2013 IL App (2d) 120624-U
No. 2-12-0624
Order filed September 17, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN N. MARKWICK, Plaintiff-Appellant, v. THE HOMEWARD GLEN HOMEOWNERS ASSOCIATION, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Kane County. No. 11-MR-193 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly ruled that the 2012 amendment to the subdivision's declarations of covenants and was validly enacted and effectively mooted the controversy between the parties and properly granted summary judgment in favor of defendant on that ground alone.

¶ 2 Plaintiff, John N. Markwick, appeals the judgment of the circuit court of Kane County, granting summary judgment in favor of defendant, the Homeward Glen Homeowners Association, on the grounds that the recent amendment abolishing the covenants and declarations of the Homeward Glen subdivision, rendered moot plaintiff's claims, and declining to rule on any other

claims. Plaintiff contends that the trial judge erred and that he was entitled to summary judgment in his favor. We agree with the trial court and affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 In the 1980s, a planned unit development was envisioned, designed and created, becoming the Homeward Glen subdivision. The subdivision was developed in two phases: in phase I, lots 1-13 were platted and developed; in phase II, lots 14-25 were platted and developed. The 25 lots comprising the subdivision are not uniform in size. Most of the parcels are for single family homes; several larger parcels, however, were designed to accommodate horses. The subdivision is bordered to the east by single-family homes, and to the west, by a farm.

¶ 5 In 1987 and 1988, the developer of the subdivision recorded the declarations of covenants, conditions, and restrictions (original declarations) for each of the phases of the subdivision. The original declarations for each phase were identical (and we will simply refer to both identical documents as the original declarations). Pertinently, the original declarations provided that the lot owners had the right, but were not required, to form a homeowners association to enforce the terms of the original declarations. Each of the original declaration documents referred to the homeowners association in the singular, leading to the inference that the entire subdivision, both phases, would be covered by a singular homeowners association. The second main provision at issue dealt with the duration of the original declarations:

> "The covenants and restrictions set forth in this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the homeowners or any association formed by them for a term of twenty years from the date that this Declaration is recorded with the Kane County Recorder. After which time said covenants shall be

> automatically extended for successive periods of ten years unless an instrument signed by the then owners of 2/3 of the lots within the existing properties has been recorded agreeing to change said covenants and restrictions in whole or in part; provided, however, that no such agreement of change shall be effective unless made and recorded one year in advance of the effective date of such change, and unless written notice of the proposed amendment is sent to every lot owner at least 90 days in advance of any such action taken."

The foregoing provision spawned 17 years of controversy and legal wrangling, far outstripping the size of the subdivision and disturbing the bucolic dream the subdivision was supposed to represent, culminating in the current installment of "*King Lear* in the Country" now before us.

¶ 6 The residents of Homeward Glen grew disenchanted with the original declarations and, in 1996, they attempted to amend the original declarations (the 1996 amendment), and inserted congenial provisions and restated the declarations. The homeowners association happily abided by the 1996 amendment for the next few years, until, apparently, someone actually read the original declarations and realized that the 1996 amendment may not have been immediately effective and there may have been a problem with the notice. In 2004, 31 homeowners (representing 17 of the 25 lots, or more than two-thirds of the lots in the subdivision) executed a document (the 2004 supplement) in which they claimed to have received notice of the vote for the 1996 amendment more than 90 days before the vote was taken.

¶ 7 The 2004 supplement was symptomatic of the disagreements that began occurring in the Homeward Glen community. The homeowners disagreed about which types of restrictions actually applied to their properties. One faction accepted the original declarations and argued that they were still in effect. Another faction supported the 1996 amendment and its restrictions. The 1996 faction

argued that the 1996 amendment had been enacted properly and validly, and was immediately effective upon enactment. (We note that the factions were not necessarily internally consistent: some in the originalist faction had both voted in favor of the 1996 amendment, and yet they had executed the 2004 supplement affirming the validity and viability of the 1996 amendment.)

¶ 8 Matters finally came to a head, and on May 1, 2007, the Homeowners Association filed a declaratory judgment action seeking to determine which, if any, of the various declarations, the original declarations, the 1996 amendment, or the 2004 supplement, were in effect and for how long. At the time it instituted the declaratory judgment action, the Homeowners Association board favored the original declarations. The association specifically sought a declaration that the original declarations were in effect and the 1996 amendment had been improperly enacted and recorded. Late in 2007, the parties filed motions for summary judgment, and these motions were denied in the trial court on the basis of factual questions precluding the entry of summary judgment.

