

NOTICE
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2016 IL App (4th) 150651-U

NO. 4-15-0651

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 15, 2016

Carla Bender

4th District Appellate
Court, IL

COBBLESTONE ESTATES SUBDIVISION)	Appeal from
HOMEOWNERS' ASSOCIATION, an Illinois Not-for-profit corporation,)	Circuit Court of
Plaintiff-Appellant,)	Sangamon County
v.)	No. 12MR1023
COURTNEY JOYNER, EMC PARTNERS, a general partnership, LUCY'S PLACE, LLC, an Illinois limited liability company, and COBBLESTONE DEVELOPMENT COMPANY, an Illinois joint venture,)	Honorable
Defendants-Appellees.)	Jeffery E. Tobin, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found the trial court did not err in granting summary judgment in favor of defendants.

¶ 2 In August 2013, plaintiff, Cobblestone Estates Subdivision Homeowners' Association (the Association), filed an amended four-count complaint for declaratory and injunctive relief against defendants, Courtney Joyner, EMC Partners (EMC), Lucy's Place, LLC (Lucy's Place), and Cobblestone Development Company (CDC), in regard to subdivision property located in Springfield, Illinois. Joyner and EMC filed a motion for summary judgment. In September 2014, the trial court granted summary judgment in favor of Joyner and EMC on counts I and II. In December 2014, the Association filed a motion for summary judgment on counts III and IV. In April 2015, Joyner and EMC filed a cross-motion for summary judgment.

Lucy's Place filed a motion for summary judgment in July 2015. That same month, the court granted the cross-motion for summary judgment as to counts III and IV and denied the Association's motion for summary judgment. In August 2015, the court granted summary judgment in favor of Lucy's Place with respect to counts I and II.

¶ 3 On appeal, the Association argues the trial court erred in granting summary judgment in favor of defendants. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The Association is an Illinois not-for-profit corporation formed pursuant to the subdivision covenants pertaining to Cobblestone Estates subdivision in Springfield. Joyner is a general partner of EMC, a general partnership engaged in real-estate development in Springfield. Lucy's Place is an Illinois limited liability company and a tenant of EMC in the Cobblestone Estates subdivision.

¶ 6 In December 2012, the Association filed a complaint for declaratory and injunctive relief against defendants. The complaint alleged CDC was the original developer of the subdivision, consisting of approximately 280 acres on the far west side of Springfield. The subdivision has been under continuous development since the early 1990s and 25 final plats have been recorded with respect to the subdivision. CDC negotiated the sale of the land comprising the 25th addition to Joyner in 2007. The complaint also alleged CDC and the Association believed that, pursuant to subdivision covenants, approval by the Association would be required for any plat of subdivision platted after January 1, 2003. Further, issues remained between CDC and the Association pertaining to the ownership and maintenance of drainage ponds serving the subdivision. CDC and the Association negotiated and executed an agreement in 2007 captioned "Agreement Regarding Future Additions to Cobblestone Estates" (the 2007 agreement). The

agreement contained a number of provisions pertaining to a storm-water detention pond known as Hedley Pond, stating drainage and storm-water runoff from the 25th addition would be directed to the pond. The complaint alleged the 2007 agreement provided for the conveyance of the pond to the Association and the payment by CDC of \$26,600 to the Association. Also, the 2007 agreement provided the Association would consent to the 25th addition and any other future additions to the subdivision provided certain conditions were met.

¶ 7 In count I, the Association alleged Joyner conveyed lot 6 of the subdivision, the 25th addition, to EMC in October 2011. Thereafter, EMC entered into an agreement with Lucy's Place for a bar and gambling operation. Lucy's Place filed a request for a conditional permitted use (CPU) permit with the City of Springfield, which the Association claimed violated section 5(v) of the 2007 agreement. Thus, the Association objected to the CPU permit application. In October 2012, the city council ultimately granted the CPU permit for Lucy's Place to operate the bar and gambling operation. The Association alleged Joyner and EMC were bound by the 2007 agreement, as was Lucy's Place as a tenant of EMC. The Association asked the trial court to find any use of the 25th addition requiring a CPU permit for the sale of liquor violated the 2007 agreement and enjoin defendants from operating any use requiring such a permit.

