No. 1-10-1564

FIRST DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

AMERICAN COMMUNITY MANAGEMENT, INC., Plaintiff and Counterdefendant-Appellee, v. BOARDWALK OF PARK RIDGE CONDOMINIUM ASSOCIATION, Defendant and Counterplaintiff-Appellant.	Appeal from the Circuit Court of Cook County. No. 2008 M1 124307 Honorable Laurence J. Dunford and James E. Snyder, Judges Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

O R D E R

HELD: Inadmissable evidence in support of the plaintiff's motion for summary judgment did not render the grant of summary

judgment error where the record established that summary judgment was proper as a matter of law. The circuit court's decision to rule on the plaintiff's motion for summary judgment before considering the defendant's motion for voluntary dismissal was not an abuse of discretion.

The defendant and counterplaintiff, Boardwalk of Park Ridge Condominium Association, appeals from orders of the circuit court of Cook County granting summary judgment to the plaintiff and counterdefendant, American Community Management, Inc., on its amended complaint and the defendant's counterclaim. The defendant contends that: (1) the grant of summary judgment on the amended complaint was error because the motion was not supported by admissible evidence, and (2) the circuit court erred by ruling on the plaintiff's motion for summary judgment on the defendant's counterclaim prior to ruling on the defendant's motion for voluntary dismissal of that claim.

We first address the defendant's failure to comply with our supreme court's rules dealing with appellate procedure. The defendant's appellant's brief is deficient in the following respects: (1) the statement of facts does not contain citations to the record on appeal (Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008)); (2) the argument portion does not provide citations to the record where the evidence in support of the defendant's arguments may be found (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)); and (3) the brief does not contain an appendix (Ill. S.

Ct. R. 342(a) (eff. Jan. 1, 2005)).

Our supreme court has consistently held that its rules "are not mere suggestions. They have the force of law, and they should be followed." *People v. Glasper*, 234 Ill. 2d 173, 189, 917 N.E.2d 401 (2009). Nonetheless, the striking of an appellate brief in whole or in part is a harsh sanction and should not be invoked unless the violations interfere with or preclude appellate review. *In re Detention of Powell*, 217 Ill. 2d 123, 132, 839 N.E.2d 1008 (2005).

Based on its violations of the rules, we would be justified in striking the defendant's appellate brief. However, as the record is not lengthy, we decline to impose such a harsh sanction in this case. We caution appellate counsel that such violations may prevent review in a future case.

BACKGROUND

The plaintiff filed an amended complaint seeking damages for the defendant's breach of the parties' management agreement. The plaintiff alleged that the defendant breached the agreement by refusing to pay the 2008 management fees owed to the plaintiff under the terms of the agreement. The following factual allegations are taken from the amended complaint and the attached exhibits.

On December 12, 2003, the parties entered into an agreement

whereby the plaintiff undertook the duties of a management agent for the defendant. The agreement was executed by Ron Burke, president of the defendant, and Ed Page, president of the plaintiff.[1] Relevant to the litigation in this case, the agreement provided in pertinent part as follows:

"TERM OF AGREEMENT

This Agreement shall run for the period reflected in Exhibit 'A', its initial Term.

Upon expiration of the Initial Term, this agreement shall automatically renew for successive 24-month Terms at an adjusted management fee rate, unless terminated as hereinafter provided.

This Agreement may be terminated by either party, with or without cause, upon written notice of not less than Ninety (90) days prior to the last day of the Initial Term or subsequent 24-month Term."

Exhibit A to the agreement was a schedule of supplies and services and provided in pertinent part as follows:

"1. Management Fee - $22.00 per unit, per month, effective January 1, 2004 through December 31, 2006, (the

[1]The record on appeal reflects that Ron Burke was no longer president of the defendant at the time of this litigation and that Ed Page died during this litigation.

Initial Term) to be auto-debited on the first of each month."

On September 17, 2007, the defendant's attorney wrote to the plaintiff's vice-president advising that the management contract was being terminated as of December 31, 2007. The attorney asserted that the initial term was not defined in exhibit A. Thus, the contract lacked an essential element, rendering it void. Thereafter, the plaintiff commenced this suit.

The defendant answered the amended complaint, raised affirmative defenses, and filed a counterclaim. The parties then filed cross-motions for summary judgment.

On April 29, 2010, the circuit court entered an order granting summary judgment to the plaintiff on its amended complaint and entered a judgment in the amount of $26,010 against the defendant. On May 12, 2010, the plaintiff moved for summary judgment on the defendant's counterclaim. On May 14, 2010, the defendant filed a motion to voluntarily dismiss its counterclaim (735 ILCS 5/2-1009 (West 2008)).

On May 25, 2010, the circuit court granted summary judgment to the plaintiff on the defendant's counterclaim. On May 26, 2010, the defendant filed its notice of appeal.

ANALYSIS

I. Summary Judgment

A. *Standard of Review*

We review the grant of summary judgment *de novo*. *Millennium Park Joint Venture, LCC, v. Houlihan*, 241 Ill. 2d 281, 309 (2010). Where the parties have filed cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Millennium Park Joint Venture, LCC*, 241 Ill. 2d 281 at 309.

B. *Discussion*

Our review in this case is guided by the well-settled principle that "[s]ummary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). In reviewing the grant of summary judgment, the court "must determine whether the record reveals disputed issues of material fact or errors in entering judgment as a matter of law." *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993). Our determination does not depend on the circuit court's reasoning; we may rely on any grounds called for by the record. *Makowski*, 249 Ill. App. 3d at 115.