¶ 9 As the 2007 lawsuit was pending, the Homeowners Association underwent a coup in which, during elections, the originalist board members were ousted and replaced with members of the 1996 faction. The Homeowners Association now favored the 1996 amendment, along with, apparently, a majority of the owners in the subdivision. The Homeowners Association no longer supported its position in the 2007 lawsuit, and, in fact, supported the opposite position. In September 2008, two owners filed a motion to become parties-plaintiff and maintain the position the Homeowners Association had relinquished. Plaintiff here was one of the two owners, and they continued to prosecute the declaratory action even though the Homeowners Association actively opposed the action.

¶ 10 Additionally, as the original suit was pending, the subdivision's property owners once again attempted to approve an amended and restated declaration of covenants and restrictions (the 2008 covenants).

¶ 11 Another round of motions for summary judgment passed before the trial court. This time, the trial court granted summary judgment in favor of the Homeowners Association and against plaintiff and the other owner. The trial court held that the 1996 amendment was valid and in force. Plaintiff here appealed to this court in *Homeward Glen v. Horseshoe Falls Ranch, LLC*, No. 2-08-1034 (Oct. 14, 2009). With this reference, we incorporate the order in *Homeward Glen* as if it were fully set forth herein. We held that there was an issue of material fact regarding whether there was proper notice of the intent to vote on the 1996 amendment under the requirements original declarations, and this precluded a grant of summary judgment. We further noted that it was uncontested that the original declarations were still in force until the expiration of the 20-year term. We remanded the matter for further proceedings.

¶ 12 Upon its return to the trial court, the Association, which was still the titular plaintiff in the original matter, filed a motion to voluntarily dismiss the action. At that time, the trial court had not entered a ruling on plaintiff's motion to substitute as party-plaintiff or the Association's motion to become a party-defendant. The trial court allowed the motion to voluntarily dismiss, reasoning that there was no longer a dispositive motion on file and the Association remained, technically, the plaintiff in the matter. This appeared to put a finish on the matter with the issue of what set of covenants and restrictions applied to the subdivision going unresolved.

¶ 13 On April 21, 2011, plaintiff instituted a new declaratory action, again seeking the answer to the question of what set of covenants and restrictions applied to the subdivision. Defendant filed a

motion for a bill of particulars which, ultimately, was denied. On September 23, 2011, plaintiff nevertheless filed an amended complaint, which formed the basis for the current action and appeal. In December 2011, and January 2012, the parties filed cross-motions for summary judgment.

¶ 14 While activities in the legal case were ongoing, in November 2011, the owners in the subdivision called for a February 16, 2012, meeting of the homeowners association to be followed by a meeting of the individual homeowners. Written notice and materials relating to the subject matter of the February meetings were distributed to all of the homeowners in the subdivision. The distribution was accomplished more than 90 days before the February 16 meetings.

¶ 15 On February 16, 2012, the meetings were held. First, the association convened its meeting, and then adjourned. After the association's meeting, the individual property owners met. At the second meeting, the homeowners voted in favor of abolishing all of the covenants and restrictions for the subdivision. The vote carried, 35-3, representing 17 lots of the subdivision voting in favor of the abolition of the declarations, one lot split, and one lot against. The 17 lots represented more than 2/3 of the lots in the subdivision, a supermajority required for action in some of the versions of the declarations. The homeowners then executed a copy of the resolution that they had just passed (2012 amendment).

¶ 16 On February 24, 2012, a copy of the executed 2012 amendment was recorded in Kane County. The 2012 amendment showed on its face that owners of 17 of the 25 lots in the subdivision, or more than 2/3 of the lots in the subdivision, approved of the 2012 amendment.

