2019 IL App (1st) 180565-U

SIXTH DIVISION
March 22, 2019

No. 1-18-0565

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WOODFIELD GROVE, LLC, Plaintiff-Appellant, v. SCHAUMBURG BUILDING ASSOCIATES, ACCU-PAVING COMPANY, and VENGAR CONSTRUCTION CORPORATION, Defendants-Appellees (Schaumburg Building Associates, Counterplaintiff-Appellee; Accu-Paving Company and Vengar Construction Corporation, Counterdefendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 15 L 9196 Honorable John C. Griffin, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court correctly found that the contract only required the seller to construct a new parking lot in the manner required by an engineer. The circuit court did not err in striking plaintiff's jury demand. Defendant is entitled to attorney fees related to this appeal. Affirmed and remanded with instructions.

¶ 2 Plaintiff Woodfield Grove, LLC (Woodfield), filed a complaint against defendants Schaumburg Building Associates (Schaumburg), Accu-Paving Company (Accu-Paving), and

Vengar Construction Corporation (Vengar) in connection with construction work on the parking lot of a building Woodfield purchased from Schaumburg. Woodfield alleged two counts of breach of contract against Schaumburg and Vengar individually, and one count of breach of warranty and guaranty against Accu-Paving. Following a bench trial, the circuit court found in favor of defendants on all counts. Woodfield now appeals, contending that the circuit court erred in (1) construing its contract with Schaumburg, (2) striking Woodfield's jury demand due to a jury waiver in its contract with Schaumburg, and (3) extending the jury waiver provision to Vengar and Accu-Paving. Schaumburg separately requests that we grant it its attorney fees under the fee-shifting provision in the contract. We affirm and remand with directions.

¶ 3 BACKGROUND

¶ 4 On October 8, 2014, Woodfield and Schaumburg entered into a "Purchase and Sale Agreement" (the Agreement), under which Woodfield agreed to purchase the property located at 830-890 East Higgins Road from Schaumburg. The property comprised an office complex known as "Woodfield Grove Business Center" as well as the adjacent parking lots.

¶ 5 Section 3.5 of the Agreement, entitled "Seller's Representations and Warranties," contained in pertinent part the following paragraph: (s) Seller has caused all parking lots at the Property to be constructed and repaved in accordance with the contract and specifications set forth on Exhibit H hereto. ***." Exhibit H was a "proposal" dated August 4, 2014, from Vengar to Curto Reynolds Oelerich, Incorporated (CRO), which managed the property when Schaumburg owned it (the Vengar contract). The Vengar contract defined the "proposed scope of work":

> "1. Mill off existing asphalt pavement to a depth of -4″ and haul away off site. Approximately 9,446 S.Y.
>
> 2. Fine grade and compact existing stone base.

3. Prime the area.

4. Furnish, place and compact 2″ of hot mix asphalt (HMA) binder and 2″ of (HMA) surface.

5. Restripe the parking area as it currently exists.

6. Work is to be completed in two phases per attached diagram.

7. No work is included at the three existing drive aprons."

The "base price" for this work was listed as $299,930. Immediately below the "scope of work" was another section entitled, "Unit Pricing." Under this section, there was a single point: "Remove and replace clean unsuitable sub base material if required by Owner's soils engineer: $95.00/CY." Finally, the Vengar contract indicated that, if CRO was in agreement with the proposed terms, it was to sign and date it. John Oelerich signed it for CRO on August 5, 2014.

¶ 6 Section 9.3 of the Agreement contained an integration clause stating that the Agreement "embodies the entire agreement between the parties" and that there were no other representations agreements between them that are not "expressly set forth" in the Agreement. In addition, Section 9.11 stated that the "exhibits and schedules attached to this Agreement and referred to herein are hereby incorporated into this Agreement by this reference and made a part hereof for all purposes."

¶ 7 Section 9.15 of the Agreement, entitled "Jury Waiver," contained the following terms in capital letters:

"PURCHASER AND SELLER DO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THEIR RIGHT TO TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, OR

> UNDER OR IN CONNECTION WITH THIS AGREEMENT, ***, OR ANY COURSE OF CONDUCT, COURSE OF DEALINGS, STATEMENTS *** OR ANY ACTIONS OF EITHER PARTY ARISING OUT OF OR RELATED IN ANY MANNER WITH THIS AGREEMENT OR THE PROPERTY ***. THIS WAIVER IS A MATERIAL INDUCEMENT FOR SELLER TO ENTER INTO AND ACCEPT THIS AGREEMENT *** AND SHALL SURVIVE THE CLOSING OR TERMINATION OF THIS AGREEMENT."

