

2011 IL App (2d) 110727-U
No. 2-11-0727
Order filed August 2, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOHN T. WOLF,)	Appeal from the Circuit Court
)	of Winnebago County.
Plaintiff-Appellee,)	
)	
v.)	No. 10-MR-639
)	
AUXXI AND ASSOCIATES, INC.,)	Honorable
)	J. Edward Prochaska,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: Plaintiff was entitled to specific performance under a contract with defendant where defendant was required to reconvey the subject property back to plaintiff if, after two years, defendant had neither obtained a bond for the project nor begun construction on the project.

¶ 1 Defendant, Auxxi and Associates, Inc., appeals the order of the circuit court of Winnebago County denying its cross-motion for summary judgment and granting the cross-motion for summary judgment of plaintiff, John T. Wolf, seeking specific performance pursuant to a contract signed involving a small portion of land defendant needed to acquire in order to construct an intersection improvement. Defendant argues on appeal that the trial court erred in awarding plaintiff title to the

subject property pursuant to the parties' contract, raising numerous grounds, including plaintiff's failure to exercise an option, lack of capacity, failure to strictly observe trust features, misrepresentation, unclean hands, failure to state a claim for specific performance, preclusion by the statute of frauds, commercial frustration, integration, lack of contract, doctrine of merger, and failure of consideration. We affirm.

¶ 2 On April 24, 2008, the parties executed the subject contract in which plaintiff promised to convey a small portion of his parcel to defendant which would allow defendant to complete an intersection necessary to its plan to commercially develop its property. The contract provided, pertinently:

¶ 3 "1. [Plaintiff] agrees to sell that portion of land approximately 2,245 square foot, as shown on Exhibit A, to [defendant] for the sum of Two Thousand Two Hundred Forty-Five and no/100's (\$2,245.00), with closing to occur on or before May 9, 2008. The acquired property must be free and clear of all claims of other parties, liens, taxes and encumbrances not of public record.

¶ 4 2. [Defendant] agrees, within two years from the date of this Agreement, to bond and commence construction of an intersection located and designed consistent with that depicted in Exhibit B. In the event the intersection is not bonded or under construction within the two-year period, [defendant] agrees to convey back to [plaintiff], by Trustee's Deed, the property acquired by this Agreement for a price equal to [defendant's] per square foot purchase price.

¶ 5 3. As part of this purchase, [defendant], agrees to pay all title, survey and recording costs associated with the purchase."

¶ 6 On May 20, 2008, pursuant to the agreement, plaintiff caused Belvidere National Bank and Trust Company, as Trustee, to convey title of the property to defendant by Trustee's deed. More than two years after executing the agreement, defendant had neither bonded or nor commenced construction of an intersection at the appropriate location. Defendant also refused to convey the property back to plaintiff, arguing that it was not required to comply because it had a number of valid defenses to the contract, including plaintiff's failure to exercise an option, lack of capacity, failure to strictly observe trust features, misrepresentation, unclean hands, failure to state a claim of specific performance, statute of frauds, commercial frustration, integration, lack of contract, doctrine of merger and failure of consideration. During the pendency of the litigation, the trust assigned any right, title, and interest it may have had in the subject property to plaintiff.

¶ 7 In September 2010, plaintiff sued defendant for specific performance under the agreement. The parties filed cross-motions for summary judgment. Eventually, during a July 2011 hearing, the trial court granted plaintiff's motion and denied defendant's and awarded plaintiff title to the subject property. Defendant timely appeals.

¶ 8 As an initial matter, we note that plaintiff claims that our jurisdiction is lacking because, on May 23, 2011, the trial court granted plaintiff's motion for summary judgment at a hearing from which defendant was absent. Defendant then filed an emergency motion to, among other things, vacate the judgment granting summary judgment in favor of plaintiff. The trial court granted defendant's emergency motion expressly continuing the motion to vacate judgment until after it had heard and decided the cross-motion for summary judgment. Plaintiff attempts to claim that defendant's emergency motion was not the type of postjudgment motion pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2010)) that tolls the time period in which

to take an appeal. According to plaintiff, because defendant's motion did not toll the 30-day time period in which to file a notice of appeal, the notice filed on July 27, 2011, was untimely because it was filed more than 30 days after the May 23, 2011, order granting plaintiff's motion for summary judgment. We disagree.

¶ 9 As we noted, defendant's emergency motion requested vacation of the May 23, 2011, order, one of the proper forms of relief that a section 2-1203 postjudgment motion may request in order to toll the 30-day time period for filing a notice of appeal. Thus, plaintiff's contention is flatly refuted by the record. Further, the trial court did not deny that motion, but continued it until after it had heard defendant's cross-motion for summary judgment. On July 19, 2011, after hearing the cross-motion, the trial court denied it and entered the judgment on plaintiff's motion for summary judgment in favor of plaintiff. Based on this, we determine that the trial court impliedly denied the motion to vacate as moot, because it sustained and entered the judgment in favor of plaintiff. Accordingly, the final judgment in this matter dates from July 19, 2011, and defendant's notice of appeal was timely filed. Our jurisdiction over this appeal is proper.

