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2016 IL App (4th) 150914-U

NO. 4-15-0914

FILED
October 5, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

OMEGA DEMOLITION CORP.,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
SPRINGFIELD HOUSING AUTHORITY, a Municipal Corporation,	)	No. 14CH389
Defendant-Appellee.	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly granted defendant's motion to dismiss where plaintiff failed to file a timely complaint in accordance with the parties' contract.

¶ 2 In April 2015, plaintiff, Omega Demolition Corporation, filed an amended complaint, alleging defendant, Springfield Housing Authority, a municipal corporation, breached the parties' demolition contract when it failed to reimburse plaintiff for additional work completed outside the scope of the contract. In June 2015, defendant filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)), asserting plaintiff's complaint was not timely filed under the provisions of the contract. In October 2015, the trial court granted defendant's motion to dismiss.

¶ 3 Plaintiff appeals, asserting the trial court erred in granting defendant's motion to dismiss. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Contract

¶ 6 In March 2013, plaintiff entered into a contract with defendant, wherein plaintiff agreed to complete demolition work on the two Sankey Towers located in Springfield, Illinois. The section of the contract governing disputes between the parties (dispute provision) states, in relevant part:

> "(c) All claims by [plaintiff] shall be made in writing and submitted to [defendant] for a written decision. ***
>
> (d) [Defendant] shall, within 60 (unless otherwise indicated) days after receipt of the request, decide the claim or notify [plaintiff] of the date by which the decision will be made.
>
> (e) [Defendant's] decision shall be final unless [plaintiff] (1) appeals to a higher level in the [Public Housing Authority] in accordance with the [Public Housing Authority's] policy and procedures, (2) refers the appeal to an independent mediator or arbitrator, or (3) files suit in a court of competent jurisdiction. Such appeal must be made within (30 unless otherwise indicated) days after receipt of [defendant's] decision."

¶ 7 B. Correspondence Between the Parties

¶ 8 1. *Plaintiff's December 2013 Claim*

¶ 9 During the demolition process, plaintiff expressed concerns over the possible presence of asbestos in a plaster overspray on the concrete beams of one of the buildings. In the end, after conducting additional testing, plaintiff removed the material.

¶ 10 On December 13, 2013, plaintiff sent a letter to defendant, requesting reimbursement pursuant to the dispute provision of the contract for its asbestos abatement of the overspray that it contended was outside the scope of the contract. The following month, defendant responded by preliminarily denying the claim pending plaintiff's submission of a detailed cost breakdown that might otherwise change defendant's decision. On February 13, 2014, plaintiff provided the requested information.

¶ 11 2. *Defendant's February 2014 Response*

¶ 12 On February 27, 2014, defendant sent plaintiff a letter stating it "denies the claim for 'additional work' as outlined in the previous requests." The letter then went on to explain defendant's reasons for denying plaintiff's claim. A certified-mail receipt shows plaintiff received the letter on March 3, 2014.

¶ 13 3. *Plaintiff's August 2014 Claim*

¶ 14 In August 2014, plaintiff submitted another letter to defendant, again requesting reimbursement, in part, for the asbestos abatement of the overspray area.

¶ 15 4. *Defendant's September 2014 Response*

¶ 16 In September 2014, defendant responded to plaintiff's August 2014 claim, explaining, in part, it had already responded to plaintiff's request for reimbursement for the overspray removal on two prior occasions. Defendant's letter went on to say it "rejects the claim that removal of the [overspray material] is additional work."

¶ 17 C. The Trial Court Proceedings

¶ 18 1. *Plaintiff's Complaints*

¶ 19 In October 2014, within 30 days of receiving defendant's September 2014 letter, plaintiff filed a complaint in the trial court. In April 2015, plaintiff filed its first amended

complaint, alleging defendant breached the parties' contract by refusing to reimburse plaintiff for the asbestos abatement.

¶ 20 2. *Defendant's Motion To Dismiss*

¶ 21 In June 2015, defendant filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), asserting plaintiff failed to file its claim in the trial court within 30 days of defendant's February 2014 letter as required by the dispute provision of the contract. Defendant also attached an affidavit from its deputy director, which stated defendant's February 2014 letter was a decision under the dispute provision. In plaintiff's August 2015 response to the motion to dismiss, plaintiff attached two affidavits, one from its president and one from an employee, both stating they "did not perceive" the February 2014 letter to be a "decision" requiring action under the dispute provision.

¶ 22 3. *The Trial Court's Ruling*

¶ 23 Following an October 2015 hearing, the trial court issued a written order granting defendant's motion to dismiss with prejudice. The court found defendant's February 2014 letter denying additional payments was an unambiguous, final decision, and, pursuant to the dispute provision, plaintiff was required to raise any challenges to that decision within 30 days.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, plaintiff asserts the trial court erred by granting defendant's motion to dismiss. During the pendency of the appeal, defendant filed a motion to strike section III of plaintiff's reply brief. We begin by addressing the motion to strike.

¶ 27 A. Motion To Strike

¶ 28 Defendant filed a motion to strike section III of plaintiff's reply brief, in which plaintiff asserts the contract's dispute resolution language was ambiguous and, therefore, the parties' disputed interpretation of the language should have survived the motion to dismiss. Defendant asserted plaintiff improperly raised the ambiguity issue for the first time in its reply brief after taking a stance at trial that the contract language was *not* ambiguous.

