FOURTH DIVISION
AUGUST 23, 2012

No. 1-11-2650

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEVIN E. MALLORY and JULIE S. MALLORY,	)	
Plaintiffs-Appellees,	)	
v.	)	Appeal from the Circuit Court of Cook County.
TEN EAST DELAWARE, LLC,	)	
Defendant-Appellant,	)	10 CH 16487
and	)	The Honorable Mary L. Mikva, Judge Presiding.
CHICAGO TITLE AND TRUST COMPANY,	)	
Defendant-Appellee.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

HELD: The circuit court properly granted plaintiff purchasers judgment on the pleadings in their suit for a declaratory judgment that they properly terminated a real estate sales

contract where the seller failed to give them the requisite fourteen days' notice prior to closing. The notice was a condition precedent, and under the contract the date of delivery for the method of service used constituted the date of notice, and the notice was delivered a day late, thereby allowing the plaintiff buyers to terminate the contract.

¶1 BACKGROUND

¶2 The instant case arises from a terminated real estate contract. Plaintiffs-appellees, Kevin E. Mallory and Julie S. Mallory, had executed a contract to purchase a condominium and a parking unit at 10 East Delaware Street in Chicago, Illinois, from defendant, Ten East Delaware, LLC (TED). Plaintiffs executed the purchase contract on April 16, 2007 and TED executed the contract on April 27, 2007. Construction of the building had not yet commenced at the time the parties executed the contract. The initial purchase price of the condominium unit was $1,865,900, and the purchase price of the parking unit was $110,000. The contract called for 10% of the purchase price to be paid and held as earnest money in a segregated account.

¶3 There were several subsequent riders to the purchase contract. On or about October 29, 2007, plaintiffs and TED executed a second rider to the purchase contract, changing the unit being purchase from Unit 26B to unit 33B, and changing the purchase price to $2,150,900, as well as adding another parking spot, totaling a new purchase price of $2,260,900. Plaintiffs also were required to pay additional amounts of $7,575 and $3,715 in upgrades. The second rider also increased the amount of earnest money to reflect the new purchase price. The total amount of earnest money was $239,790, $190,000 of which was secured by a letter of credit.

¶4 Section 6(a) of the contract provided the following regarding setting the closing date:

"The Closing shall occur on a date (the 'Scheduled Closing Date') selected by Seller *not earlier than fourteen (14) days after Seller delivers notice to Buyer* that the Unit is

substantially complete." (Emphasis added.)

¶5 Regarding notice, section 26 of the contract provides:

"All notices and demands required hereunder shall be made *in writing and* the mailing of notice by first-class mail or facsimile transmission on [sic] delivery by a recognized delivery service, such as United Parcel Service or Federal Express, with a written record of delivery, to the Seller or Buyer at the addresses given in this Contract shall be sufficient. *** *If delivery is by a delivery service, the date of delivery shall be the date of delivery on the records of such service*." (Emphasis added.)

¶6 TED maintained that plaintiffs' failure to attend the closing was a default under the contract. Section 9 of the contract concerns defaults and provides the following:

"Defaults. A failure by a party hereto to appear at the Scheduled Closing Date or to enter into an escrow agreement or to make the deposit required thereunder or to perform any other obligations under this Contract shall constitute a default by such party. In the event Buyer shall default hereunder and if such default continues for twenty (20) days following the receipt by the Buyer of Seller's written notice of such default, Seller may elect to terminate this Contract and retain the Earnest Money, together with all other amounts paid pursuant to this Contract, as liquidated damages, however, if Buyer has deposited more than fifteen percent (15%) of the Purchase Price as Earnest Money, exclusive of any interest earned thereon, Seller shall refund to Buyer any amount which remains after subtracting from such amount fifteen percent (15%) of the Purchase Price, excluding any interest owed under this contract and any and all interest that Buyer has, or may have, in

the Premises shall automatically be relinquished by Buyer. In the event Seller shall default hereunder and if such default continues for ten (10) days following the delivery by Buyer to Seller of written notice of such default, Buyer, as Buyer's sole and exclusive remedy, shall have the right either to seek specific performance of this Contract against Seller or to terminate this Contract and receive the return of the Earnest Money, any and all accrued interest thereon, and all other funds paid by Buyer hereunder, upon receipt of which any and all interest that Buyer has, or may have, in the Premises shall automatically be relinquished by Buyer, or such other remedy as provided in the Interstate Land Sales Full Disclosure Act. In the event the Closing does not occur on the Scheduled Closing date due to the fault of Buyer and Seller does not elect to terminate the Contract, at the Closing Buyer shall pay to Seller, as a late closing fee, interest on the total Purchase Price at the rate of eight percent (8%) per annum from the Schedule Closing Date to the actual Closing Date."

