2018 IL App (1st) 170338-U

Nos. 1-17-0338 and 1-17-2193 Consolidated

Order filed March 26, 2018

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOEL F. HANDLER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 M1 103263
	)	
	)	Honorable
MARGARET ANDERSON,	)	Daniel P. Duffy and
	)	Maureen O. Hannon,
Defendant-Appellee.	)	Judges, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant's breaches of the parties' settlement agreement were immaterial, the circuit court's denials of the plaintiff's motions to reinstate the underlying case and enter judgment in his favor were not against the manifest weight of the evidence.

¶ 2 In this breach of contract action, plaintiff Joel F. Handler appeals from orders of the circuit court denying his two separate motions to reinstate the underlying case and enter judgment in his favor. On appeal, Handler contends that defendant Margaret Anderson's two

failures to pay him on time constituted material breaches of their settlement agreement, and that therefore, the circuit court's refusals to reinstate the case were in error.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Handler, an attorney, represented Anderson in her divorce. On February 6, 2015, Handler filed a complaint against Anderson, alleging that she had agreed to pay him a rate of $475 per hour for his legal services and to reimburse him for all costs. Handler asserted that Anderson owed him an outstanding amount of $25,925.44 for services and costs, and asked the court to enter judgment in his favor in that amount.

¶ 5 Eventually, the parties engaged in a settlement conference. On January 15, 2016, following the conference, the trial court entered an order dismissing the matter, without prejudice and subject to reinstatement, and stating the following:

> "IT IS HEREBY ORDERED:
>
> That *** pursuant to settlement by which the defendant shall tender to the plaintiff the amount of $700.00 on February 1, 2016[,] and 1st day of each of the succeeding 24 months until the amount of $17,500.00 is paid in total.
>
> All payments to be made payable to Joel F. Handler and received on the 1st of each month this installment is in effect. Time is of the essence in this agreement.
>
> IT IS FURTHER ORDERED:
>
> That, should defendant be found to be in default by the court of the payments due, the plaintiff shall have the right to move to reinstate the case and

> receive judgment in the amount originally prayed for in the complaint less any payments made, plus costs of suit."

¶ 6 On December 8, 2016, Handler filed a motion to reinstate the case and for entry of judgment, alleging that in violation of the settlement agreement, Anderson had failed to tender him a timely payment on December 1, 2016. According to Handler, he received Anderson's payment on December 6, 2016. Handler requested that as relief, the circuit court enter judgment in his favor in the amount of $18,225.44 plus costs. Handler attached to his motion a copy of a letter from Anderson's attorney, dated December 5, 2016, indicating that Anderson's December 2016 payment was enclosed and that the letter was hand delivered.

¶ 7 On January 26, 2017, the circuit court entered an order denying Handler's motion. In doing so, the circuit court observed that even where a contract contains an express clause stipulating that "time is of the essence," Illinois courts will inquire into the situation of the parties and the underlying circumstances to determine whether a delay in performance resulted in a material breach. The court then determined that no factors of materiality, as set forth in Section 241 of the Restatement (Second) of Contracts, weighed in favor of a finding of materiality: (1) the single late payment did not deprive Handler of the benefit which he reasonably expected; (2) the benefit of which Handler was deprived was *de minimus* and could be calculated at roughly 69 cents in interest at the post-judgment rate of 9%; (3) Anderson would suffer a severe forfeiture if a judgment were imposed as a result of the late payment; (4) there had been a cure, as a check was provided and the funds cleared; and (5) Anderson offered a good faith excuse for the late payment, *i.e.*, her attorney was ill and out of the office on December 1.

¶ 8 The trial court determined that the single late payment was not a material breach of the agreement. The court then concluded as follows:

> "That is not to say, however, that license should be taken to deliver payments in any manner other than expressly agreed to. Payments are due, unequivocally, on the 1st day of each month. Any future late payments will be subject to analysis under the Section 241 factors in the aggregate – rather than in the singular."

