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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SQUIRES LANDING, LLC,)	Appeal from the Circuit Court
)	of Ogle County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-CH-248
)	
CITY OF ROCHELLE,)	
)	
Defendant and Third-Party)	
Plaintiff-Appellee)	Honorable
)	Robert T. Hanson,
(AKCK, LLC, Third-Party Defendant).)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting defendant summary judgment: once plaintiff assigned the parties' contract, plaintiff was no longer obligated to maintain an escrow or letter of credit, and defendant, having drawn on the letter of credit but then not having used it per the contract, was required to refund the money to plaintiff, not to the assignee.

¶ 2 Plaintiff, Squires Landing, LLC, appeals from the order of the circuit court of Ogle County granting summary judgment to defendant, City of Rochelle. Because the trial court erred

in its interpretation of an annexation agreement between the parties, we reverse and enter judgment in favor of plaintiff.

¶ 3

I. BACKGROUND

¶ 4 In May 2005, plaintiff and defendant entered into a 20-year annexation agreement (agreement) related to real property owned by plaintiff and located within defendant's boundaries. Pertinent to this appeal, article III(E)(3) of the agreement required plaintiff to post a cash escrow in the amount of \$43,000. The escrow was to be applied to the cost of improving the intersection of two streets in the event that plaintiff developed the property. Article III(E)(3) further provided that, if the \$43,000 were not used before termination of the agreement, it would "be refunded to [plaintiff] or [plaintiff's] assignee or successor in interest."

¶ 5 Article XIII(E) provided that the agreement shall "inure to the benefit of, and be binding upon, [plaintiff] and *** [plaintiff's] assignee" and shall "constitute a covenant running with the land." Further, article XIII(E) provided that the agreement "may be assigned without [defendant's] approval, and upon said assignment and acceptance by an assignee, [plaintiff] shall have no further obligations hereunder." Finally, article XIII(E) stated that, if a portion of the property were sold, "the seller shall be deemed to have assigned to the purchaser any and all rights and obligations seller may have under this [a]greement which affect the portion of the [p]roperty sold or conveyed and thereafter the seller shall have no further obligations under this [a]greement as it relates to the portion of the [p]roperty conveyed."

¶ 6 In early 2008, plaintiff and defendant agreed that plaintiff could provide a letter of credit in lieu of the escrow required by the agreement.¹ The new agreement provided, in relevant part,

¹ Because the agreement refers to an escrow, we will use that term when interpreting the agreement. Nonetheless, because the parties substituted a letter of credit for an escrow under the

that if the issuer of the letter of credit provided a 60-day notice of nonrenewal, and if plaintiff did not provide defendant, within 30 days of such notice, a substitute letter of credit, then plaintiff would be in default. Therefore, defendant would be “entitled to draw on the [l]etter of [c]redit according to its terms.”

¶ 7 On July 24, 2008, plaintiff’s bank issued a letter of credit that was scheduled to expire on July 23, 2009. On January 29, 2009, the bank issued an amended letter of credit that extended the expiration date to January 23, 2010. On January 22, 2010, the bank issued an amended letter of credit that extended the expiration date to January 23, 2011. On October 26, 2010, the bank sent a written notice to defendant that the letter of credit would not be extended automatically beyond January 23, 2011. On January 24, 2011, the bank issued an amended letter of credit with an expiration date of January 23, 2012. The bank also notified defendant that the letter of credit would not be extended automatically. On December 9, 2011, the bank issued an amended letter of credit with an expiration date of October 31, 2012.

¶ 8 On or about February 18, 2009, plaintiff sold the property to AKCK, LLC. According to the affidavit of Ryan Fitzgerald, plaintiff’s project manager, he demanded the release of the letter of credit via an e-mail dated September 27, 2012, and plaintiff’s attorney did so in a letter of September 28, 2012. Defendant refused to release the letter of credit. The parties agree that the property remains undeveloped farmland.

¶ 9 According to the affidavit of David Plyman, defendant’s city manager, defendant has “no security other than the letter of credit to secure the developer’s obligation to post the \$43,000” and, if the letter of credit were to expire without being drawn upon, defendant would have “no security for the [escrow] obligation” under the agreement. On October 17, 2012, Plyman sent a

agreement, our holding applies equally to the letter of credit.

letter to plaintiff's bank, stating that plaintiff had "failed to satisfy its obligation pursuant to the [agreement]" regarding the \$43,000 escrow. The letter included a "sight drawn draft" and a request that the bank pay defendant the \$43,000. The bank satisfied the draw and paid \$43,000 to defendant.

¶ 10 Plaintiff filed suit, seeking injunctive relief and a declaratory judgment that the draw on the letter of credit was improper. Defendant answered and filed a third-party complaint against AKCK, alleging that, if the court were to find in favor of plaintiff, AKCK would be obligated under the agreement to post an escrow.