¶ 8 In count II, the Association alleged Joyner filed a request with the City of Springfield in October 2011 for rezoning of lot 5 of the subdivision, 25th addition, from the B-1 zoning classification to the R-3 zoning classification for the purpose of constructing apartments. In October 2012, the city council granted the rezoning request. The Association alleged the use of this parcel for apartments violated paragraph 5 of the 2007 agreement because such use would be inconsistent with the residential and commercial uses existing in the subdivision as of the date of the 2007 agreement. The Association asked the trial court to find Joyner to be bound by the

2007 agreement and that any use of lot 5 of the subdivision, 25th addition, for apartments violated the agreement.

¶ 9 In June 2013, Joyner and EMC filed a motion for summary judgment. Therein, defendants stated Joyner filed petitions to rezone the property in May and August 2012, and the city council granted the request in October 2012. While the zoning petitions were pending, defendants alleged the Association "resurrected the 2007 Agreement as a further tool on their attempt to stymie Defendants' development plans." Defendants claimed they had not executed the 2007 agreement, they were not named parties, and the agreement had not been recorded prior to the zoning petition. The motion alleged the Association recorded the 2007 agreement in July 2012, claimed it runs with the land, and was binding on defendants. Defendants, however, argued the 2007 agreement was void based on the following conditions set forth in the agreement:

"4. The effectiveness of this Agreement is conditioned upon City Council approval of the proposed 25th Addition as currently proposed as of the date of this Agreement, including, but not limited to, the variance for the right-in/right-out curb cut on Meadowbrook Road as proposed in the preliminary plat. ***

5. Within thirty days of the City Counsel [*sic*] approval, the Board of Directors of the Association shall call a special meeting of the Membership of the Association and recommend to the Membership that the Membership should give its approval of all future additions to Cobblestone Estates Subdivision, including but not limited to the 25th Addition, without requiring Developer

to pay any sums in addition to that required in paragraph 1 of this Agreement, and without requiring any future conditions, permission or approval of the Association, provided that any future additions comply with the following conditions:

* * *

If the Membership shall fail to adopt said approval as set forth in this paragraph 5, then this Agreement shall be null and void and no party shall have any further obligation to the other under the terms of this Agreement."

Joyner and EMC contended the city council approved the 25th addition on September 4, 2007, and Mayor Tim Davlin signed the ordinance on September 7, 2007. Moreover, the city council approved the requested variance to permit the right-in/right-out access on July 17, 2007, and Mayor Davlin signed the ordinance on July 20, 2007. Joyner and EMC argued the Association then had 30 days from no later than September 7, 2007, to place the 2007 agreement before the general membership of the Association for approval. As the 2007 agreement was not voted on by the general membership until December 10, 2007, the Association failed to fulfill an explicit condition, and thus, the 2007 agreement is null and void.

¶ 10 In August 2013, the Association filed an amended complaint for declaratory and injunctive relief. Counts I and II were substantially similar to the two counts raised in the original complaint. Count III related to Joyner's claim that the 2007 agreement was void at its inception due to the alleged failure of the Association to timely secure the approval thereof by its members. The Association stated the original covenants of the subdivision were filed with the

Recorder of Deeds in 1993 (1993 covenants), and paragraph 33 required the consent of the Association to any future plats filed after January 1, 2003. Paragraph 33, dealing with additional plats, stated, in part, as follows:

"A. The Developer, its successors and assigns, shall have the right but shall not be required to bring within the scheme of this Declaration of Easements, Covenants and Restrictions, without consent of members, additional properties within the area described in Exhibit "B" attached hereto in future states of development, provided that said additions are effected prior to January 1, 2003.

B. The additions authorized as provided herein shall be effected by the filing of a final plat or plats of subdivision from time to time in the Office of the Recorder of Deeds of Sangamon County, Illinois describing such real property upon which final plat the Developer has placed language making the covenants, restrictions, easements, charges and liens herein set forth binding upon such platted property, whereupon said additions shall become annexed to the properties and become subject to the jurisdiction of the Association."