¶ 8 Section 9.9 of the Agreement contained a fee-shifting provision that stated in pertinent part that "In the event it becomes necessary for either party hereto to file suit to enforce this Agreement or any provision contained herein, the party prevailing in such suit shall be entitled to recover *** reasonable attorneys' fees incurred in such suit."

¶ 9 Vengar retained Accu-Paving to serve as the contractor for the paving work. That work began about September 12, 2014, and was completed about a week later. Vengar was paid in full, and Vengar released its lien. Accu-Paving subsequently provided Schaumburg with a comprehensive Warranty and Guarantee, which stated that the work would be "free of defects in materials and workmanship for a period of one year from *** September 17, 2014," and that Accu-Paving would "promptly correct any such defects at no cost or expense to the owner."

¶ 10 On September 8, 2015, Woodfield filed its complaint against defendants. As noted above, Woodfield alleged breach of contract against Schaumburg based upon Schaumburg's purported failure to "cause all parking lots at the Property to be constructed in accordance with the specifications." With respect to Vengar, Woodfield asserted that it breached the "Vengar

Contract" because the work was either defective or not performed according to the Agreement's specifications. Finally, Woodfield alleged that Accu-Paving breached its warranty and guaranty because of the defective work it performed on the parking lot and its failure to complete the necessary remediation work. The "civil action cover sheet" accompanying Woodfield's complaint includes a field entitled, "Jury Demand," with the "Yes" checkbox checked. Accu-Paving filed its appearance on September 29, 2015, but did not include a jury demand. Vengar and Schaumburg, however, each filed their appearances and jury demand on October 14, 2015, and December 10, 2015, respectively.

¶ 11 On May 15, 2017, the circuit court set a five-day jury trial to begin on October 23, 2017. The date was subsequently continued to January 8, 2018. After discovery and motion practice closed, the court set a "trial material exchange conference" for December 18, 2017.

¶ 12 On January 4, 2018, Schaumburg moved to enforce the jury waiver provision under the Agreement and to proceed to a bench trial. Accu-Paving and Vengar joined in this motion. In response, Woodfield argued in part that Schaumburg forfeited its right to enforce the jury waiver in the Agreement based upon Schaumburg's initial jury demand, Schaumburg's failure to object to a jury trial for over two years, and Schaumburg's submission of proposed jury instructions and various motions *in limine*. The circuit court granted Schaumburg's motion, and the case proceeded to a bench trial over Woodfield's objection on January 8, 2018. The record on appeal contains no report of proceedings (or acceptable substitute) for the trial.

¶ 13 On January 12, 2018, the circuit court held a hearing at which it announced its findings. The court stated that it heard testimony, received exhibits and stipulations into evidence, reviewed case law, and considered the parties' arguments. Since a verbatim transcript was taken, "an exhaustive recitation of the testimony and evidence" was not necessary. The court further

stated that Woodfield failed to establish that defendants breached the Agreement. It explained that the Agreement incorporated the Vengar Contract, which only required replacement of subbase material in the parking lot if Schaumburg's soils engineer required it. On that point, the court found Woodfield's expert witness (who opined that the subbase had to be removed) not credible and Schaumburg's expert (who opined that it did not) credible. The court therefore found in favor of all three defendants and against Woodfield. The court further found that the fee-shifting clause in the Agreement only applied to Woodfield and Schaumburg. On February 14, 2018, the court entered a final judgment order reflecting its findings and awarding Schaumburg $231,985.25, which included $179,039.87 in attorney fees. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Woodfield first contends that the circuit court erroneously construed section 3.5(s) of the Agreement to require construction of a new parking lot "only if required by a soils engineer." Woodfield argues that, under the unambiguous language of the Agreement, Woodfield "bargained for the unconditional construction of a new parking lot." Defendants note that Woodfield failed to include a transcript or acceptable substitute of the five-day trial. Schaumburg argues that this absence requires us to presume that the court's orders had a sufficient factual and legal basis. Vengar and Accu-Paving agree and add that Woodfield's failure prevents meaningful review by this court, which also requires that we affirm.

¶ 16 Woodfield has failed to provide either a report of proceedings (or an acceptable substitute) for the five-day trial. Illinois Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as bystander's

report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. July 1, 2017). The burden of providing a sufficient record on appeal rests with the appellant (here, plaintiffs). *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Foutch*, 99 Ill. 2d at 392. Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.* With these limitations in mind, we turn to Woodfield's claim.

¶ 17 The essential elements of a breach of contract are: (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resultant injury to the plaintiff. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27. The terms of an agreement, if unambiguous, should generally be enforced as they appear, and those terms will control the rights of the parties. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 479 (1998).

