2017 IL App (3d) 160790-U

Order filed November 14, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

HOOBYAR-BALDI IMPORT AUTO, INC.,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-16-0790
	)	Circuit No. 15-MR-2412
	)	
J. MICHAEL WEBB,	)	Honorable
	)	John C. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Liquidated damages provision of purchase agreement did not apply where contract terminated without the fault of either party.
(2) Refusal to award attorney fees was not an abuse of discretion.

¶ 2 Defendant, J. Michael Webb, agreed to purchase a Volkswagen dealership from plaintiff, Hoobyar-Baldi Import Auto, Inc. Prior to the closing date, Webb notified Hoobyar-Baldi that the contract had been terminated and requested the return of his earnest money and liquidated damages. In response, Hoobyar-Baldi filed a complaint seeking a declaration of the parties'

rights. Webb appeals from the trial court's order instructing the dealership to return the earnest money but denying his demand for liquidated damages and attorney fees. We affirm.

¶ 3 FACTS

¶ 4 Hoobyar-Baldi owned a Volkswagen dealership in Highland, Indiana. In July of 2015, Webb agreed to purchase the dealership for approximately $7,000,000. Following negotiations, the parties entered two agreements: an "Asset Purchase Agreement" for the purchase of the assets of the dealership; and an "Agreement for Sale and Purchase of Real Estate" for the sale of the real estate. Under the asset purchase agreement, Webb agreed to pay $2,450,000 for the goodwill and franchise rights of the dealership and $300,000 for the furniture, fixtures and equipment. According to the real estate agreement, Webb arranged to purchase the real property for $4,000,000.

¶ 5 The asset purchase agreement listed various conditions precedent to Webb's obligation to close on the purchase:

> "22. Conditions to Buyer's Obligations. The obligation of Buyer to consummate the transaction contemplated in this Agreement is subject to the satisfaction or waiver in writing by Buyer of each of the following express conditions precedent.
>
> ***
>
> 22.4 No Change in Seller's Assets. There has been no material adverse change in the assets of Seller to be sold hereunder between the date of this Agreement and the Closing Date.
>
> ***

22.6 Representations and Warranties. All representations and warranties of Seller contained in this Agreement shall be true and accurate in all material respects as of the Closing Date, and the Seller shall have performed all conditions required by this Agreement to be performed, complied with or satisfied by Seller prior to closing."

¶ 6 The representations and warranties were contained in section 17 and provided, in part:

"17. Representations and Warranties of Seller. Seller represents and warrants to Buyer as follows:

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17.5 Litigation. No lawsuit, action, administrative proceeding, arbitration proceeding, governmental investigation or other legal or equitable proceeding of any kind is pending or, to Seller's knowledge, threatened against Seller or any of the assets to be conveyed to Buyer hereunder that will adversely affect the value of such assets or the ability of Seller to consummate the transaction contemplated hereunder."

¶ 7 Under the terms of the agreements, the closing date was scheduled to occur prior to November 1, 2015. If the closing did not take place by the agreed date, the asset purchase agreement provided for termination.

"24.2 Termination of Agreement.

a) If this Agreement is terminated without the fault of either party, the earnest money paid under Section 2 shall be returned to Buyer forthwith, this Agreement shall terminate and neither party shall have any further rights or obligations hereunder.

b) If Seller shall fail or refuse to proceed under and in accordance with the Agreement without just cause, at the election of Buyer, (i) the earnest money paid under Section 2 shall be returned to Buyer upon its demand and the liquidated sum of $50,000.00, not as a penalty, and upon such return and further payment, neither party shall have any further rights or claims against the other as a result of this Agreement or its termination.

c) If Buyer or its permitted assignee(s) shall fail or refuse to proceed under and in accordance with this Agreement without just cause, then the earnest money paid under Section 2 of this Agreement shall be paid to Seller, not as a penalty, but as liquidated damages sustained by Seller which shall be the sole remedy against Buyer and shall conclusively constitute the full measure of Seller's damages from Buyer.

