonable delay in raising that claim has misled or prejudiced the opposing party. *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, ¶ 52. The doctrine is based on the principle that courts are reluctant to come to the aid of a party who has knowingly withheld assertion of a right when, in the exercise of due diligence, the party should have asserted that right earlier. *Nancy's Home of the Stuffed Pizza, Inc., v. Cirrincione*, 144 Ill. App. 3d 934, 940 (1986). Whether the defense of *laches* is available is to be determined based on the facts and circumstances of each case. *Admiral Builders Corp. v. Robert Hall Village*, 101 Ill. App. 3d 132, 139 (1981). To succeed on a *laches* defense, a defendant must establish that (1) the plaintiff

lacked diligence in presenting his or her claim, and (2) the delay resulted in prejudice to the defendant. *Ulm*, 2012 IL App (4th) 110421, ¶ 52; see also *Teamsters & Employers Welfare Trust v. Gorman Brothers Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002) (plaintiff's suit was barred by *laches* where plaintiff's actions reasonably induced defendant to believe he would not be sued and defendant's ability to defend himself was impaired). Mere delay in asserting a right does not constitute *laches*. *Cirrincione*, 144 Ill. App. 3d at 941. A defendant must show prejudice or hardship in addition to passage of time. *Fruhling v. County of Champaign*, 95 Ill. App. 3d 409, 416 (1981).

¶ 28 A significant appreciation or depreciation in the value of property which is the object of controversy, such that the granting of relief would itself work an inequity, is evidence of prejudice justifying the application of *laches*. *Schroeder v. Schlueter*, 85 Ill. App. 3d 574, 576 (1980). This rule is particularly applicable in the case of an option contract, where time is a material element of the consideration running to the optionee. *Id*. at 577-78. Whether a party is guilty of *laches* to a degree that would bar suit is a matter within the trial court's discretion. *City of Rockford v. Suski*, 307 Ill. App. 3d 233, 244 (1999).

¶ 29 Here, Gardner was given the option to purchase for a period of 18 months beginning in September of 2005 and was later informed that Dolak, as the seller, considered her failure to act under the contingency provision an abandonment of her contractual rights. We find no evidence in the record that Gardner properly exercised her right of election not to purchase the property within the 18-month subdivision approval period. Instead, she waited six years to inform Dolak that she was no longer interested in purchasing the property. Her unreasonable delay coupled with a decrease in property value defeats a claim for reimbursement under the 18-month contingency provision.

¶ 30 Gardner argues that regardless of whether she provided notice of election under the 18-month approval period, Dolak's default under the contract by failing to provide her with a promissory note and mortgage and a topographic survey warrants reimbursement of the earnest money. However, Gardner never demanded a promissory note and mortgage, and she admitted that she had a conversation with Dolak in which he expressed his intent to have her firm conduct the survey. In addition, she sent emails to Dolak indicating that she was working on the flood plain study. Gardner's actions and correspondence led Dolak to believe that Gardner had procured the survey and initiated the flood plain study. At no time during the 18-month subdivision approval period did Gardner provide Dolak with written default or allow a cure for the alleged breaches as provided in the terms of the agreement. Gardner did not formally express to Dolak her election to forego the purchase until April of 2011, five-and-a-half years after the parties negotiated the terms of the purchase option agreement. During that time, the value of the property diminished and Dolak continued to maintain the property at his own expense. To grant Gardner relief under the 18-month contingency provision after such an extended period of time, during which Dolak had other buyers express interest, would be prejudicial to Dolak.

¶ 31 A party is guilty of *laches*, which will defeat whatever claim that party might have, when he or she remains passive while another party "incurs risk, enters into obligations, or makes expenditures for improvements or taxes." *Pyle v. Ferrell*, 12 Ill. 2d 547, 555 (1969). This case illustrates that rule. The detriment to Dolak from allowing Gardner to belatedly assert her right of election and reimbursement of the advancement warrants the application of *laches* here. See *County of Du Page v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 275-76 (1994).

¶ 32 II

¶ 33 On cross-appeal, Dolak argues that the trial court abused its discretion by not awarding the full amount of its requested attorney fees.

¶ 34 Generally, unsuccessful litigants in a civil action are not responsible for the payment of the opponent's attorney fees. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987). Contractual provisions addressing attorney fee awards are an exception to that general rule. *Id.* Regardless of contractual provisions, however, trial court's may only award reasonable fees which consist of "reasonable charges for reasonable services." *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 113 (2010). "When assessing the reasonableness of fees, a trial court may consider a variety of factors, including the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and the fees charged." *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314-15 (2007). The trial court has broad discretion in awarding attorney fees, and its decision will not be reversed absent abuse. *Id.* at 314.

¶ 35 We find no abuse of discretion in this case. When the trial court awarded attorney fees, it stated that both sides raised substantive legal issues but noted that the case could have been settled prior to trial. Dolak's attorney examined two witnesses in a one-day trial. The court considered the factors and examined the petition for fees. It determined that reasonable charges for reasonable services equaled $13,073 in attorney fees. The trial court properly exercised its discretion in awarding Dolak a portion of the fees he requested.

¶ 36 CONCLUSION

¶ 37 The judgment of the circuit court of Will County is affirmed.

¶ 38 Affirmed.