¶ 18 The dispute before us centers on the third element: whether defendants breached the agreement. Section 3.5(s) of the Agreement, which the parties agree is unambiguous, required that Schaumburg ensure that the parking lots at the property were "constructed and repaved in accordance with the contract and specifications set forth on Exhibit H," *i.e.*, the Vengar Contract. The Vengar Contract, in turn, provides that Vengar would remove and replace unsuitable subbase material only "if *required* by [Schaumburg's] soils engineer" (emphasis added). In essence, the Vengar Contract limited the scope of the parking lot's "construct[ion] and repav[ing]" to the layers above the subbase *if and only if* Schaumburg's soils engineer required replacement of the subbase. Therefore, Woodfield's argument that the Agreement "as a matter of law" required the complete replacement of the parking lot is meritless.

¶ 19 Moreover, whether the Agreement was breached depends upon the evidence adduced at trial. The circuit court heard testimony from both Woodfield's and Schaumburg's expert witnesses concerning whether replacement of the subbase was required. The court found that the evidence at the close of trial favored all three defendants. We are unable to determine, however, whether the circuit court erred in finding in favor of defendants. We must therefore presume the court acted in conformity with the law and with a sufficient factual basis for its findings. See *Foutch*, 99 Ill. 2d at 392; see also *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985) (holding that, when the record is incomplete, a reviewing court must indulge "every reasonable presumption" in favor of the judgment that is appealed, "including that the trial court ruled or acted correctly"). On this additional basis, we are compelled to affirm the court's judgment.

¶ 20 Woodfield next contends that the circuit court erroneously enforced the jury waiver provision in the Agreement with respect to the claims against Schaumburg as well as Vengar and Accu-Paving. Woodfield argues that Schaumburg's "last minute gamesmanship comes too late in the process to assert a previously unraised contractual provision" and that it "should not have been permitted to blindside Woodfield on the eve of trial." Woodfield further argues that Vengar and Accu-Paving cannot enforce the jury waiver in the Agreement because they are not parties to the Agreement, and thus the waiver of jury trials is only between Woodfield and Schaumburg.

¶ 21 "When construing a contract, the court's primary objective is to give effect to the intent of the parties, as revealed by the language used in the agreement." *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009) (citing *Gallagher v. Lenart*, 226 Ill. 2d 208, 232-33 (2007)). If a contract incorporates another document by reference, its terms become part of the contract. *Id.*

¶ 22 The Illinois constitution provides that the right to a jury trial "as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. The phrase "heretofore enjoyed" has been defined as the common law right to a jury trial " '*as enjoyed at the time of the adoption of the 1970 constitution*.' " (Emphasis in the original.) *Interstate Bankers Casualty Co. v. Hernandez*, 2013 IL App (1st) 123035, ¶ 15 (quoting *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 215 (1988)). Breach of contract actions are among those actions that include a right to a jury trial. See *Seaman v. Thompson Electronics Co.*, 325 Ill. App. 3d 560, 562 (2001). Nonetheless, parties may waive their constitutional right to a jury trial. See *Themas v. Green's Tap, Inc.*, 2014 IL App (2d) 140023, ¶ 8. We review *de novo* the legal question of a litigant's right to a trial by jury. *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 174 (2009).

¶ 23 Woodfield first argues that Schaumburg forfeited its right to enforce the jury waiver by its conduct. The parties do not cite, and our research does not reveal, controlling precedent on this point. Woodfield, however, argues that two cases, *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, and *Paul H. Schwendener, Inc. v. Larrabee Commons Partners*, 338 Ill. App. 3d 19 (2003), support its argument. We disagree.

¶ 24 Plaintiff's reliance on *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, is misplaced. In that case, the court considered solely whether the defendant waived the right to enforce an arbitration contract provision. *Id.* ¶ 22. The appellate court holding was limited to arbitration clauses, for which the court ruled that a defendant filing an answer and affirmative defense unrelated to the arbitration provision constitutes a waiver of the defendant's right to arbitrate. *Id.* ¶ 25. In other words, invoking the arbitration clause would have divested the circuit court of jurisdiction and thus obviated the need to file an answer and affirmative defense. Thus, the defendant's act of filing the answer and defense sufficed to indicate a waiver of

arbitration. Here, however, whether a party demands or waives a jury trial does not strip the circuit court of the power to determine the controversy. *Koehler* is therefore unavailing.

¶ 25 Nor does *Schwendener* convince us. In that case, the plaintiff-counterdefendant (Schwendener) filed a breach of contract action against the defendant-counterplaintiff (Larrabee). *Id.* at 21. The court observed that the contract "further permitted the parties any other remedies 'existing at law or in equity.' " *Id.* at 22. Larrabee filed a jury demand with its countercomplaint, and Schwendener "promptly demanded a jury after [Larrabee] waived its jury demand," which required the court to construe section 2-1105(a) of the Code of Civil Procedure (735 ILCS 5/2-1105(a) (West 1998)). *Id.* at 28. Here, by contrast, the parties contractually agreed to a jury waiver; there is nothing to indicate that the parties' contract in *Schwendener* contained a jury waiver. It is the parties' jury *waiver*, not *demand*, that is at issue before us, and we are called upon to construe their contract, not section 2-1105(a). Woodfield's reliance upon *Schwendener* is therefore unavailing.