¶ 11 AKCK answered the third-party complaint. In doing so, it alleged that, before it purchased the property, plaintiff did not represent that it would cease posting the \$43,000 escrow. It further alleged that "no transaction regarding the escrow was conducted at [the] closing" on the sale of the property and that "neither [plaintiff] [nor] the [defendant] ever approached [it] regarding the cash escrow."

¶ 12 Defendant filed a motion for summary judgment, contending that plaintiff had a continuing obligation to post the escrow, even after the sale to AKCK. Defendant also argued that plaintiff acknowledged its continuing obligation under the agreement by extending the letter of credit after the sale.

¶ 13 Plaintiff responded that its obligation to post an escrow (effectively the substituted letter of credit) terminated upon the sale of the property to AKCK. It further argued that any resolution of the issue regarding its extension of the letter of credit after the sale would require consideration of extrinsic evidence, which would be improper in a summary judgment proceeding. Alternatively, plaintiff posited that, assuming it had a continuing obligation under

the agreement, defendant was not entitled to “take” its money, because the property was never developed and defendant did not give the required notice.

¶ 14 In granting summary judgment to defendant, the trial court ruled that the agreement provided that, upon the sale, plaintiff assigned all its rights to AKCK, including the “right to the refund of the \$43,000.” According to the court, if the property is not developed within the time period covered by the agreement, then AKCK would be entitled to the \$43,000. The court added that plaintiff should have accounted for such an outcome when it sold the property and that defendant was not obligated “to continue to go after other people for [the escrow].” Defendant voluntarily dismissed its third-party complaint against AKCK, making the summary judgment appealable. See *Hudson v. City of Chicago*, 228 Ill. 2d 462, 474 n.3 (2008). Plaintiff filed this timely appeal.

¶ 15

II. ANALYSIS

¶ 16 On appeal, plaintiff contends that the trial court erred in granting summary judgment in favor of defendant, for two reasons. First, it argues that the court misinterpreted the agreement to have imposed upon it an obligation to maintain the letter of credit after its assignment of the agreement to AKCK. Second, it maintains that, if it had such an obligation, the two conditions that would have allowed defendant to draw on the letter of credit, the actual expenditure of funds to improve the intersection and proper notice by defendant of a breach of the escrow provision of the agreement, were not met.

¶ 17 Defendant responds that the unambiguous language of the agreement and the letter of credit establishes that it had a right to draw on the letter of credit. Specifically, it contends that, under article III(E)(3) of the agreement, it was obligated to refund the escrow to either plaintiff or its “assignee or successor in interest” and, therefore, any right to a refund passed to AKCK as

the assignee of the agreement. Alternatively, defendant argues that, if the agreement was facially ambiguous (which it asserts it was not), then plaintiff's extension of the letter of credit after the sale constituted an undisputed acknowledgement that its obligation to maintain the letter of credit continued.

¶ 18 Summary judgment is proper where there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009). We review a trial court's grant of summary judgment *de novo*. *Covinsky*, 388 Ill. App. 3d at 483. Where the construction of a contract is at issue, the legal effect and interpretation of the contract is a question of law, for which summary judgment is proper. *Covinsky*, 388 Ill. App. 3d at 483.

¶ 19 In interpreting an annexation agreement, the basic rules of contract interpretation apply. *The Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 39. In construing a contract, the primary objective is to effectuate the intent of the parties. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39. In doing so, a court must look first to the contract language. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39. A contract must be construed as a whole, and each provision must be viewed in light of all the others. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39. The court cannot ascertain the parties' intent by viewing an isolated clause or provision or by looking at detached portions of the contract. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39. Further, if contract language is clear and unambiguous, it must be given its plain, ordinary, and popular meaning. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39. A contract is not ambiguous because the parties disagree on its meaning. Rather, it is ambiguous if its language is obscure as a result of its indefinite expression. *The Reserve at Woodstock*, 2011 IL App (2d) 100676, ¶ 39.

When construing a commercial contract, common sense is as important as the dictionary or the various canons of interpretation. *Joyce v. Fidelity Real Estate Growth Fund II, L.P.*, 2013 IL App (1st) 121697, ¶ 23; see also *Salce v. Saracco*, 409 Ill. App. 3d 977, 982 (2011) (court is to interpret language of a contract in a manner that gives a common-sense meaning to the entire contract).