¶7 The contract also contained a buyer termination option if the closing did not occur on or prior to March 31, 2010. Paragraph 4 of the first rider provided:

"Notwithstanding anything contained in the Contract to the contrary, in the event the Closing does not occur on or before March 31, 2010, then at any time thereafter and prior to April 10, 2010, Buyer shall have the option to terminate the Contract and receive a refund of the Earnest Money, interest accrued thereon, and all other amounts paid by Buyer to Seller pursuant to this Contract, including amounts paid toward Upgrades, and the parties shall have no further rights or obligations to the other under this Contract.

Buyer shall have no right to terminate under this paragraph on or after April 10, 2010."

¶8 Paragraph 11 of the first rider also provided:

"In any provision of this Contract relating to Buyer's lawful Termination of this Agreement and the refund of Earnest Money, the definition of Earnest Money shall also include the LOC [Letter of Credit]."

¶9 The parties discussed the closing date beginning in early March 2010 in a series of emails and telephone calls between Jeffrey Breaden of TED and plaintiff Kevin Mallory. On March 11, 2010, Breaden sent Mallory a message stating:

"With respect to timing for closing, we had discussed late April/early May. However, we noticed that your contract contains a Buyer termination option if the closing does not occur on or prior to 3/31/10. We are definitely able to close by this date if that is desirable to you. If it isn't, we'll be happy to stick with the late April/early May timeframe, but in this case believe it would be prudent to request a contract modification that addresses the termination option. *** Please let me know your preference regarding the closing ***."

¶10 On March 15, 2010, Mallory responded in a message stating that he would pull the contract to refamiliarize himself with its terms and discuss it with his wife and would set up a time to talk on March 19, 2010.

¶11 On March 17, 2010, Breaden sent plaintiff Kevin Mallory an email stating:

"In advance of our speaking, I took another quick look at the contract to ensure that Ten East Delaware is doing everything necessary to be set for the upcoming closing. Per the

> language of the contract it looks like we need to provide a certain amount of advance notice, so to be cautious I'll go ahead and have our attorney send this notice. This process will allow us to close on 3/31/2010 if that's the date you would prefer. After we speak, we can adjust this date as necessary – I just want to ensure that we do everything necessary to close in your preferred timeframe."

¶12 On that same date, March 17, 2010, TED's counsel, William Ralph, sent plaintiffs a letter by Federal Express (FedEx) which stated that their unit is substantially complete and that "[i]n accordance with the Contract," the closing was scheduled for March 31, 2010, at Chicago Title Insurance Company. Plaintiffs did not receive this notice until the following day, March 18, 2010. The proof of delivery record, attached as an exhibit to the complaint, shows that the delivery date was March 18, 2010, and the "detailed results" record of FedEx, also attached as an exhibit to the complaint, shows that the letter was delivered on March 18, 2010 by being left at the front door of plaintiffs' address.

¶13 Mallory requested an inspection of the unit, and Breaden accompanied Mallory on an inspection of the unit on March 18, 2010, prior to the final inspection, which was scheduled for March 30, 2010.

¶14 In the meantime, on March 22, 2010, plaintiffs' counsel, Elizabeth Todorovic, sent a letter to TED's counsel stating that TED's notice did not comply with the contract because plaintiffs did not receive the notice until March 18, 2010, and thus closing could not occur any earlier than fourteen days after that, on April 1, 2010. TED's counsel, Ralph, responded in a letter dated March 26, 2010, stating that the notice complied with the contract and that TED expected

plaintiffs to close as scheduled on March 31, 2010. Todorovic replied on March 31, 2010, that plaintiffs had elected "to exercise their option to terminate the Contract in accordance with [the Contract]."