¶ 10 Turning to the merits of this matter, defendant challenges the propriety of the trial court's judgment in favor of plaintiff and against defendant on the cross-motions for summary judgment. Summary judgment is proper where the pleadings, depositions, admissions, affidavits and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from

doubt. *Jones*, 191 Ill. 2d at 291. We review *de novo* the trial court's grant of summary judgment. *Jones*, 191 Ill. 2d at 291.

¶ 11 Defendant first argues that plaintiff failed to properly state a claim for specific performance. To state a claim for specific performance, the plaintiff must demonstrate the existence of the following elements: "(1) the existence of a valid, binding, and enforceable contract; (2) compliance by the plaintiff with the terms of the contract, or proof that the plaintiff is ready, willing, and able to perform the contract; and (3) the failure or refusal of the defendant to perform his part of the contract." *Hoxha v. LaSalle National Bank*, 365 Ill. App. 3d 80, 85 (2006). It is within the trial court's discretion to decide whether specific performance of a contract will be granted. *White Hen Pantry, Inc. v. Cha*, 214 Ill. App. 3d 627, 636 (1991).

¶ 12 Defendant challenges the existence of a valid, binding, and enforceable contract between the parties. Where there is no factual dispute, such as in a motion for summary judgment, the question of whether a contract between the parties exists presents a question of law (*Mid-Century Insurance Co. v. Founders Insurance Co.*, 404 Ill. App. 3d 961, 967 (2010)) that is reviewed *de novo* (*Board of Education of Ridgeland School District No. 122 v. Property Tax Appeal Board*, 2012 IL App (1st) 110461, at ¶ 25). A contract for the sale of real estate cannot be enforced unless the writings contain (1) the names of the vendor and the vendee, (2) a description of the property sufficiently definite to identify it, (3) the price, (4) the terms and conditions of sale, and (5) the signature of the party to be charged. *Leach v. Hazel*, 398 Ill. 33, 39 (1947). The contract's terms must be so certain and unambiguous that the court can require the specific thing contracted for be done. *Kane v. McDermott*, 191 Ill. App. 3d 212, 217 (1989). It is not necessary for the contract to state specifically all details in regard to matters concerning which the parties are contracting. *Kane*, 191 Ill. App. 3d

at 217. Contracts will, if possible, be interpreted so as to effectuate the intent of the parties. *Kane*, 191 Ill. App. 3d at 217.

¶ 13 In particular, defendant argues that there is not a valid contract because plaintiff was the beneficiary of the land trust and not the owner, and so could not actually convey the subject property. We disagree.

¶ 14 In Illinois, the beneficiary of a conventional land trust, under appropriate circumstances, may enter into a valid contract to convey title to the trust property. *Timberline, Inc. v. Towne*, 225 Ill. App. 3d 433, 440 (1992). The beneficiary may do so, not as agent of the trustee, but in his or her capacity of beneficiary. *Timberline*, 225 Ill. App. 3d at 440. This right is limited to situations in which the trust agreement vests in the beneficiary the sole right to direct the trustee to convey title. *Timberline*, 225 Ill. App. 3d at 440. Such a contract will be mutually enforceable by the beneficiary as seller and the buyer where it expressly, or by reasonable construction, provides for exercise by the beneficiary of the power of direct conveyance. *Timberline*, 225 Ill. App. 3d at 440. A contract is not enforceable when a beneficiary signs an agreement "as agent of the trustee contrary to the provisions of the trust agreement." *Timberline*, 225 Ill. App. 3d at 440. Agreements to sell or encumber real estate are enforceable where the beneficiary of a land trust enters into the agreement in his capacity as "beneficiary" and has the power to direct conveyance of the property. *Timberline*, 225 Ill. App. 3d at 440. An enforceable agreement is created when the beneficiary of a land trust contracts as seller to cause title to be conveyed to the purchaser even though the purchaser is not specifically advised of the existence of the trust. *Timberline*, 225 Ill. App. 3d at 440.

¶ 15 A covenant of good faith and fair dealing is implicit in every contract as a matter of law. *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 799 (2011). A reason this covenant is implied is to protect

the parties such that no party takes advantage of another in a way that could not have been contemplated at the time the contract was drafted. *Pielet*, 407 Ill. App. 3d at 799.