¶ 17 On February 27, 2012, defendant informed the trial court of the 2012 amendment and suggested that, by abolishing all of the covenants and restrictions encumbering the lots in the subdivision, there was no longer any actual controversy over which set of covenants and restrictions

was currently effective. The trial court allowed the parties to file supplemental briefing on this issue. On May 9, 2012, the trial court heard argument on the cross-motions for summary judgment and the supplemental briefing. The trial court held in favor of defendant and against plaintiff, entering an order that provided:

> "1) The Court finds that the February 24, 2012[,] amendment to dissolve covenants in their whole was a valid amendment and the Court finds that the covenants are dissolved as of that date.
>
> 2) The Court grants Defendant's summary judgment motion on the grounds that the February 24, 2012[,] amendment eliminates any controversy or case.
>
> 3) The Court does not make any finding on the other arguments raised in Defendant's summary judgment motion.
>
> 4) The Court denies the remaining motions as moot."

By this ruling, the trial court did not pass substantively on plaintiff's contentions, but instead, it simply denied plaintiff's motion for summary judgment as moot because there was no longer an underlying case or controversy between the parties. Plaintiff timely appeals.

¶ 18 II. ANALYSIS

¶ 19 On appeal, plaintiff divides his contentions into two parts: he argues that the trial court erred in granting defendant's motion for summary judgment, and he argues that the trial court erred by not granting plaintiff's motion for summary judgment. As both branches of plaintiff's argument concern the trial court's judgment on a motion for summary judgment, we briefly review the pertinent standards. A motion for summary judgment is properly granted when the pleadings, depositions, and admissions on file, along with any affidavits, show that there is no genuine issue of material fact and

the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 73. Cross-motions for summary judgment suggest that the parties do not believe that there exists any factual issues, and the case is resolved solely on legal issues. *Id.* The fact alone that the parties filed cross-motions for summary judgment does not mean that both the trial and reviewing courts cannot independently determine whether factual issues exist sufficient to preclude summary judgment in spite of the parties' belief that there is no factual issue. *Haake v. Board of Education for Township High School Glenbard District 87*, 399 Ill. App. 3d 121, 131 (2010). We review *de novo* the trial court's judgment on a motion for summary judgment. *Gaffney*, 2012 IL 110012, ¶ 73; *Haake*, 399 Ill. App. 3d at 131.

¶ 20 On appeal, plaintiff specifically contends that the trial court improperly did not consider the rulings in *Homeward Glen* this court previously made on the recurring and identical issues. Plaintiff also contends that the court's rulings in *Homeward Glen* operate as *res judicata* or an estoppel to preclude the relitigation of the recurrent issues here that were already decided in that case. Plaintiff further argues that one of the holdings in *Homeward Glen* was that the association did not comply with the 90-day notice requirement in the original declarations. Finally, and most pertinently to this case, plaintiff argues that defendant and the individual lot owners in the subdivision could not dissolve the covenants and restrictions of the original declarations. Before attempting to consider the point raised on appeal by plaintiff, we determine where we are given that plaintiff's issues on appeal do not seem to directly assail the trial court's rationale in granting summary judgment in favor of defendant and denying summary judgment for plaintiff.

¶ 21 Resolution of this case turns on the interpretation of the duration provision of the original declarations. In interpreting the original declarations, the rules of contract construction apply. *Forest Glen Community Homeowners Ass'n v. Bishof*, 321 Ill. App. 3d 298, 303 (2001). The cardinal rule of construction is to give effect to the intent of the parties, and this is done by giving the language of the provision its plain and ordinary meaning if the provision is not ambiguous. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 48. A provision is ambiguous if it is reasonably susceptible to more than one meaning, but the parties' disagreement about the correct meaning of the provision alone does not render the provision ambiguous. *Bishof*, 321 Ill. App. 3d at 303. The interpretation of a provision presents a question of law and is reviewed *de novo*. *Id.*

¶ 22 The duration provision of the original declarations states:

> "The covenants and restrictions set forth in this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the homeowners or any association formed by them for a term of twenty years from the date that this Declaration is recorded with the Kane County Recorder. After which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by the then owners of 2/3 of the lots within the existing properties has been recorded agreeing to change said covenants and restrictions in whole or in part; provided, however, that no such agreement of change shall be effective unless made and recorded one year in advance of the effective date of such change, and unless written notice of the proposed amendment is sent to every lot owner at least 90 days in advance of any such action taken."