¶15 Also on March 31, 2010, Ralph wrote to the plaintiffs, stating:

> "The Buyer is in default under Section 6 of the Purchase Contract for failing to close on the Scheduled Closing Date (as such term is defined in the Purchase Contract). Pursuant to Section 9 of the Purchase Contract, failure of the Buyer to perform any obligation under the Purchase contract constitutes a default by the Buyer. Seller hereby demands that the Buyer cure such default and fulfill its obligations within twenty (20) days after receipt of this notice or Seller may elect to pursue its remedies under the Purchase Contract on account of such default. Seller's remedies include charging a late closing fee in accordance with Section 9 of the Purchase Contract, terminating the Purchase Contract and retaining the Earnest Money, together with any other amounts paid pursuant to the Purchase Contract, as liquidated damages, on the terms set forth in the Purchase Contract or any other remedies set forth in the Purchase Contract."

¶16 Plaintiffs did not schedule a closing within 20 days of their receipt of this letter. Plaintiffs filed a Verified Complaint for Declaratory and Other Relief. TED filed an answer. Plaintiffs moved for judgment on the pleadings pursuant to section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 6/2-615 (West 2010). Plaintiffs maintained that the seller, TED, did not provide adequate notice of a closing date under the contract, and that this was a condition precedent to the contract. TED moved for partial summary judgment on the issue of TED's

notice. On June 30, 2011, the trial court granted plaintiffs' motion for judgment on the pleadings and denied TED's motion for partial summary judgment. In its order, the court determined that the notice requirement was a condition precedent as to which strict compliance was required and that TED did not provide the required fourteen days' notice, entitling plaintiffs to terminate the contract.

¶17 Plaintiff moved for entry of a judgment order and on July 20, 2011, the circuit court entered a judgment order that superseded its order of June 30, 2011, which provided, in pertinent part to this appeal:

"IT IS HEREBY ORDERED that:

A. The Court finds and declares as follows:

(a) Plaintiffs, Kevin E. Mallory and Julie S. Mallory ("Plaintiffs") had no obligation to close on March 31, 2010 under the Condominium Purchase Contract executed April 27, 2007, as amended and supplemented, relating to the purchase of Residential Unit 33B at Ten East Delaware Street, Chicago, Illinois (the "Contract");

(b) Plaintiffs are not in default under the Contract on account of their failing to close on March 31, 2010;

(c) Plaintiffs effectively terminated the Contract pursuant to section 4 of the Contract rider dated June 12, 2009;

(d) Plaintiffs are entitled to: (i) the return of all earnest money paid by Plaintiffs under the Contract, together with interest accrued thereon, and (ii) the

return of all amounts paid by Plaintiffs pursuant to the Contract riders dated April 9, 2009 and August 3, 2009; and

(e) Plaintiffs are entitled to the return of the Irrevoacable Standby Letter of Credit issued by Merrill Lynch Bank USA dated June 26, 2007 in the amount of $190,000 and subsequently renewed (the "Letter of Credit").

B. Defendant Ten East Delaware, LLC is ordered and directed to pay to Plaintiffs the amount of $11,290.00, representing the amounts paid by Plaintiffs pursuant to the Contract riders dated April 9, 2009 and August 3, 2009.

* * *

D. Defendant Ten East Delaware, LLC is ordered and directed to deliver the Letter of Credit to Plaintiffs."

¶18 The judgment order also awarded plaintiffs court costs. TED filed a motion for reconsideration of both orders, which the court denied.

¶19 ANALYSIS

¶20 TED argues on appeal that the court erred in granting plaintiffs judgment on the pleadings due to its failure to provide the required fourteen days' notice of closing required in the real estate contract. Plaintiffs, meanwhile, respond that the grant of judgment on the pleadings in their favor was proper because the required fourteen days' notice prior to closing was a condition precedent to their obligation to perform under the contract, and failing the satisfaction of this condition precedent, they properly exercised their right to terminate the contract. We agree with plaintiffs.

¶21 "In deciding a section 2-615 motion for judgment on the pleadings (735 ILCS 5/2-615(e) (West 1998)), the trial court must examine all pleadings on file, taking as true the well-pleaded facts set forth in the opposing party's pleadings and the reasonable inferences to be drawn therefrom, and determine whether a material factual dispute exists or whether the controversy can be resolved strictly as a matter of law." *Schaffner v. 514 West Grant Place Condominium Ass'n, Inc*., 324 Ill. App. 3d 1033, 1038 (2001) (citing XLP Corporation v. The County of Lake, 317 Ill. App. 3d 881, 884-85 (2000)). Judgment on the pleadings is appropriate in a declaratory judgment action where "the court can determine the relative rights of the parties in the subject matter solely from the pleadings." *Johnson v. Town of Evanston*, 39 Ill. App. 3d 419, 423 (1976). We review a trial court's grant of a motion for judgment on the pleadings *de novo*. *Schaffner*, 324 Ill. App. 3d at 1038 (citing *People ex rel. Shapo v. Agora Syndicate, Inc*., 323 Ill. App. 3d 543 (2001)).