24.3 Recovery of Attorneys' Fees and Costs. If an action is initiated to obtain relief pursuant to Section 24.2 of this Agreement by Seller or Buyer, the prevailing party in such action shall also be entitled to recover from the other its costs and reasonable attorneys' fees."

¶ 8 In addition, the sale of the real estate was expressly contingent upon the sale of the dealership. Section 12 of the real estate purchase agreement stated:

"12. Conditions Precedent to Obligations of Purchaser: Purchaser's obligations under this agreement are subject to and contingent upon fulfillment of the following conditions, unless waived in writing by Purchaser:

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> B. Simultaneous closing by Purchaser, or his designee, of the purchase of certain of the assets and inventories of Import pursuant to the Asset Purchase Agreement ("APA"). In the event the APA is not closed in accordance with its terms, this agreement shall terminate with the remedies available to either party under the APA."

¶ 9 On September 18, 2015, the United States Environmental Protection Agency (EPA) alleged that Volkswagen violated the federal Clean Air Act (42 U.S.C. § 7401 *et seq*. (2012)) by manipulating emissions testing equipment in certain diesel engines. Volkswagen later admitted to installing "defeat devices" software programmed to switch the engines to cleaner test modes during official emissions tests. As a result of these allegations, between July 8, 2015 and October 7, 2015, Volkswagen's stock price decreased sharply, and the United States Justice Department launched a criminal investigation into Volkswagen's activities.

¶ 10 On October 8, 2015, Webb sent a letter to Hoobyar-Baldi notifying the dealership that the agreements had been terminated because the value of the dealership's assets had significantly declined. Webb requested the return of his earnest money and demanded $50,000 in liquidated damages.

¶ 11 On October 14, 2015, Hoobyar-Baldi filed a declaratory judgment action seeking a declaration that the contracts had not been terminated and that Webb was required to purchase the dealership under the terms of the agreements. Hoobyar-Baldi also requested attorney fees and costs under section 24.3 of the asset purchase agreement. In response, Webb filed a counterclaim seeking a declaration that he was no longer obligated to purchase the dealership because certain conditions precedent to the agreements had not been met. Webb requested (1) the return of his earnest money pursuant to section 24.2(a) of the asset purchase agreement, (2)

an award of liquidated damages, pursuant to section 24.2(b) of the agreement, and (3) an award of attorney fees pursuant to Section 24.3 of the agreement. He then filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to the issues raised by the parties. In arguments before the court, Hoobyar-Baldi conceded that Webb was entitled to the earnest money as outlined in section 24.2(a) but objected to Webb's request for liquidated damages and attorney fees.

¶ 12 The trial court granted summary judgment as to the return of Webb's earnest money but denied his request for liquidated damages and attorney fees. The court found that liquidated damages were not appropriate because the contract terminated due to external conditions and declined to apply the fee-shifting provision in section 24.3.

¶ 13 ANALYSIS

¶ 14 I. Liquidated Damages

¶ 15 Webb contends that the trial court erred in denying his summary judgment motion for liquidated damages. He argues that the Volkswagen emission investigation resulted in a material adverse change in Hoobyar-Baldi's assets that led to termination of the purchase agreements. He further maintains that Hoobyar-Baldi's failure to immediately return the earnest money to him entitles him to liquidated damages of $50,000 pursuant to the termination provisions of the asset purchase agreement.

¶ 16 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue on any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). The trial court's decision to grant summary judgment presents a question of law and is

subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 17 The primary objective in construing a contract is to give effect to the intention of the parties involved. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232-33 (2007). The parties' intent must be ascertained from the language employed in the instrument. *Joseph v. Lake Michigan Mortgage Co.*, 106 Ill. App. 3d 988, 991 (1982). A contract is to be construed as a whole, giving meaning and effect to every provision, if possible, because it is presumed that every clause in the contract was inserted deliberately and for a purpose. *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 283 (1958). Where the contract is clear, its interpretation is a question of law to be determined only from its own terms. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288 (1990).