The duration provision consists of two sentences. The first sentence states, unambiguously, that the original declarations shall be in effect for a period of 20 years. There is nothing in that first sentence

regarding amending or changing the original declarations. The second sentence is comprised of five clauses and sets forth what happens after the initial term of the original declarations runs and how the original declarations may be changed. The correct understanding of the second sentence and its interplay with the rest of the provision is the key to correctly understanding the parties' intent and the meaning of the duration provision.

¶ 23 Plaintiff's position here (and ultimately in the *Homeward Glen* case) has been that the original declarations remained in force until 2007 and 2008, when the initial 20-year term expired. Plaintiff maintains that the 1996 amendment was ineffective because the notice clause of the duration provision was not followed, so it did not become effective after the expiration of the initial 20-year term. Instead, the original declarations were automatically extended for a 10-year term, and they will expire in 2017 and 2018, at which time any validly enacted changes may become effective. Plaintiff discounts the 2004 supplement, because it attempted to fudge a correction to the improper procedure used in attempting to enact the 1996 amendment, and plaintiff claims that the 2008 covenants would not be effective until the expiration of the current 10-year extension in 2017 and 2018. Finally, plaintiff contends that the 2012 amendment is invalid (although it could potentially take effect after the expiration of the extension of the original declarations) because there is no provision in the original declarations to dissolve or abolish the covenants and restrictions.

¶ 24 Defendant's position is that it does not matter what set of covenants is in effect because the 2012 amendment is immediately effective and wipes the slate clean. We believe that defendant is on the right track.

¶ 25 While the language of the duration provision of the original declarations is unambiguous (and we so hold), the parties employ the last antecedent rule in their construction of the provision. While,

strictly speaking, it is unnecessary to employ the last antecedent rule because the duration provision is unambiguous (and therefore, we need not resort to the tools of construction (see *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 180 (2011)), discussion about and application of the rule demonstrates the grammatical goings-on and helps to illustrate the proper construction.

¶ 26 Under the last antecedent rule, " 'relative or qualifying words, phrases, or clauses are applied to the words or phrases or clauses immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote, [unless the intent of the parties requires such an extension].' " *Department of Transportation v Singh*, 393 Ill. App. 3d 458, 465 (2009) (quoting *In re E.B.*, 231 Ill. 2d 459, 467 (2008)). Applying the rule here shows that the modifying clause, "unless an instrument signed by the then owners of 2/3 of the lots within the existing properties has been recorded agreeing to change said covenants and restrictions in whole or in part" applies only to the clause preceding it, "[a]fter which time said covenants shall be automatically extended for successive periods of ten years," and not to the first sentence of the duration provision. The effect, then, is that the original declarations cannot be modified during the initial 20-year term. Modification of the original declarations can occur during an automatic extension term.

¶ 27 Continuing, the "provided, however," clause modifies the change clause and sets forth two conditions precedent for a change in the original declarations to take place: first, the amendment must be made and recorded one year before its effective date, and second, notice must be given to the lot owners at least 90 days before the amendment will be executed. If these two conditions precedent are met, then the amendment will be effective. Thus, the last antecedent rule suggests that the initial 20-year term will brook no modifications to the original declarations, which will

automatically extend for another 10-year term, unless 2/3 of the lot owners agree to change them and satisfy the conditions precedent to enacting an amendment.

¶ 28 While we have employed the last antecedent rule to parse the duration provision, we actually need not do so, because the provision is unambiguous. A straight reading of the provision reveals exactly the same result as that obtained by employing the last antecedent rule. The first sentence contains no language suggesting that amendment is possible, and the first sentence defines the initial term. The second sentence automatically extends the original declarations for another 10-year term, "unless" the lot owners decide to change the original declarations, "provided" that they meet the two conditions set forth in the "provided, however" clause. Thus, the original declarations are inviolable during the initial 20-year term; they will automatically extend for a 10-year term unless the lot owners decide to change them and they meet the two conditions: the changes will take effect one year after recording, and the lot owners must receive an at least 90-day notice before they vote on the changes. Unsurprisingly, the same result is reached from a straight reading and from employing the last antecedent rule.