Evidence inadmissible at trial cannot be considered by the court in support of or in opposition to a motion for summary

judgment. *Watkins v. Schmitt*, 172 Ill. 2d 193, 202 (1996). The defendant points out that neither the contract nor the letter of September 17, 2007, were authenticated, and therefore, the documents would not be admissible at trial. See *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 484-85 (2006) (e-mails attached to an affidavit in support of summary judgment were not admissible where they were not authenticated by their author's affidavit or deposition). Therefore, the defendant maintains that the plaintiff failed to establish its right to summary judgment. We disagree.

We consider the entire record in determining whether summary judgment was properly granted. *Makowski*, 249 Ill. App. 3d at 115. The record, including the responsive pleadings and motions filed by the defendant, does not reveal a genuine question of fact as to the existence of the December 12, 2003, agreement between the parties. See *Klesath v. Barber*, 4 Ill. App. 3d 86, 88 (1972) (merely joining the issues by the pleadings does not preclude granting a motion for summary judgment). According to the affidavit of Gloria Skmomasa, president of the defendant, filed in support of the defendant's motion to dismiss the amended complaint, the plaintiff failed to notify the defendant that the contract would automatically renew unless the defendant cancelled the contract.

The record does not reveal a question of fact as to the defendant's breach of the agreement. Initially, we find the automatic renewal provision unambiguous. *Lewis X. Cohen Insurance Trust v. Stern*, 297 Ill. App. 3d 220, 225 (1998) (interpretation of a contract on appeal is a question of law to be determined *de novo* by the appellate court). Under the applicable rules of construction, our objective is to give effect to the intention of the parties as expressed in the language of the contract. *Lewis X. Cohen Insurance Trust*, 297 Ill. App. 3d at 232. Contract language is not ambiguous simply because the parties disagree upon its meaning. *Lewis X. Cohen Insurance Trust*, 297 Ill. App. 3d at 232.

In clear and plain language, the agreement and accompanying exhibit provided that the initial term of the contract was January 1, 2004 through December 31, 2006 and that, unless the defendant cancelled the agreement by written notice 90 days prior to the expiration of the initial term, which was December 31, 2006, the agreement was automatically renewed for a 24-month period, or until December 31, 2008. There is nothing ambiguous about those terms.

There is no genuine question of fact as to the defendant's breach of the agreement. The defendant did not assert that it provided written notice of cancellation to the plaintiff 90 days

prior to the expiration of the initial term on December 31, 2006. Without that notice, the contract was automatically renewed until December 31, 2008. Nothing in the record disputes the defendant's refusal to pay the 2008 management fee.

Finally, the defendant forfeited his best evidence argument. The defendant acknowledges that this argument was raised at oral argument, and refers this court to page 14 of the transcript. Due to the defendant's failure to comply with appellate rules, we have been unable to locate the transcript of the hearing in the record to confirm the defendant's representation. As the defendant failed to establish that the best evidence argument was raised in the circuit court, the argument is forfeited. See *Benson v. Stafford*, 407 Ill. App. 3d 902, 919-18 (2010).

Based on the record before us, there are no material questions of fact as to the existence of the December 12, 2003, agreement between the parties and the defendant's breach of the agreement. As the automatic renewal provision was unambiguous, as a matter of law, the plaintiff was entitled to summary judgment on its amended complaint.

II. Voluntary Dismissal

A. *Standard of Review*

Section 2-1009(b) of the Code of Civil Procedure (the Code) provides that the circuit court may hear and decide a previously

filed and potentially dispositive motion before ruling on a plaintiff's motion for a voluntary dismissal. 735 ILCS 5/2-1009(b) (West 2008). The court's decision is reviewed for an abuse of discretion. *Morrison v. Wagner*, 191 Ill. 2d 162, 165, 729 N.E.2d 486 (2000).

B. *Discussion*

The defendant does not challenge the grant of summary judgment on its counterclaim. The defendant's contention is that, because its motion for voluntary dismissal was filed prior to the plaintiff's motion for summary judgment on the defendant's counterclaim, the circuit court abused its discretion by ruling on the plaintiff's motion first. The defendant further contends that the plaintiff's motion was not dispositive because the defendant had filed a notice of appeal from the court's order granting summary judgment to the plaintiff on the amended complaint.

According to the parties' stipulation to supplement the record on appeal, the plaintiff's motion for summary judgment on the defendant's counterclaim was filed on May 12, 2009, and the defendant's motion for voluntary dismissal was filed on May 14, 2009. The notice of appeal was filed on May 26, 2009, the day after the circuit court granted summary judgment to the plaintiff on the counterclaim. Thus, the appeal was not pending at the

time the circuit court granted summary judgment to the plaintiff on the defendant's counterclaim.

The defendant's arguments are refuted by the record on appeal. Therefore, the defendant's contention that the circuit court abused its discretion lacks merit.

CONCLUSION

The circuit court's grant of summary judgment to the plaintiff was proper where the record established that there were no genuine issues of material fact as to the existence of the management agreement between the parties and the defendant's breach of the agreement and the plaintiff was entitled to summary judgment as a matter of law. The defendant's contention that the circuit court abused its discretion by ruling on the plaintiff's motion for summary judgment on the defendant's counterclaim before considering the defendant's motion for a voluntary dismissal was refuted by the record.

Affirmed.