¶ 26 Woodfield has not cited, nor have we found, anything to indicate that a party's participation in pretrial matters consistent with a jury trial compels it to proceed to a trial by jury. To the contrary, case law suggests that jury waivers are viewed favorably. See, *e.g.*, *People v. Taylor*, 101 Ill. 2d 508, 519-20 (1984) (holding that a defendant's jury waiver, which was lodged "after the State had completed examination of its second witness," was valid). Moreover, we agree with those decisions from foreign jurisdictions that have upheld jury waivers under circumstances similar to those in this case.

¶ 27 In *Parsons v. Associated Banc-Corp*, 374 Wis. 2d 513, 519 (2017), the plaintiffs filed suit in May 2011 against the defendant in connection with a failed construction project for which they received financing from the defendant's predecessor in interest. The plaintiffs' complaint

asserted multiple causes of actions and included a jury demand. *Id.* at 520. In December 2012, the plaintiffs filed an amended complaint, again demanding a jury, and shortly thereafter, paying the fee for a jury. *Id.* In May 2014, three years after the filing of the original complaint, the defendant filed a motion to strike the plaintiffs' jury demand based upon a jury waiver in the promissory note plaintiffs had executed. *Id.* Although the Wisconsin appellate court reversed the trial court's granting of the motion to strike, the Wisconsin supreme court reversed the appellate court. *Id.* at 518-19. The court held that the defendant was not estopped from seeking to strike the plaintiffs' jury demand, noting that, since the plaintiffs "contracted away" their right to a jury trial, "any reliance that the [plaintiffs] might have had on [the defendant's] initial acquiescence in their unfounded demand for a jury trial was not reasonable." *Id.* at 538. The *Parsons* court further held that the defendant's motion to strike was not untimely. *Id.* at 539.

¶ 28 We agree with the reasoning in *Parsons* and reject Woodfield's argument that Schaumburg waived the jury trial waiver. Woodfield freely contracted with Schaumburg to broadly waive the right to have a jury settle *any* disputes under the Agreement. For that reason, Woodfield's initial jury demand and any reliance upon Schaumburg's similar "acquiescence in [Woodfield's] unfounded demand for a jury trial" was not reasonable. Woodfield's argument on this point is therefore unavailing.

¶ 29 Woodfield also argues that, even if the jury waiver is operative as to its claim against Schaumburg, the waiver is inapplicable to the claims against Vengar and Accu-Paving because they are not parties to the Agreement. Woodfield's argument is meritless.

¶ 30 The Vengar contract was attached to the Agreement as Exhibit H. Section 9.11 of the Agreement expressly stated that the exhibits attached to the Agreement were incorporated into the Agreement "and made a part hereof for all purposes." Section 9.3 stated that the Agreement

embodied that "the entire agreement between the parties" and that there were no other representations that were not expressly included in the Agreement. On these facts, all provisions of the Agreement, including the jury waiver in section 9.15, applied to disputes involving the Vengar contract. Section 9.15 mandated the waiver of a jury trial in the event of (1) *any* litigation based upon, arising out of, under, or in connection with the Agreement or (2) any course of conduct arising out of or related *in any manner* with the Agreement or the property. Woodfield's claims against Vengar and Accu-Paving both centered on the fact that property's parking lot was not completely replaced. This litigation therefore clearly arose out of the Agreement and was plainly related "in any manner with" the Agreement and the property.

¶ 31 Finally, Schaumburg asks this court to award it its attorney fees in defending against this appeal. Woodfield does not address this claim in its reply. Section 9.9 of the Agreement provides in pertinent part that, if either party files suit to enforce the Agreement or any of its provisions, the prevailing party shall be entitled to recover reasonable attorney fees "incurred in such suit." Since our holding results in Schaumburg being the prevailing party, it is entitled to its reasonable attorney fees pursuant to section 9.9 of the Agreement. We remand this case to the circuit court to determine and award Schaumburg's reasonable attorney fees in defending against this appeal.

¶ 32 CONCLUSION

¶ 33 The circuit court did not err in its construction of the Agreement, and it properly enforced the jury waiver provision in the Agreement. Schaumburg is entitled to its attorney fees incurred in the defense of this appeal. We remand this case to the circuit court for a determination of Schaumburg's reasonable attorney fees.

¶ 34 Affirmed and remanded with instructions.