2018 IL App (2d) 170675-U
No. 2-17-0675
Order filed April 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

R and S MINIMART, INC. and WAEL SHEHAYBER,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 14-MR-1439
PARENT PETROLEUM, INC.,	)	Honorable Paul M. Fullerton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment to defendant. Affirmed.

¶ 2 Plaintiffs, R&S MiniMart, Inc., and Wael Shehayber, appeal the trial court's order granting summary judgment to defendant, Parent Petroleum, Inc., on plaintiff's declaratory-judgment action. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Agreement

¶ 5 The undisputed facts follow. Shehayber has operated and managed R&S Minimart, Inc., a gas station in Chicago at 5901 South Pulaski Road, since 1998. Prior to 2009, plaintiffs purchased fuel directly from British Petroleum (BP). In 2008 or 2009, BP changed its business model and entered into an agreement with B&R Oil Company, Inc., d/b/a Atlas Oil for the purchase of several BP real estate sites. After the acquisition of the BP sites, Atlas became a BP "jobber," meaning it purchased fuel in bulk from BP and sold it to retail stations like MiniMart.

¶ 6 A deed restriction for the gas station required plaintiffs to sell only BP-branded fuel. On January 21, 2009, plaintiffs entered into a product-supply agreement with Atlas that required plaintiffs to purchase all of their BP fuel from Atlas. Specifically, paragraph 3(a) of the agreement provides:

> "*** [Plaintiffs] agree[] to purchase BP motor fuels from [Atlas] during the term of this Agreement ***. During the term of this Agreement and any extensions thereof, [plaintiffs] further agree[] to purchase all motor fuels exclusively from [Atlas] and from no other supplier. *** [Plaintiffs] further acknowledge[] and agree[] that *BP and [Atlas] also reserve the right to discontinue the marketing of any or all product(s) in any or all geographical area*(s), including [plaintiffs'] geographical area, *in which case [Atlas] and [plaintiffs] shall be relieved of any further obligation under this Agreement* with respect to any such product or products and/or with respect to any such area or areas." (Emphases added.)

¶ 7 The agreement specifies that its term runs through *January 12, 2034*, and includes liquidated-damages provisions. Further, the agreement provides that Atlas can assign its rights. Specifically, paragraph 11(b) states:

"[Atlas] shall have the right at any time to assign its rights and delegate its duties under this Agreement without [plaintiffs'] consent. In the event of any such assignment by [Atlas], the prices to be paid by [plaintiffs] *** shall be such prices as may be set in good faith by the transferee. Any such assignment or other transfer by [plaintiffs] shall not relieve [plaintiffs] of [their] obligations hereunder."

¶ 8 On March 31, 2014, Atlas sent plaintiffs a letter, explaining that its right to grant plaintiffs the use of BP products was derived from its own contract with BP. BP had notified Atlas that its contract with Atlas would not be renewed and would expire by its terms on June 30, 2014. However:

"Atlas has the right to assign your [agreement] with Atlas. In order to preserve your right to use the BP trademarks, Atlas has entered into an agreement to *** assign your [agreement] to another capable jobber (the "Assignee"), *subject to the approval of BP*. We anticipate the assignment of your [agreement] to occur not later than May 30, 2014. The Assignee of your [agreement] will assume Atlas' obligations under your [agreement]. The terms of your [agreement] will remain unchanged. Your right to continue to use the BP trademarks will not be affected. We and the Assignee will provide additional information to you over the coming weeks.

Notwithstanding the foregoing, *should that sale not be completed on or before June 30, 2014*, in compliance with the terms of your [agreement], this letter shall serve as notice of Atlas' termination and/or non-renewal of your franchise effective 11:59 p.m., Eastern Time on June 30, 2014 ***." (Emphases added.)

¶ 9 Atlas assigned its interest in the agreement to Parent on May 23, 2014.