¶ 20 In this case, the dispositive issue is whether, under the terms of the agreement, plaintiff's obligation to post an escrow continued after the sale of the property. Article XIII(E) of the agreement unambiguously answers that question. Article XIII(E) provided, in pertinent part, that the agreement shall "inure to the benefit of, and be binding upon, [plaintiff] *** and [its] assigns." It further provided that the agreement could be assigned without defendant's approval and that upon such assignment plaintiff would have "no further obligations [thereunder]." Similarly, if the property were sold, plaintiff would be deemed to have assigned to the purchaser "any and all rights and obligations" and plaintiff would have "no further obligations under [the agreement] as it relate[d] to the [property] conveyed."

¶ 21 The language of article XIII(E) unambiguously stated that, upon assigning the agreement to AKCK, plaintiff was no longer obligated under the agreement. One of those obligations was posting an escrow. Therefore, plaintiff's obligation to maintain an escrow (or letter of credit) terminated once it assigned the agreement to AKCK. Thus, the trial court erred in ruling that plaintiff was not entitled to withdraw its letter of credit.²

² Our conclusion is not affected by the fact that the agreement constituted a "covenant running with the land." That language did not affect the relative rights and obligations of the parties to the agreement. Rather, it merely provided that the property would continue to be subject to the agreement irrespective of the particular owner. See *La Salle National Trust, N.A.*

¶ 22 The trial court also incorrectly ruled that any refund of plaintiff's escrow was to go to AKCK. In that regard, article III(E)(3) of the agreement stated that, if no improvements to the intersection were necessitated by development of the property before the termination of the agreement, then the escrow was to be "refunded" to either plaintiff or its assignee. That term is not defined in the agreement, so we give it its common and generally-accepted meaning. See *Covinsky*, 388 Ill. App. 3d at 484. In doing so, we look to the dictionary. *Covinsky*, 388 Ill. App. 3d at 484.

¶ 23 The word "refund" is defined as "[t]he return of money to a person who overpaid." Black's Law Dictionary 1307 (8th ed. 2004). That definition logically implies that to have a refund there must be an initial overpayment or a change in circumstances such that the initial payment is no longer valid. Further, under that definition, the return of any overpayment must be made to the party who was obligated to make the payment. Therefore, in the context of the agreement in this case, a refund of the escrow could be made only to the party who paid the escrow in the first place. That would be plaintiff. Thus, under article III(E)(3), plaintiff was entitled to a refund of its escrow (or to withdraw its letter of credit) once it assigned the agreement to AKCK.

¶ 24 Our conclusion is not altered by the language in article III(E)(3) that allowed for the refund to be made to an assignee. That language merely contemplated a situation where there was an assignment and the assignee posted an escrow. In such a case, the escrow would be rightly refunded to the assignee. To read article III(E)(3) otherwise would conflict with our

v. Village of Westmont, 264 Ill. App. 3d 43, 71 (1994) (benefits and obligations of a covenant that runs with the land pass with ownership).

interpretation of article XIII(E). See *Manor Healthcare Corp. v. Soiltest, Inc.*, 192 Ill. App. 3d 934, 940 (1989) (terms of a contract should be construed harmoniously).

¶ 25 Additionally, a contrary interpretation, that AKCK was entitled to a refund of an escrow posted by plaintiff, without more, would defy common sense. Had the parties intended to allow for the assignee to receive an escrow posted by plaintiff, they could have clearly said so in the agreement. Moreover, had they so intended, they certainly would not have used the term “refund,” which, as we have said, has a meaning inconsistent with such an intent. Thus, the trial court erred in ruling that any refund of the escrow posted by plaintiff was to go to AKCK.

¶ 26 Defendant alternatively maintains that, if there is a facial ambiguity in the agreement, plaintiff’s extension of the letter of credit after the sale of the property to AKCK was an acknowledgment that its obligation continued after the sale. That argument is meritless, as we have determined that the agreement is not ambiguous. Additionally, the mere fact that plaintiff extended the letter of credit after the sale, without more, does not show any acknowledgment that it considered its obligation to have continued.

¶ 27 We note that the parties’ agreement regarding substituting a letter of credit for an escrow did not modify the escrow provision of the agreement. The parties do not contend otherwise. Therefore, pursuant to our interpretation of the agreement regarding the escrow, plaintiff was necessarily permitted to withdraw the letter of credit upon its assignment of the agreement. Accordingly, because defendant refused to release the letter of credit and drew the entire amount, plaintiff is entitled to a refund of the \$43,000.

¶ 28 We realize that plaintiff did not move for summary judgment in the trial court. Nonetheless, having reversed the summary judgment in favor of defendant, we may enter

judgment for plaintiff. See *West Suburban Bank v. City of West Chicago*, 366 Ill. App. 3d 1137, 1146 (2006).

¶ 29

III. CONCLUSION

¶ 30 For the foregoing reasons, we reverse the order of the circuit court of Ogle County granting summary judgment in favor of defendant and enter judgment in favor of plaintiff.

¶ 31 Reversed.