The Association claimed that, pursuant to paragraph 33, the Association's approval was required for inclusion of Joyner's 25th addition within the jurisdiction of the Association.

¶ 11 The Association also contended Joyner filed covenants for the 25th addition in March 2008 (2008 covenants), and paragraph 12.2 subjected the 25th addition to the jurisdiction

of the Association insofar as drainage, retention, and detention facilities and other common areas are concerned. Paragraph 12.2 of the 2008 covenants states, in part, as follows:

"Homeowners Association Membership, Duties, and Voting. The property subject to this plat is described as additional property under the Declaration of Covenants, Easements and Restrictions for Cobblestone Estates Subdivision First Addition, recorded October 21, 1993, as Document No. 93-46127 in the Office of the Recorder of Deeds of Sangamon County, Illinois. As provided it shall *not* be subject to the Covenants and Restrictions for Cobblestone Estates Subdivision First Addition, except as specifically provided herein. The owner of each lot or parcel described herein shall, however, be a member of the Cobblestone Estates Homeowners Association, and any drainage facilities, retention and/or detention ponds, easements, subdivision fences, berms, landscaping, entrance improvements and subdivision signs, public areas and other appurtenances located upon property described in this plat shall be maintained at the expense of the Cobblestone Estates Homeowners Association." (Emphasis in original.)

The Association also claimed paragraph 12.7 incorporated by reference provisions of the 1993 covenants as follows:

"Paragraphs 8, 9, 10, 11, 16, 20, 21, 22, 23, 24, 26, 31, 32, 33, and 34 of the Declaration of Covenants Easements and Restrictions for

Cobblestone Estates Subdivision First Addition referred to above are hereby incorporated herein by reference."

¶ 12 The Association argued if Joyner is correct the 2007 agreement was void at its inception, then the Association's approval of inclusion of Joyner's 25th addition within the jurisdiction of the Association is similarly void. Thus, the Association argued Joyner and his purchasers had no right to use the Association's drainage facilities either for drainage or retention of storm water generated by the 25th addition and Joyner must provide for his own drainage for the 25th addition.

¶ 13 Count IV alleged paragraph 5B of the 1993 covenants authorized the Association to suspend the right of any member who is in default of the obligation to pay assessments to use the common areas of the subdivision. The Association alleged Joyner was in arrears in his dues in an amount exceeding \$25,000, thereby giving it the right to refuse Joyner the use of the Association's common areas for drainage of those parts of the 25th addition belonging to Joyner.

¶ 14 In September 2014, the trial court conducted a hearing on defendants' motion for summary judgment. In October 2014, the court issued a written order and found no dispute regarding the following facts:

"The Parties entered into an agreement on 7/13/07. Paragraphs 4 and 5 of the agreement provided conditions to the effect that, within 30 days of City Council approval of a requested variance and the proposed 25th Addition, the Plaintiff was required to hold a special meeting for approval of all future additions. The City Council approved the variance on 7/17/07 and the ordinance was signed by the mayor on 7/20/07. The City Council later approved

the 25th Addition on 9/04/07 and the ordinance was signed by the mayor on 9/07/07. The Plaintiff had until 10/07/07 to hold the required meeting for approval. That meeting did not take place until 12/10/07 at which time there was approval. The terms of the agreement provided that any failure to meet the conditions made the agreement null and void."

The court stated the contractual provisions were clear and unambiguous and the intentions of the parties controlled. The court found the Association "clearly failed to comply with the 30 day time period and therefore the agreement is null and void." The court granted summary judgment in favor of defendants on counts I and II.

¶ 15 In December 2014, the Association filed a motion for summary judgment as to counts III and IV of the amended complaint. Therein, the Association asked the trial court to compel Joyner to pay subdivision dues in excess of \$40,000 and construct his own drainage, detention, and retention facilities.