¶ 9 Handler filed a timely notice of appeal.

¶ 10 On July 6, 2017, Handler filed a second motion to reinstate the case and for entry of judgment, alleging that in violation of the settlement agreement, Anderson had failed to tender him a timely payment on July 1, 2017. According to Handler's motion, he had not yet received Anderson's July payment. Handler requested that as relief, the circuit court enter judgment in his favor in the amount of $14,025.44 plus costs.

¶ 11 On July 14, 2017, the circuit court entered a motion call order granting Anderson until August 4, 2017, to file a response to Handler's motion. In the order, the circuit court noted that Handler received Anderson's payment on July 12, 2017, and that Handler could deposit that check without prejudice to his motion. About one month later, on August 11, 2017, the circuit court entered a motion call order denying Handler's motion to reinstate and for entry of judgment. The trial court wrote the following:

> "The plaintiff's motion is denied after hearing arguments of counsel for both parties. In the event that plaintiff does not receive a timely payment in the future, the defendant shall be liable for an additional 2% of the monthly payment.

> By adding this 2% payment, the plaintiff does not waive his existing appeal or the right to appeal this order."

¶ 12 Again, Handler filed a timely notice of appeal. This court consolidated the appeals.

¶ 13 On appeal, Handler contends that the circuit court erred in denying his motions to reinstate the case and for entry of judgment, since Anderson's failures to timely pay him in December 2016 and July 2017 constituted material breaches of the settlement agreement. Contrary to the circuit court's conclusion, Handler asserts that the five factors for materiality outlined in the Restatement (Second) of Contracts all apply in his favor. He further argues that the circuit court should have strictly enforced the "time is of the essence" provision in its order setting forth the settlement agreement, as the parties' intention was for strict enforcement and there was no ambiguity in the order. Handler concludes that the circuit court's denials of his motions "for all intents and purposes, have signaled the deathknell of the 'time is of the essence' provision in a contract."

¶ 14 As an initial matter, we note that the parties disagree as to the standard of review. Handler, relying on *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935, 946 (2006), asserts that a circuit court's decision to grant or deny enforcement of a settlement without an evidentiary hearing is reviewed *de novo*. In *Ramirez*, the buyer of a building filed a motion to stay its demolition and, later, a "motion to enforce settlement," in which he admitted that he and the City had not executed a written settlement agreement but asserted they had reached a "meeting of the minds" supported by consideration. *Id.* at 937, 938. The circuit court denied the motion to enforce settlement, and the buyer appealed. *Id.* at 940.

¶ 15 We dismissed the appeal as moot, finding that because the building in question had been destroyed, it was impossible to grant the buyer effectual relief. *Id.* at 941, 947. However, despite dismissing the appeal, this court addressed a number of the buyer's contentions because they raised important, recurring issues regarding which we desired to provide guidance. *Id.* at 941. Among the issues we addressed was the buyer's contention that the trial court erred in denying his motion to enforce a settlement agreement with the City. *Id.* at 945. In considering this contention, we first determined that the motion was best classified as a motion for summary judgment concerning the issue of settlement, as the buyer was requesting that the trial court enter a new judgment more favorable to him prior to an evidentiary hearing or trial. *Id.* at 945-46. We then addressed the standard of review, stating:

> "Like a summary judgment motion, the trial court's decision to grant or deny enforcement of a settlement agreement made on the motion pleadings and attachments, without holding an evidentiary hearing, is reviewable *de novo*. [Citation.] Also like a summary judgment motion, if the court determines that there is insufficient evidence to decide summarily whether a settlement agreement exists or what its terms are, the factual dispute regarding the settlement agreement may be resolved in a later evidentiary hearing or trial." *Id.* at 946.