¶ 18 A contract is ambiguous if the language employed is susceptible to more than one reasonable meaning or obscure in meaning through indefiniteness. *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888 (1995). A contract is not rendered ambiguous merely because the parties do not agree on its meaning. *Joseph*, 106 Ill. App. 3d at 991. Whether a contract is ambiguous is also a question of law. *Quake Construction*, 141 Ill. 2d at 288.

¶ 19 Liquidated damages are an amount contractually stipulated to as a reasonable estimation of actual damages to be recovered by one party if the other party breaches. *Penski Truck Leasing Co., L.P., v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 456 (2000). Generally, courts will only enforce a liquidated damages clause when (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach, (2) the amount of liquidated damages was reasonable at the time the contract was signed, and (3) actual damages would be uncertain in

amount and difficult to prove. *GK Development, Inc. v. Iowa Falls Financing Corp.*, 2013 IL App (1st) 112802, ¶¶ 47-49.

¶ 20 Here, section 24.2 of the asset purchase agreement provides a remedy for the termination of the contract to purchase the dealership. The agreement uses plain language from which the parties' intent can be clearly ascertained. Under section 24.2, the contract may be terminated under three different scenarios: (1) "without the fault of either party," (2) if the seller "fail[s] or refuse[s] to proceed with [the agreement] without just cause," or (3) if the buyer "fail[s] or refuse[s] to proceed with [the agreement] without just cause." If neither party is at fault, as set forth in subsection a, the contract terminates and the earnest money is returned to the buyer. If the seller is at fault, as described in subsection b, the earnest money is returned to the buyer and the seller is required to pay an additional $50,000 to the buyer in liquidated damages. Last, if the buyer is at fault under subsection c, the earnest money is surrendered to the seller as liquidated damages and the only remedy.

¶ 21 Nothing indicates that Hoobyar-Baldi failed or refused to proceed with the sale of the dealership. The facts demonstrate that Webb decided not to proceed with the closing based on a "material adverse change" in Hoobyar-Baldi's assets. His decision was clearly permissible under the terms of the agreements. Section 22 of the asset purchase agreement, entitled "Conditions to the Buyer's Obligations," states that the buyer is not obligated to complete the transaction if certain conditions precedent had not been met, including "no material adverse change" in the dealership's assets. However, in this case, the adverse change in the seller's assets did not result from the actions of seller. It is evident that the forces that caused Hoobyar-Baldi's assets to plummet in value were the result of external events. Hoobyar-Baldi's conduct

did not cause the dealership's assets to be significantly devalued. Thus, Hoobyar-Baldi did not terminate the contract under subsection b.

¶ 22 Sections 17.5 and 22.6 of the asset purchase agreement set forth certain conditions that are properly construed as conditions precedent. Here, those conditions were not satisfied. The parties never closed the sale due to Volkswagen's EPA violations and the ensuing investigation, conditions created by a third-party. Neither party to the contract was at fault for its termination. Awarding Webb $50,000 would be imposing a penalty against Hoobyar-Baldi for its failure to fulfill a condition precedent over which the dealership had no control. The contract was no longer enforceable because a condition precedent was not met without fault of either party. See *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 282 (2007) (a contract is not enforceable until the condition precedent is performed). Thus, under the terms of the agreement, Webb is only entitled to the earnest money under section 24.2(a). The liquidated damages provision in section 24.2(b) does not apply.

¶ 23 Webb nevertheless argues that Hoobyar-Baldi's filing of the complaint, instead of returning the earnest money, constituted a failure or refusal to proceed under the agreement as stated in section 24.2(b). Webb maintains therefore that Hoobyar-Baldi's act of filing a complaint entitled him to liquidated damages. However, defendant demanded $50,000 in liquidated damages on October 8, 2015, and the record does not demonstrate that Hoobyar-Baldi actually refused to return the earnest money. It was only after Webb asked for the return of the earnest money and demanded $50,000 in liquidated damages that Hoobyar-Baldi filed its complaint on October 14, 2015. Thus, there are no facts to support Webb's claim that Hoobyar-Baldi failed or refused to proceed under the agreement before Webb sought to impose the liquidated damages provision. Accordingly, the trial court properly concluded that section

24.2(b) did not apply as a matter of law and denied Webb's summary judgment motion on the issue of liquidated damages.