¶ 29 What does this construction of the duration provision do to the consideration of the facts of this case? First, the original declarations ran effectively and undisturbed until the expiration of that term in 2007 and 2008. The 1996 amendment could have been effective if both of the conditions precedent had been fulfilled, and then they would have taken effect and preempted the automatic extension of the original declarations. In *Homeward Glen*, we held that there was a factual issue regarding the 90-day notice condition precedent that precluded the grant of summary judgment. We also held that, on the record established in that case, we could say that the 90-day notice requirement had been followed. *Homeward Glen*, No. 2-08-1034 (Oct. 14, 2009), slip op. at 19-20. That

determination was not challenged in the *Homeward Glen* case, and while it was questioned in this case, we need not fully address it, as no evidence establishing the foundation for the 2004 supplement or otherwise explaining the deficiencies identified in the *Homeward Glen* order was submitted here. We conclude, then, based on the record before us, that the 1996 amendment was not effectively made, so it did not preempt the automatic extension of the original declarations.

¶ 30 The 2008 covenants purported to amend the 1996 amendment. As it was set forth according to the terms of the 1996 amendments, which were not in effect and were not validly enacted upon this record, the requisite notice under the original declarations was not provided to the lot owners. Specifically, the 2008 covenants recited that more than 30 days notice were given to the lot owners, but more than a 90-day notice was needed before the 2008 covenants could be voted upon. The parties submitted no other evidence about the circumstances of the 2008 covenants, so we are limited to considering only the recitals to the 2008 covenants. Because the original declarations continued in effect via the automatic extension clause of the duration provision, and because there is no evidence in the record that the 90-day notice condition precedent was satisfied, we conclude that the 2008 covenants were not effectively enacted. Accordingly, the original declarations continued in force and effect after the attempt to enact the 2008 covenants.

¶ 31 We next come to the 2012 amendment. The evidence in the record shows that the 90-day notice term was fulfilled; the lot owners received notice of the February 16, 2012, meeting and the written materials to be considered at the meeting more than 90 days in advance of the meeting. The evidence further shows that 2/3 of the lot owners (actually 17 of the 25 lots) voted in favor and executed the 2012 amendment. Finally, the evidence shows that the 2012 amendment was validly enacted on February 16, 2012, and it was recorded on February 24, 2012. Under the remaining

condition precedent, it would become effective one year after it was recorded. Accordingly, we hold that the 2012 amendment took effect as of February 24, 2013, fulfilling all of the requirements of the duration provision of the original declarations.

¶ 32 Plaintiff disputes this conclusion. Under his reading of the duration provision, the automatic extension must continue uninterrupted for 10 years. According to plaintiff, the original declarations may be preempted by an amendment only at the time the automatic extension would occur. In other words, if an amendment is validly enacted during the first nine years of the 10-year extension period, it would take effect on the anniversary date on which the original declarations would automatically extend. We disagree.

¶ 33 Under both a plain reading of the unambiguous duration provision and the last antecedent rule, the original declarations automatically extend for a 10-year period, "*unless* an instrument signed by the then owners of 2/3 of the lots within the existing properties has been recorded agreeing to change said covenants and restrictions in whole or in part." (Emphasis added.) Without applying any rules of construction, we see that the unless clause applies to or modifies the automatic extension clause. "Unless" is defined as meaning "except on the condition that," or "but that." Webster's Third New International Dictionary 2503 (1993). The duration provision means that, except on the condition that an instrument signed by owners of 2/3 of the lots has been recorded (and also fulfilling the conditions precedent), the original declarations automatically extend. The unless cause contains no temporal limitations beyond the associated conditions precedent (90-day notice, and recording a year in advance of the effective date). Indeed, the conditions precedent suggest that the effective date of an amendment can be any day, not just 10-year multiples of the anniversary date of the recording of the original declarations, because the conditions precedent state, "and recorded one year

in advance of the effective date of such change." Had the effective date been limited to the anniversary date of the recording of the original declarations, the "one-year-in-advance" language would not have been needed; moreover the "one-year-in-advance" language expressly contradicts plaintiff's position that an amendment to the original declarations could only occur on 10-year multiples of the anniversary date of the recording of the original declarations.