¶ 16 We then examined a letter from the City to the buyer's attorney and determined that no firm offer existed in its language. *Id.* at 946. We also found that the implied agreement in the correspondence alleged by the buyer did not address the essential question of consideration. *Id.* at 947. As such, we found that any agreement that may have been reached was unenforceable

and that the trial court did not err in denying the buyer's motion to enforce the purported settlement agreement. *Id.*

¶ 17 Anderson disagrees with Handler's assertion that *de novo* review is appropriate in the instant case. She observes that in *Ramirez,* the question presented was whether a settlement agreement existed, while here, there is no such dispute. Rather, she asserts, the issue here is whether there was a material breach of the agreement's terms, a determination she asserts should be reversed only if against the manifest weight of the evidence.

¶ 18 We agree with Anderson that here, where the issue to be reviewed is whether she materially breached her agreement with Handler, not whether an enforceable agreement existed, *de novo* review is not the applicable standard. Whether or not a material breach of contract has been committed is a question of fact. *Mohanty v. St. John Heart Clinic, S.C.,* 225 Ill. 2d 52, 72 (2006). As such, the circuit court's determination on this question will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* A judgment is considered to be against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding itself is arbitrary, unreasonable, or not based on the evidence presented. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 43.

¶ 19 In the instant case, Handler contends that Anderson materially breached their settlement agreement by not complying with the requirement that she pay him on the first day of every month. Contractual time requirements "are by their nature accessory rather than central aspects of most contracts." *Chariot Holdings, Ltd. v. Eastmet Corp.*, 153 Ill. App. 3d 50, 58, (1987). Even where, as here, a contract contains an express clause stipulating that "time is of the

essence," a court will inquire into the situation of the parties and the underlying circumstances to determine whether a delay in performance resulted in a "material breach." *Id.*

¶ 20 A breach is "material" when it is fundamental or defeats the purpose of a contract. *Commonwealth Edison Co. v. Elston Ave. Properties, LLC*, 2017 IL App (1st) 153228, ¶ 18. Factors to consider in determining whether a breach is material include the following: (1) the extent to which the injured party will be deprived of the benefit that he or she reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he or she will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his or her failure, taking account of all the circumstances, including any reasonable assurances; and (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Id.* ¶ 19 (citing Restatement (Second) of Contracts § 241 (1981)).

¶ 21 As noted above, when the first breach occurred here, the circuit court reviewed the factors set forth in the Restatement (Second) of Contracts and determined that (1) Anderson's late payment did not deprive Handler of the benefit which he reasonably expected; (2) the benefit of which Handler was deprived was *de minimus* and could be calculated at roughly 69 cents in interest at the post-judgment rate of 9%; (3) Anderson would suffer a severe forfeiture if a judgment were imposed as a result of her late payment; (4) there had been a cure, as a check was provided and the funds cleared; and (5) Anderson offered a good faith excuse for the late payment, *i.e.*, her attorney was ill and out of the office on December 1. While the circuit court did not issue a detailed written order after the second breach, it apparently came to the same

conclusions. It did note in one motion call order that Handler received Anderson's July payment on the 12th, and wrote in a second motion call order that it had heard arguments from counsel for both parties and directed that if Anderson made yet another untimely payment, she would be liable for an additional 2% of the monthly payment.

¶ 22 We cannot find that the circuit court's decisions regarding materiality were against the manifest weight of the evidence. The circuit court weighed the evidence and made determinations that Anderson's breaches did not defeat the bargained-for objectives of the parties, did not cause disproportionate prejudice to Handler, had been cured, and were not made in bad faith. The circuit court's rulings were based on the evidence, were not arbitrary or unreasonable, and the opposite conclusion is not clearly evident. We agree with the circuit court that Anderson's breaches did not result in any material harm to Handler. See *Commonwealth Edison Co.*, 2017 IL App (1st) 153228, ¶¶ 29-30. Accordingly, we affirm the circuit court's denials of Handler's motions to reinstate the case and for entry of judgment.

¶ 23 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 24 Affirmed.