¶ 24 II. Fee-Shifting Provision

¶ 25 Webb also contends that the trial court erred in denying his request for attorney fees and costs. He claims that he prevailed on the "significant" issue of whether the agreements terminated due to the failure of conditions precedent pursuant to section 24.2(a). Therefore, he is entitled to attorney fees and other costs under the fee-shifting provision of the Asset Agreement.

¶ 26 Generally, the losing party in a lawsuit cannot be required to pay attorney fees to the winning party. *Bjork v. Draper*, 381 Ill. App. 3d 528, 543 (2008) (citing *Chapman v. Engel*, 372 Ill. App. 3d 84, 87 (2007)). However, parties may alter this rule by contract by incorporating contractual "fee-shifting" provisions for the award of attorney fees; such provisions will be enforced by the courts. *Bjork*, 381 Ill. App. 3d at 543.

¶ 27 We are required to strictly construe a contractual provision for attorney fees. *Id*. at 544. That is, we construe the fee-shifting provision "to mean nothing more-but also nothing less-than the letter of the text." *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004). The construction of a contract's fee-shifting provision presents a question of law, which we review *de novo*. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005). To the extent the trial court applied the terms of the agreement to the facts, our review is based on an abuse of discretion standard. *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 226 (2007).

¶ 28 Some courts have declined to apply fee-shifting provision in the context of declaratory actions. *Arrington v. Walter E. Heller International Corp.*, 30 Ill. App. 3d 631, 642 (1975); see also *Chapman*, 372 Ill. App. 3d at 88. However, most courts evaluate the contract and award attorney fees, even in declaratory judgment cases, based on the construction of the language used

in the fee-shifting provision. See, e.g., *Bright Horizons Children's Centers, LLC, v. Riverway Midwest II, LLC,* 403 Ill. App. 3d 234, 254 (2010); *Peleton,* 375 Ill. App. 3d at 226; *Erlenbush,* 353 Ill. App. 3d at 952; *Powers v. Rockford Stop-N-Go, Inc.,* 326 Ill. App. 3d 511, 515 (2001); *Myers v. Popp Enterprises, Inc.,* 216 Ill. App. 3d 830, 838 (1991).

¶ 29 Here, the asset purchase agreement contained the following fee-shifting provision:

> "24.3 Recovery of Attorneys' Fees and Costs. If an action is initiated to obtain relief pursuant to Section 24.2 of this Agreement by Seller or Buyer, the prevailing party in such action shall also be entitled to recover from the other its costs and reasonable attorneys' fees."

As stated, attorney fees are to be awarded to the "prevailing party" if an action is initiated to obtain relief pursuant to termination. For the purpose of awarding attorney fees, courts have held that a "prevailing party" is "one that is successful on a significant issue and achieves some benefit in bringing suit." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership,* 325 Ill. App. 3d 276, 280 (2001); see also *Jackson v. Hammer,* 274 Ill. App. 3d 59, 70 (1995). A litigant does not have to succeed on all claims to be considered a prevailing party. *Powers,* 326 Ill. App. 3d at 515. Still, "when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party." *Id*.

¶ 30 This case is complicated because Webb succeeded on a significant issue involving earnest money and Hoobyar-Baldi succeeded on another significant issue involving liquidated damages. In essence, the trial court's decision gave each side something: Webb received his earnest money of $150,000, and Hoobyar-Baldi did not have to pay liquidated damages for failing to return the earnest money immediately. In its order, the trial court found that "there was

no actual breach or wrongdoing" by either party. With each side prevailing on a significant issue, we cannot find error in the trial court's refusal to apply the fee-shifting provision.

¶ 31 CONCLUSION

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

¶ 33 Affirmed.