¶ 10 B. The Complaint

¶ 11 In March 2016, in a second-amended complaint, plaintiffs filed a declaratory judgment action pursuant to section 2-701 of the Code of Civil Procedure (735 ILCS 5/2-701 (West 2014)), asking the court to declare that, without incurring any liquidated damages to Parent, they are relieved of any further obligations under the agreement, such that they may obtain a new supplier of BP-branded fuel or sell the location to a third party who does not intend to sell gasoline at the site. Plaintiffs alleged that the agreement between plaintiffs and Atlas terminated on June 30, 2014, when Atlas lost the authority to sell BP-branded fuel. Nevertheless, plaintiffs alleged that Parent claimed that, due to the May 2014 assignment, the old agreement had *not* terminated and that *it* was entitled to enforce and collect from plaintiffs liquidated and other monetary damages under the agreement. Plaintiffs alleged that an assignment to Parent could not continue the agreement between plaintiffs and Atlas. Moreover, plaintiffs alleged that their position was supported by the fact that, after receipt of the March 31, 2014, letter, plaintiffs unsuccessfully spoke to Parent representatives to negotiate terms for a new fuel-supply agreement. Accordingly, plaintiffs asked the court to declare that the agreement was invalid and unenforceable. Alternatively, in a second count, plaintiffs asked the court to declare that the liquidated damages and other remedy sections of the agreement were unenforceable penalty clauses that were void as a matter of law.

¶ 12 Parent moved to dismiss plaintiffs' second-amended complaint. As to the first count, it argued that the facts failed to establish a viable cause of action. As to the second count, it argued that plaintiffs improperly sought advice on the validity of the liquidated-damages provisions *if* plaintiffs were to breach the agreement. The court denied the motion to dismiss "for those reasons set forth on the record." (No transcript of a hearing on the motion is contained in the record).

¶ 13 C. Summary Judgment

¶ 14 Parent next moved for summary judgment. Parent argued that: (1) the agreement permitted Atlas to assign its rights thereunder; (2) on May 23, 2014, Atlas assigned its rights and obligations under the agreement to Parent; and (3) the June 30, 2014, date, whereupon Atlas's contract with BP expired, "has absolutely no significance in this lawsuit." Alternatively, Parent argued that ratification applied, because plaintiffs continued to perform and avail themselves of the benefits of the agreement. Finally, as to both counts of the complaint, Parent again questioned the existence of an actual controversy, as the complaint seemed to seek the court's advice on a future event, *i.e.*, possible breach of the agreement by plaintiffs. Parent noted that the parties had continued to perform under the agreement for nearly three years since the assignment and that Parent had never sought to enforce any liquidated-damages provisions.

¶ 15 On April 21, 2017, after a hearing, the court granted Parent's summary-judgment motion. The court distinguished plaintiffs' cited caselaw and agreed with Parent that the assignment was valid. "At the time of the assignment in this case, all of the rights of [Atlas] were assigned to [Parent], so the supply agreement goes by its own terms it goes [*sic*] through the year 2034." The court found moot Parent's alternative argument regarding ratification. On July 28, 2017, the court denied plaintiffs' motion to reconsider. Plaintiffs appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiffs argue that the trial court erred in its summary-judgment ruling because it misapprehended the central issue related to Atlas's assignment of the agreement to Parent. Specifically, plaintiffs contend that the question concerns what rights Atlas possessed that could, in turn, be assigned to Parent. According to plaintiffs, "[t]here is no dispute that Atlas'[s] rights to distribute BP fuel ended pursuant to the March 31, 2014 letter wherein Atlas

stated that it had lost its right to distribute BP-branded fuel." As acknowledged by the court, plaintiffs note, Atlas's contract with BP expired on June 30, 2014. Therefore, plaintiffs conclude, Atlas could only assign to Parent the rights it possessed under the contract, which meant the right to supply fuel only up to June 30, 2014. Plaintiffs also assert that the agreement contained anti-assignment clauses.

¶ 18 We review *de novo* a trial court's summary-judgment ruling. *People ex rel. Director of Corrections v. Booth*, 215 Ill. 2d 416, 423 (2005). Summary judgment is proper when the pleadings, depositions, affidavits, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). For the following reasons, we disagree with plaintiffs' arguments and affirm.

¶ 19 First, plaintiffs' assertion that the agreement contained anti-assignment clauses must fail. The section that plaintiffs reference for their position, providing that an assignment of the agreement may trigger an event of default, concerns Atlas/Parent's rights to terminate the agreement under certain circumstances, including if assignments are made by *plaintiffs.*