¶ 34 Likewise, under the last antecedent rule, the "unless" clause modifies the "after which" clause of the second sentence. Thus, the "after which" clause generally obtains, but if the conditions in the "unless" clause are fulfilled, then, the "unless" clause controls. Similarly, the "provided, however" clause modifies the "unless" clause, setting forth conditions precedent that must be fulfilled before the "unless" clause can be fulfilled. If the circumstances of both the "unless" and "provided, however" clauses are met, then, one year after the recording of the amending instrument, the amendment will become effective, because the conditions precedent of the "provided, however" clause specify that a 90-day notice must be given, and the amending instrument must be recorded one year in advance of the effective date (not a specified date, or the anniversary date of the original declarations). Both methods (a clear reading of the unambiguous provision or employing the last-antecedent rule) of considering the duration provision arrive at the same result. Accordingly, we hold that the 2012 amendment was effectively enacted because it provided the requisite notice to the lot owners and was recorded on February 24, 2012, so its effective date would be February 24, 2013.

¶ 35 We note that the trial court erred in granting immediate effect to the 2012 amendment; it should have been given the effective date of February 24, 2013. That date has come and passed, and the 2012 amendment is now effective, so there is no need to disturb the trial court's judgment beyond modifying it to reflect that the effective date of the 2012 amendment is February 24, 2013.

¶ 36 Having concluded that the trial court correctly determined that the 2012 amendment mooted the controversy between the parties, we now turn to plaintiff's specific arguments. Plaintiff argues generally that *Illini Federal Savings & Loan Ass'n v. Elsah Hills Corp.*, 112 Ill. App. 3d 356, 358-59 (1983), controls the outcome of this case and, particularly, contradicts our conclusion that an amendment may be made and become effective during the term of an automatic extension. Plaintiff is only partially correct.

¶ 37 *Illini* interpreted a duration provision similar to the one at issue in this case. The controversy in *Illini* was whether its duration provision, which ran for 20 years after being recorded, and automatically extended for 10 years "unless" validly amended, prohibited the recording of amendments to the declaration of covenants and restrictions during the initial 20-year term, or whether an amendment could be made at any time and immediately take effect. *Id.* at 358. The court held that neither position was correct. Instead, using the last antecedent rule, the court held that the "unless" clause (containing the amendment provision) modified the "after which" clause (containing the automatic extension provision), while the 20-year term provision was unaffected by the "unless" clause. *Id.* at 359. The court concluded that, based on the last antecedent rule, the declaration ran without interruption or amendment for the initial period of 20 years, that an amendment could be made at any time during that initial term, but that such an amendment would only take effect after the expiration of the initial 20-year term. *Id.*

¶ 38 *Illini* supports our interpretation of the duration provision at issue here. It provides a solid underpinning for our holding that the original declarations continue for the initial period of 20 years and cannot be amended during that period. Plaintiff accepts this conclusion's applicability to the instant case, and further argues that *Illini* supports his contention that any time the automatic

extension operates to extend the covenants and restriction, they must also continue without interruption or amendment during each additional 10-year term, pointing to the following language in *Illini*:

> "the interpretation by [the plaintiff] is patently wrong. The provision clearly states that unless properly amended, the covenants will be automatically extended for 10 more years at the end of the 20-year period. The covenants are not amended until an instrument so doing is recorded. If no amendatory instrument was recorded prior to [the expiration of the initial 20-year term], the original restrictions would have continued in effect for 10 more years." *Id.* at 358.

Plaintiff contends that the quoted passage accords the 10-year automatic-extension terms the same interpretation as the initial 20-year term for the original restrictions, namely that an extension term cannot be interrupted or terminated by an amendment. We disagree.

¶ 39 First, plaintiff overlooks the fact that, in the quoted passage, the court is analyzing and responding to the plaintiff's argument in *Illini* and is not yet definitively interpreting the provision. Second, plaintiff overlooks the procedural posture and its relation to the issue presented in *Illini*. In that case, the court was deciding only whether an amendment recorded during the initial 20-year term of the original declarations could be valid, and, if so, when it would take effect. The issue was not concerned with any automatic-extension term. *Id.* at 358-59. Indeed, in holding that the amendment was valid and would take effect when the initial 20-year term ended, the court was necessarily foreclosing any issue about an automatic extension occurring. Thus, *Illini* is inapposite to the issue of how the automatic extension provision should be interpreted and cannot support plaintiff's argument on that precise point. Accordingly, while we agree with plaintiff that *Illini*

supports our interpretation of the original declarations and the initial 20-year term of the duration provision, the case is silent regarding the interpretation of the automatic extension clause and we reject plaintiff's contention that it should have controlled our analysis.