¶22 Here the circuit court granted plaintiffs' motion for judgment on the pleadings based on its finding that the fourteen days' notice requirement in the contract was a condition precedent. "A 'condition precedent is one that must be met before a contract becomes effective or that is to be performed by one party to an existing contract before the other party is obligated to perform.' " *Carollo v. Irwin*, 2011 IL App (1st) 102765 at ¶ 23 (quoting *Catholic Charities of the Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 307 (2000), citing *McAnelly v. Graves*, 126 Ill. App. 3d 528, 532 (1984)). "Conditions precedent in a real estate contract are those that prevent the vesting of title until the condition is complied with." *Carollo*, 2011 IL App (1st) 102765 at ¶ 23 (citing *Koch v. Streuter*, 232 Ill. 594, 597 (1908)). "The intent of the parties to

create a condition precedent to the formation of a contract is a question of law where the language in the instrument is unambiguous." *Carollo*, 2011 IL App (1st) 102765 at ¶ 23 (citing *Thorpe*, 318 Ill. App. 3d at 308, citing *IK Corp. v. One Financial Place Partnership*, 200 Ill. App. 3d 802, 810 (1990)). Where a contract contains a condition precedent, the contract is neither enforceable nor effective until the condition is performed or the contingency occurs; if the condition remains unsatisfied, the obligations of the parties are at an end. *Carollo*, 2011 IL App (1st) 102765 at ¶ 25. "Express conditions precedent in contracts that affect a party's performance are subject to rules of strict compliance." *Carollo*, 2011 IL App (1st) 102765 at ¶ 25 (citing *Regency Commercial Associates, LLC v. Lopax, Inc*., 373 Ill. App. 3d 270, 282 (2007), citing *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 26 (1993)).

¶23 We find the circuit court's determination that the notice provision was a condition precedent is correct. The contract provided: "The Closing shall occur on a date (the 'Scheduled Closing Date') selected by Seller *not earlier than fourteen (14) days after Seller delivers notice to Buyer* that the Unit is substantially complete." (Emphasis added.) TED was required to provide notice to plaintiffs at least 14 days before closing. If 14 days' notice was not given, a closing could not occur and plaintiffs were not required to perform.

¶24 TED argues that the fourteen-day notice requirement was not a condition precedent but, instead, was a constructive condition of exchange as discussed in *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18 (1993), and therefore only required substantial compliance. The court in *MXL Industries* contrasted a condition precedent, which "must be performed either before a contract becomes effective or which is to be performed by one party to an existing contract

before the other party is obligated to perform" (*MXL Industries*, 252 Ill. App. 3d at 25) with a constructive condition of exchange, which is a concept developed to allow the court "to supply terms under which a party's duties to perform are conditioned on the performance to be given in return" (*MXL Industries*, 252 Ill. App. 3d at 26).

¶25 Contrary to TED's argument, in this case the notice provision was required to be fulfilled by TED before plaintiffs were obligated to perform and therefore is a condition precedent. The notice provision was not conditioned on any performance by plaintiffs in return. "[A]n express condition precedent, unless otherwise excused, operates by agreement of the parties to define the satisfaction of a necessary antecedent to a party's performance under the contract." *MXL Industries*, 252 Ill. App. 3d at 26. Because the notice requirement is a necessary antecedent to plaintiffs' performance, it is a condition precedent.

¶26 TED maintains that there remain genuine issues of material fact which precluded judgment on the pleadings because: (1) "[p]laintiffs did not include allegations in the complaint establishing that [Ted's counsel's] letter was the only communication between the parties concerning the close date"; and (2) "TED denied that it gave less than fourteen days' notice of the March 31, 2010 closing date and the substantial completion of [p]laintiffs' unit."

¶27 However, the complaint and answer establish that the March 17, 2010 letter was the only notice of substantial completion given to plaintiffs in writing, and that this notice was sent by FedEx but was not delivered to plaintiffs until March 18, 2010, thus requiring a closing date of no sooner than fourteen days later, which was April 1, 2010. There is no genuine issue of material fact that TED's notice did not comply with the contract and therefore plaintiffs were not

obligated to perform.