¶ 16 In April 2015, Joyner and EMC filed a cross-motion for summary judgment. Therein, defendants alleged the 2008 covenants explicitly stated in paragraph 12.2 that the 25th addition "shall not be subject to [the 1993 covenants], except as specifically provided herein." The 2008 covenants did provide the owner of each lot in the 25th addition would become a member of the Association. Defendants stated the 2008 covenants were recorded with the Recorder of Deeds on March 26, 2008, and, since that time, defendants have constructed roads, storm and sewer systems, utility lines, and otherwise improved the property. The cross-motion also stated the Association and CDC entered into an agreement regarding the subdivision in 2010 (2010 agreement). The agreement noted CDC had added additions 2 through 25, "all of which

have been platted and recorded with the Sangamon County Recorder of Deeds." The agreement further stated the Association membership met on December 10, 2007, and approved the 2007 agreement. The 2010 agreement then stated CDC would pay \$26,600 for improvements to the Hedley Pond and transfer title to the Association.

¶ 17 In July 2015, Lucy's Place filed a motion for summary judgment, arguing the trial court's October 2014 ruling constituted the law of the case and thus summary judgment should be entered in favor of Lucy's Place as to counts I and II.

¶ 18 In July 2015, the trial court issued its written order. The court found the Association could not establish it had no adequate remedy at law to entitle it to injunctive relief. Moreover, the court found, in part, as follows:

"The equities and public interest are also clearly against the Plaintiff based upon undisputed facts. The property in question (25th Addition) has been developed over a period of about 8 years. Most glaring is that the relief requested by the Plaintiff would require a fundamental alteration of a platted and engineered development. Defendant Joyner would incur substantial costs in constructing another detention/retention facility. There was no evidence presented by the Plaintiff which would indicate that the current facility was overburdened. Many lots have been sold off over the years. Many third party land and business owners would be adversely effected [*sic*]. Previously recorded real property documents would be effected [*sic*]. The City of Springfield's authority to weigh in regarding issues of drainage and retention

would be diluted. These facts weigh quite heavily against the Plaintiff."

¶ 19 The court found none of the applicable covenants provided the Association with the power to suspend the use of the detention/retention ponds and the provision in the 1993 covenants was never incorporated with the 2008 covenants. The court denied the Association's motion for summary judgment and granted defendants' cross-motion for summary judgment as to counts III and IV. The court also ruled as follows:

"The 2008 covenants apply to the 25th Addition. The 1993 covenants do not apply except as specifically incorporated in Sections 12.2 and 12.7 of the 2008 covenants. The 25th Addition owners can continue to drain and utilize the detention ponds. The [Association] has no authority to suspend those rights. The 25th Addition remains part of the Cobblestone Subdivision per the 2010 agreement."

¶ 20 In August 2015, the trial court entered summary judgment in favor of Lucy's Place with respect to counts I and II of the Association's amended complaint. Thereafter, the Association appealed the court's three orders.

¶ 21 **II. ANALYSIS**

¶ 22 **A. The 2007 Agreement**

¶ 23 The Association argues the trial court erred in finding the 2007 agreement was void based on the Association's failure to approve it within the 30-day period mentioned therein. We disagree.

¶ 24 "The law and the public policy of Illinois permit and require that competent

parties be free to contract with one another." *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 549, 687 N.E.2d 968, 972 (1997). "Parties to a contract are free to include any terms they choose, as long as those terms are not against public policy and do not contravene some positive rule of law." *Green v. Safeco Life Insurance Co.*, 312 Ill. App. 3d 577, 581, 727 N.E.2 393, 397 (2000).

¶ 25 In construing a contract, a court's primary objective is to give effect to the intent of the parties. *Zabaneh Franchises, LLC v. Walker*, 2012 IL App (4th) 110215, ¶ 17, 972 N.E.2d 344.

"A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent. [Citations.] Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007).