¶ 40 Next, plaintiff argues that the issue of the interpretation of the duration provision was settled in *Homeward Glen*. Specifically, plaintiff argues that either *res judicata* or collateral estoppel applies, and that this court in *Homeward Glen* interpreted the duration provision exactly as plaintiff suggests it should be interpreted here. We disagree.

¶ 41 The doctrines of *res judicata* and collateral estoppel promote judicial efficiency and protect litigants by preventing the relitigation of issues previously adjudicated in an earlier case. *Ross Advertising, Inc. v. Heartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶¶ 29, 42. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent cause of action between the same parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). "When *res judicata* applies, it bars all matters that were offered to sustain or defeat a claim in the first action, as well as all matters that could have been offered." *Ross Advertising*, 2012 IL App (3d) 110200, ¶ 30. *Res judicata* applies if three requirements are fulfilled: (1) there is a final judgment on the merits by a court of competent jurisdiction; (2) there is an identity of parties or their privies; and (3) there is an identity of cause of action. *Id.*, ¶ 31. Similarly, collateral estoppel applies when a legal or factual issue was actually litigated and determined by a valid and final judgment, and the determination on the issue was essential to the judgment. *Id.*, ¶ 42. In such a case, the earlier determination is conclusive in a later action between the parties, whether it is on the same or a different claim. *Id.* Collateral estoppel applies when three requirements are met: (1) there is an

identity of issues between the earlier action and the current action; (2) there is a final judgment on the merits in the earlier action; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the earlier action. *Id.*

¶ 42 With these principles in mind, we consider whether either doctrine applies here. A key requirement in both doctrines is a final judgment on the merits in the earlier action. *Id.*, ¶¶ 31, 42. That requirement is lacking in *Homeward Glen*, the case plaintiff contends provides the earlier judgment fixing the interpretation of the duration provision. Generally, the denial of a motion for summary judgment is not an appealable order because it is an interlocutory order. *Fifth Third Bank, N.A. v. Rosen*, 2011 IL App (1st) 093533, ¶ 21. There is an exception where the parties filed cross-motions for summary judgment and one of the motions is granted and the other denied (*id.*), but in *Homeward Glen*, No. 2-08-1034 (Oct. 14, 2009), slip op. at 10-11, 15, only the individual defendants and the Association had filed a motion for summary judgment, and it was denied by order of this court (*id.*, slip op. at 24), and the cause was remanded for further proceedings. Thus, the exception does not apply, and we hold that there was no final order in *Homeward Glen*, only an interlocutory denial of the appellees' motion for summary judgment. Because there was no final order on the merits, neither of the doctrines of *res judicata* or collateral estoppel can apply. See *Ross Advertising*, 2012 IL App (3d) 110200, ¶¶ 31, 42 (a final judgment on the merits is a necessary requirement to invoke the doctrines of *res judicata* or collateral estoppel). Accordingly, we reject plaintiff's contention.

¶ 43 Next, plaintiff argues that we held, in *Homeward Glen*, that the Association did not comply with the 90-day-notice requirement of the duration provision. The purpose of this contention is to demonstrate that the 1996 amendment (and the 2008 covenants) cannot be valid. We have, in our

analysis above, already reached that conclusion and there is no need to further address plaintiff's contention.

¶ 44 Plaintiff next contends that there is no evidence that the Association has ever been validly formed. This is a problematic contention because, by filing suit against the Association (and prosecuting this appeal), plaintiff is tacitly acknowledging the Association's proper existence, yet, for the expediency of argument, plaintiff now tries to deny that existence. We hold that plaintiff has forfeited the argument by virtue of having filed suit against the very Association it now seeks to deny. See *Myers v. Woods*, 374 Ill. App. 3d 440, 448 (2007) (an issue on appeal is forfeited if the party's position on appeal is inconsistent with its position below). In any event, the thrust of this argument was also directed against the validity of 1996 amendment (and the 2008 covenants), an issue we have already resolved as plaintiff wanted, and there is no need to further address this contention.