¶ 20 Second, although plaintiffs repeatedly cast the March 31, 2014, letter as reflecting that Atlas lost its ability to perform *under the agreement*, this is simply not the case. The letter clearly reflects that, as permitted under the agreement, Atlas intended to assign its rights and obligations, *with BP's permission*, thereunder. Only *if* that assignment was not completed by June 30, 2014, would Atlas's agreement with BP expire and, in turn, the agreement between the parties terminate. In addition, plaintiffs operate under the assumption that, without qualification, their rights under the agreement would be extinguished if Atlas, alone, stopped selling BP gasoline. In fact, the agreement provides that "[Atlas] and [plaintiffs] shall be relieved of any

further obligation under this Agreement" in the event that "BP *and* [Atlas]" discontinued marketing fuel in plaintiffs' geographical area. Here, BP did not discontinue marketing fuel; rather, it simply approved Atlas transferring its role to Parent. Plaintiffs further incorrectly assert that "Atlas lost the ability to perform under the Atlas [agreement], [and] Parent could not somehow *revive* the extinguished obligations of the [agreement] by a *subsequent contract* with Atlas." (Emphases added.) As the assignment was not subsequent to any extinguished obligations, Parent was not reviving anything that was lost. Plaintiffs suggest that their communications with Parent to negotiate a "new" agreement reflects that the original agreement was extinguished, but the agreement itself contemplated that, upon assignment, new price terms would be set in good faith by the assignee and, therefore, discussions regarding terms and pricing were not inconsistent with the letter of the agreement. In sum, there is no question that the letter did *not* inform plaintiffs that Atlas had *already* lost the right to sell BP fuel and, therefore, that plaintiffs were relieved from any further obligation under the agreement.

¶ 21 Third, although plaintiffs correctly cite basic principles of assignment law, including that an assignee steps into the shoes of the assignor and "one cannot convey that which he does not have" (see *e.g.*, *Kenny v. Kenny Industries, Inc.*, 2012 IL App (1st) 111782, ¶ 20), they confuse the rights Atlas possessed as against plaintiffs with Atlas's rights and obligations as to BP. The agreement between Atlas (now Parent) and plaintiffs runs until *2034*. Therefore, when Atlas assigned the agreement to Parent in May 2014, it: (1) had the right to sell BP fuel to plaintiffs; (2) until 2034. The *subsequent* expiration of Atlas's contract with BP did not impact the validity of the *earlier* assignment (which, we note, apparently received BP's approval). Indeed, if plaintiffs were correct in their argument, then the agreement's assignment provision would be rendered meaningless because, upon *any* assignment, the assignor would have lost its ability to

provide BP fuel under the agreement. Further, although plaintiffs cite authority reflecting that assignees acquire the assignor's limitations under the contract and are subject to any defenses that the obligor (plaintiffs here) had against the assignor, they do not cite authority to support the notion that an assignment of rights under an agreement becomes invalid—regardless of the *term* of that agreement— if the assignor, *in the future*, loses rights under a *third-party agreement*.

¶ 22 Again, plaintiffs assert that "[p]rior to Atlas Oil assigning the Fuel Supply Agreement to Parent here, Atlas Oil lost the right to sell BP-branded gasoline to the Plaintiffs pursuant to the March 31, 2014 letter." As explained above, this is simply incorrect. The issue is the rights Atlas had at the time of the assignment. Atlas lost its rights to sell BP gasoline *after* the assignment. The weakness in plaintiffs' argument becomes more apparent if we consider a hypothetical. If, hypothetically, Atlas assigned the agreement to Parent in 2014, but its own agreement with BP was not scheduled to expire until 10 years later in 2024, would the agreement between Parent and plaintiffs necessarily end in 2024, even though 10 more years would remain in the agreement's term (*i.e.*, until 2034)? While we suspect that plaintiffs would argue that to be the case, they offer no relevant support for that position. Contrary to plaintiffs' assertion, *Reimers v. Honda Motor Co., Ltd.*, 150 Ill. App. 3d 840, 843 (1986), is not analogous, as it concerned the assignee's inability to pursue a claim barred by the statute of limitations, where the assignor could also not bring the claim.

¶ 23 In sum, we affirm the trial court's summary-judgment decision. We also note that plaintiffs' second-amended complaint contained two counts, with the second count requesting that, if the court found that the assignment was valid, it alternatively find that certain damages provisions were invalid. Both before the trial court and here, the parties have focused on the issue of the assignment's validity. However, the summary-judgment motion argued that both

counts of the complaint were deficient. In its ruling, the court did not explicitly reference the second count of the complaint, but it appears to have implicitly granted summary judgment on the entire action. Further, plaintiffs made no specific argument concerning the second count in their motion to reconsider below, nor do they do so on appeal. As such, any argument that summary judgment was improperly granted on the second count has been forfeited. See, *e.g.*, *Department of Transportation v. Dalzell*, 2018 IL App (2d) 160911, ¶ 77.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 26 Affirmed.