¶ 16 Here, the agreement signed between plaintiff and defendant is a valid and enforceable contract. Although it is true that plaintiff, as the sole trust beneficiary, may not act as if no trust exists, he did not, as the contract only describes him as a “party” to the agreement. Further, he is not described specifically as the owner of the property or as the beneficiary. Thus, plaintiff, even though the beneficial owner of the subject property, had the right of direction and could, and did, validly contract with defendant to convey the subject property.

¶ 17 Where the language of a contract is unambiguous, extrinsic facts surrounding the making of the contract are not to be considered. *Bard v. Harvey*, 74 Ill. App. 3d 16, 19 (1979). However, where the language is ambiguous, extrinsic evidence, including prior negotiations between the parties, any oral understandings, and the parties' conduct, is admissible to determine the parties' intentions. *Bard*, 74 Ill. App. 3d at 19-20.

¶ 18 We can infer, by defendant's acceptance of the property signed over to it pursuant to the agreement, that both parties understood and accepted that plaintiff was acting in his capacity as a beneficiary, and he agreed to and caused title of the property to be conveyed to the defendant. See *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 353 (2011) (“a party seeking to rescind a contract on the ground of fraud or misrepresentation must elect to do so promptly after learning of the fraud or misrepresentation”); *Zirp-Burnham, LLC v. E. Terrell Associates, Inc.*, 356 Ill. App. 3d 590, 601 (2005) (a party with the power to avoid a contract may ratify the contract through its conduct).

¶ 19 Additionally here, the agreement contains an adequate description of the property, the sales price, terms and conditions of sale, and the signature of the party to be charged. Plaintiff has

demonstrated compliance with the terms of the contract by causing the trustee to pass title to the defendant and has shown that he is ready, willing, and able to perform the contract. Plaintiff caused title of the land to be transferred to defendant for a price and on the condition that within two years of the date of the contract an intersection on the land was either bonded or under construction. Otherwise, the price paid was to be refunded and title was to be transferred back to plaintiff by Trustee's Deed. Defendant failed to have the intersection bonded or under construction within the agreed upon time period and has refused to transfer the title back to plaintiff. Accordingly, we affirm the trial court's order granting plaintiff's request for specific performance.

¶ 20 Defendant also argues that plaintiff invalidated the original agreement when he made a new offer by requesting reconveyance by warranty deed. Plaintiff's request in the complaint for reconveyance by warranty deed as opposed to a trustee's deed does not constitute a new offer as this agreement contains no option. This inadvertence may be attributed to a scrivener's error. See *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 438 (2005) (recognizing a properly pleaded complaint even though the correct statute was not cited).

¶ 21 Defendant argues the defense of commercial frustration. To state a claim for commercial frustration, a defendant must prove that "(1) the frustrating event was not reasonably foreseeable; and (2) the value of counter performance has been totally or nearly totally destroyed by the frustrating event." *American National Bank v. Richoz*, 189 Ill. App. 3d 775, 780 (1989). Defendant fails to meet either prong of the test for this defense. The failure to complete the bonding and beginning the construction timely was foreseeable when this contract was executed, and economic hardship does not render a contract impossible to be performed. *Greenlee Foundries, Inc. v. Kussel*,

13 Ill. App. 3d 611, 619 (1973) (finding a less profitable result in performance does not render a contract commercially frustrated).

¶ 22 Defendant argues that the contract merged fully into the deed. The doctrine of merger states that all prior agreements between the buyer and seller are merged in the deed and the deed supersedes the previous agreements and becomes the only binding instrument between the parties. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). However, if the terms of the contract for sale of realty are fulfilled by delivery of the deed, there is a “merger” of the contract and deed, but if there are provisions in the contract which delivery of the deed does not fulfill, the contract is not merged in the deed as to such provisions, but remains open for performance. *Czarobski*, 227 Ill. 2d at 370; *Neppl v. Murphy*, 316 Ill. App. 3d 581 (2000); *Brownell v. Quinn*, 47 Ill. App. 2d 206 (1964); *Chicago Title & Trust Co. v. Wabash-Randolph Corp.*, 384 Ill. 78 (1943) (recognizing that merger does not apply when an obligation is to be performed after transference of deed). Here, there remained defendant’s obligation to bond or construct an intersection within the proper time period after the contract was executed. Subsequently, the deed was delivered and defendant failed to perform under the contract. The contract is still in effect and it directs reconveyance back to the plaintiff by Trustees Deed “for a price equal to [defendant’s] per square foot purchase price.

¶ 23 We need not specifically address defendant’s remaining arguments. We have carefully reviewed the record and defendant’s arguments concerning plaintiff’s lack of capacity, misrepresentation, unclean hands, failure to state a claim for specific performance, and statute of frauds violations, lack of contract, and failure of consideration and, to the extent they are not covered by our analysis above, we reject them. Finally, it should be noted that if these defenses were

accepted the contract would likely be considered only voidable and not void. Thus, the same result would obtain.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 25 Affirmed.