¶ 45 Plaintiff argues that the 2012 amendment is invalid because an amendment cannot abolish or dissolve the original declarations. We disagree. The duration provision provides the original declarations may be changed "in whole or in part." "In whole" suggests that they may be completely redone and supplanted. This also includes the concept that they may be abolished or deleted. Accordingly, we reject plaintiff's contention.

¶ 46 Returning to the duration provision, plaintiff contends that the provision was unambiguous and did not need to be interpreted under the aegis of rules of construction. We agree. We conducted our analysis using both a plain reading of the duration provision and interpreted the duration provision with the aid of the last antecedent rule. Our interpretation, however, differed from the one

plaintiff urges. We need not revisit the result of our analysis; plaintiff offers no compelling reason to change our result.

¶ 47 Plaintiff argues that the duration provision was interpreted previously by this court and the trial court. To the extent that plaintiff is correct, it is of no moment. Plaintiff is not arguing that the interpretation is settled by the previous passes, either by this court or, especially, by the trial court. We further note that this case is subject to *de novo*, or plenary, review, meaning that we will look at the issues raised anew and without deference to any decision made by the trial court. Therefore, to the extent that plaintiff is contending that we must follow the trial court's previous interpretation, we reject the notion. Further, to the extent that plaintiff is claiming that *Homeward Glen* should be the law of the case, we do not find the argument sufficiently raised to consider it. See Ill. S. Ct. Rule 341(h)(7) (eff. July 1, 2008) (arguments not sufficiently made will be deemed forfeited).

¶ 48 Plaintiff reiterates his argument that the original declarations may not be effectively deleted as defendant purported to do via the 2012 amendment. We disagree. Plaintiff does not analyze the effect of the phrase, "in whole or in part," pertaining to amending the covenants and restrictions in the duration provision. Instead, plaintiff simply posits that the verb, "to amend," means to change something while retaining the principle, citing to the dictionary. While this may well be the meaning of the verb, "to amend," plaintiff is tacking on the idea that an amendment must retain something of the original in order to qualify as an amendment, which he infers from the definition he uses, but this idea is not expressly contained in that definition. This hurdle aside, we note that the terms used in the duration provision of the original declarations do not discuss an "amendment" to the original declarations, but only discuss "an instrument *** agreeing to change said covenants and restrictions

in whole or in part." The language is clear that the covenants and restrictions can be changed in whole. Accordingly, we reject plaintiff's contention.

¶ 49 Plaintiff argues that the 10-year automatic extension term is effectively inviolable, again relying on *Illini*. We have determined that *Illini* does not address how to interpret the extension provision as it was only concerned with the original 20-year initial term in a similar duration provision. Plaintiff offers nothing new to the discussion that would cause us to change our view of *Illini*.

¶ 50 Further, our interpretation of the duration provision requires that an amendment may take effect one year after its recording in order to give effect to that term of the duration provision, which would otherwise be superfluous and without effect. Accepting plaintiff's construction, by contrast, would render the one-year delay-of-effectiveness term without effect. Nevertheless, plaintiff cites to *Scholten v. Blackhawk Partners*, 909 P.2d 393 (Ariz. Ct. App. 1995), which interpreted *Ilini*'s holding on the initial 20-year term to apply to the 10-year automatic extension term. *Scholten* held that the 10-year automatic-extension term in the duration provision in *Illini* would be superfluous if it did not mean that, like the 20-year initial term, it could not be interrupted or amended until its expiration. *Id.* at 396. While that may be true, neither *Illini* nor the duration provision at issue in *Scholten* included a one-year delay-of-effectiveness term. This renders both cases distinguishable.

¶ 51 Plaintiff also cites to *Mauldin v. Panella*, 17 P.3d 837, 839 (Colo. App. 2000), for the same proposition he advances in relation to *Illini* and *Scholten*. Once again, the provision at issue in *Mauldin* does not contain a one-year delay-of-effectiveness term, and this renders *Mauldin* distinguishable.

¶ 52 Plaintiff's arguments are unavailing that the 10-year automatic extension term cannot be amended, effective one year from the date of recording the amendment. Accordingly, we hold that the trial court's judgment, as modified (the effective date of the 2012 amendment is February 24, 2013), was correct and is affirmed.

¶ 53 III. CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed as modified.

¶ 55 Affirmed as modified.