¶ 26 When parties dispute the meaning of a contract provision, "the threshold issue is whether the contract is ambiguous." *Fleet Business Credit, LLC v. Enterasys Networks, Inc.*, 352 Ill. App. 3d 456, 469, 816 N.E.2d 619, 629 (2004). If the language of the contractual provision is unambiguous, it is to be given its plain and ordinary meaning. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149, 153 (2007). "A contract is not rendered ambiguous merely because the parties disagree on its meaning." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153, 821 N.E.2d 206, 214 (2004). A court's determination as to whether a contract is ambiguous is a question of law. *Peck v. Froehlich*, 367

Ill. App. 3d 225, 228, 853 N.E.2d 927, 931 (2006).

¶ 27 In the case *sub judice*, the parties entered into the 2007 agreement on July 13, 2007. The agreement included paragraphs 4 and 5, which provided, in part, as follows:

"4. The effectiveness of this Agreement is conditioned upon City Council approval of the proposed 25th Addition as currently proposed as of the date of this Agreement, including, but not limited to, the variance for the right-in/right-out curb cut on Meadowbrook Road as proposed in the preliminary plat. ***

5. Within thirty days of the City Counsel [*sic*] approval, the Board of Directors of the Association shall call a special meeting of the Membership of the Association and recommend to the Membership that the Membership should give its approval of all future additions to Cobblestone Estates Subdivision, including but not limited to the 25th Addition, without requiring Developer to pay any sums in addition to that required in paragraph 1 of this Agreement, and without requiring any future conditions, permission or approval of the Association, provided that any future additions comply with the following conditions:

* * *

If the Membership shall fail to adopt said approval as set forth in this paragraph 5, then this Agreement shall be null and void and no party shall have any further obligation to the other under the

terms of this Agreement."

The city council approved the variance on July 17, 2007, and the mayor signed the ordinance on July 20, 2007. The city council later approved the 25th addition on September 4, 2007, and the mayor signed the ordinance on September 7, 2007. The Association did not hold its special meeting of its members until December 10, 2007, at which time approval was given.

¶ 28 The terms of the 2007 agreement are clear and unambiguous. The parties to the agreement agreed to those terms. The agreement set forth the procedures for approving the agreement as well as the specific result if that approval was not provided. The facts indicate the Association failed to obtain the required approval within the time period set forth in the agreement, and the result is the agreement was "null and void and no party shall have any further obligation to the other under the terms of this Agreement." We find the trial court did not err in finding the agreement null and void and granting summary judgment in favor of defendants.

¶ 29 B. The Association's Retention and Detention Facilities

¶ 30 The Association argues the trial court erred in granting summary judgment in Joyner's favor on counts III and IV because, but for the 2007 agreement, which the court found null and void, and pursuant to paragraph 33 of the 1993 covenants, Joyner has no right to use the Association's retention and detention facilities. We disagree.

¶ 31 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' "

Ioerger v. Halverson Construction Co., 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008)

(quoting 735 ILCS 5/2-1005(c) (West 2000)). Where, as here, cross-motions for summary

judgment were filed, the parties "agree only a question of law is involved, and the court should

decide the issue based on the record." *Farmers Automobile Insurance Ass'n v. Danner*, 2012 IL App (4th) 110461, ¶ 30, 967 N.E.2d 836. On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 32 In this case, the trial court found the 2007 agreement was void. Thus, the Association could not rely on it to assert its rights in conjunction with its amended complaint. However, that did not mean the 25th addition itself was invalid. When the Association entered into the 2010 agreement, it confirmed the 25th addition was part of the subdivision. While the Association may have been working under the incorrect illusion that the 2007 agreement controlled, the Association's acquiescence in the 25th addition's development and recognition of it in the 2010 agreement prevent it from contending it does not exist or that Joyner failed to bring the addition "within the scheme" of the 1993 covenants. Moreover, as the court found, the 25th addition has undergone development since 2007, lots have been sold, and third-party owners would be adversely impacted if Joyner were forced to construct his own detention/retention facility. Considering the evidence and the circumstances, we find the court did not err in finding the owners of the 25th addition could continue to drain and utilize the detention ponds. Further, the court did not err in granting summary judgment in favor of defendants.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment.

¶ 35 Affirmed.