¶ 29 "[T]he striking of an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the alleged violations of procedural rules interfere with or preclude review. [Citations.]" (Internal quotation marks omitted.) *In re Detention of Powell*, 217 Ill. 2d 123, 132, 839 N.E.2d 1008, 1013 (2005). In the present case, plaintiff's reply brief substantially complies with Illinois Supreme Court Rule 341(h) (eff. Dec. 9, 2015) and it neither hinders nor precludes our review. Accordingly, defendant's motion to strike is denied. However, we will disregard any inappropriate statements or arguments made by plaintiff in its reply brief. See *Walk v. Illinois Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1180, 926 N.E.2d 773, 779 (2010).

¶ 30 We now turn to the merits of defendant's appeal.

¶ 31 B. Motion To Dismiss

¶ 32 Plaintiff asserts the trial court erred by granting defendant's motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)).

¶ 33 Initially, plaintiff argues defendant's motion should have been a motion for summary judgment rather than a motion to dismiss. We disagree. A motion for summary judgment seeks to dispose of litigation when the disputed issue is one of law or there is an absence of a genuine issue of material fact. *Feldheim v. Sims*, 326 Ill. App. 3d 302, 310, 760 N.E.2d 123, 130 (2001). Here, defendant claimed an affirmative matter—the timeliness of the

complaint—defeated plaintiff's cause of action, which is an issue appropriately brought in a section 2-619 motion to dismiss. See *Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. Thus, we will address the trial court's ruling on defendant's motion to dismiss.

¶ 34 A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Id.* ¶ 31. In reaching its decision, the court may rely upon pleadings, depositions, and affidavits. *Gray v. National Restoration Systems, Inc.*, 354 Ill. App. 3d 345, 354, 820 N.E.2d 943, 952 (2004). Our review is *de novo*. *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 41, 32 N.E.3d 583.

¶ 35 Plaintiff's central argument is that its well-pleaded facts demonstrate an issue of material fact exists as to whether plaintiff perceived defendant's February 2014 letter as a final decision that required plaintiff to act within 30 days. Specifically, plaintiff asserts its affidavits demonstrate plaintiff did not perceive defendant's February 2014 letter to constitute a final decision requiring further action, a factual issue that should have precluded the trial court from granting defendant's motion to dismiss.

¶ 36 In making this argument, plaintiff focuses on its affiants' perceptions of the February 2014 letter as constituting a well-pleaded fact. However, even in taking the statements of the affiants as true, whether the affiants "perceived" the February 2014 letter as a final decision requiring plaintiff to act within 30 days is irrelevant. "Where a contract is interpreted as a matter of law, the contracting parties' 'subjective intentions are irrelevant; rather, the pertinent inquiry focuses upon the objective manifestations of the parties, including the language they used

in the contract.' " See *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 22, 2 N.E.3d 1211 (quoting *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724, 727, 856 N.E.2d 24, 26 (2006)). Thus, we must focus on the language of the contract and the content of the letters exchanged between plaintiff and defendant to determine whether, as a matter of law, the timeliness issue defeats plaintiff's cause of action.

¶ 37 "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary[,] and popular meaning." *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 47 (2011). "Further, when parties agree to and insert language into a contract, it is presumed that it was done purposefully, so that the language employed is to be given effect." *Id.*

¶ 38 In its reply brief, plaintiff asserts for the first time the contractual language is ambiguous. Plaintiff's failure to raise this issue in its opening brief renders the issue forfeited. See *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 56, 10 N.E.3d 929; Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Moreover, a party cannot take a position on appeal that is contrary to its position before the trial court. *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 172, 795 N.E.2d 817, 840 (2003). We therefore will not consider whether the contractual language is ambiguous.

¶ 39 In its December 2013 letter to defendant, plaintiff specifically cited the dispute provision of the contract, which meant plaintiff was well aware of the procedures outlined in the dispute provision. See *Premier Electrical Construction Co. v. Ragnar Benson, Inc.*, 111 Ill. App. 3d 855, 865, 444 N.E.2d 726, 732 (1982) ("One is presumed to know the contents and meaning of the obligations he undertakes when he signs a written contract."). Thus, when it filed its claim under the dispute provision, plaintiff was on notice that it had to challenge defendant's eventual decision. When defendant thereafter sent its February 2014 letter stating it "denies the claim for

'additional work' as outlined in the previous requests," plaintiff was on notice that it had 30 days to take further action to preserve the claim.

¶ 40 Plaintiff asserts the February 2014 letter did not inform it that this was defendant's "final" decision such that further action was necessary. Notably, the September 2014 letter that plaintiff deemed a "final decision" also did not contain such language. Regardless, such a designation is not required under the contract. The contract specifically states, "[Defendant's] decision shall be final," meaning that any decision provided by defendant was a final decision. Defendant's letter clearly denied plaintiff's request for reimbursement. Thus, under the plain language of the contract, defendant's decision was final unless plaintiff took certain actions, such as filing a complaint in the trial court within 30 days. Plaintiff failed to follow this procedure. Thus, under the plain language of the contract, plaintiff's October 2014 complaint was not timely filed.

¶ 41 Accordingly, the trial court did not err in dismissing plaintiff's complaint with prejudice pursuant to section 2-619.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we affirm the trial court's judgment.

¶ 44 Affirmed.