¶28 TED also argues that the notice condition precedent was satisfied because plaintiffs had actual notice, relying on *Rogers v. Balsley*, 240 Ill. App. 3d 1005 (1993), and *Vole, Inc. v. Georgacopoulos*, 181 Ill. App. 3d 1012 (1989). In *Rogers*, the plaintiffs' contract with the defendant buyer included a contingency clause making the contract subject to the buyer's ability to obtain financing. *Rogers*, 240 Ill. App. 3d at 1006-07. The buyer sent a letter to the sellers' attorney stating that she was declaring the contract null and void because she could not obtain financing, but the sellers filed suit against the buyer, alleging that she breached the contract's notice provisions. *Rogers*, 240 Ill. App. 3d at 1007-08. The trial court granted the sellers' motion for summary judgment as to liability, denied the buyer's summary judgment motion, and awarded damages to the sellers after a trial. *Rogers*, 240 Ill. App. 3d at 1009. The buyer appealed and the Second District appellate court reversed, holding that although the buyer failed to comply with the contract's technical requirements by directing her notice to the sellers' attorney rather than to the sellers' addresses set forth in the contract, the sellers' attorney received the notice. *Rogers*, 240 Ill. App. 3d at 1011. The court also held that equity prevented a forfeiture because the sellers had actual notice. *Rogers*, 240 Ill. App. 3d at 1011.

¶29 In *Vole*, a lease agreement provided that a lessor had the right to terminate the lease if, within 10 days of receipt from the lessor of a notice of default by lessee, the lessee did not commence correcting the default. *Vole*, 181 Ill. App. 3d at 1018-19. The plaintiff landowner leased commercial property and the lease was subsequently assigned and then subleased. *Vole*, 181 Ill. App. 3d at 1014. The landowner plaintiff filed suit against the assignee and his sublessee

claiming breach of the lease due to the erection of a business sign. *Vole*, 181 Ill. App. 3d at 1014. The lease agreement required that the notice be sent by registered mail. *Vole*, 181 Ill. App. 3d at 1019. The assignee of the lease testified that he received the notice of default. *Vole*, 181 Ill. App. 3d at 1015. The trial court found there was a breach and ordered forfeiture of the lease and repossession by the landowner. The court affirmed the judgment in favor of the landowner, finding that because the assignee "admitted actual receipt of written notice of the lease violations from a representative of plaintiff, plaintiff's failure to send such notice by registered mail did not render such notice invalid." *Vole*, 181 Ill. App. 3d at 1016.

¶30 We note critical distinctions in both cases. In both cases, the time given for notice was not at issue; rather, the means of service of the notice was at issue. In *Rogers*, allegation was that the notice was not sent to the plaintiffs at their home address, as required under the contract but, rather to their attorney. In *Rogers*, the contract provided that "[t]he mailing of a notice by registered mail, return receipt requested, shall be sufficient notice." *Rogers v. Balsley*, 240 Ill. App. 3d at 1007. The court held that the failure to provide notice to plaintiffs at their home address, while a technical breach of the contract, was not a material breach of the contract. *Rogers*, 240 Ill. App. 3d at 1011 ("While plaintiffs are correct that defendant technically breached the contract by not sending the notice to their home address, equitable principles will prevent a forfeiture of a contract in this situation). The date of delivery was not the effective date of notice, as it is in this case. Also, in *Rogers* written notice was provided to the plaintiffs' attorney by the required date, and notice to a party's attorney is imputed as notice to the client. *Rogers*, 240 Ill. App. 3d at 1011. Here, there is no allegation that plaintiffs' attorney received the

notice within the required fourteen days.

¶31 In *Vole*, the *manner* in which the notice was sent was at issue, not the *date* of notice, as is the issue in this case. In *Vole*, the lease agreement required that the notice be sent by registered mail, and the defendant sublessees' only contention was that the notice of default was not sent by registered mail. *Vole*, 181 Ill. App. 3d at 1019. There was no contention that the required 10 days' notice was not given. Thus, the Second District appellate court affirmed the trial court's ruling that the defendant sublessees received sufficient notice because they received actual notice. *Vole*, 181 Ill. App. 3d at 1019. Here, unlike *Vole*, the amount of time given for the notice, and not the means of service of notice, is the issue. There is no argument that the manner of sending the notice *via* FedEx was an improper means of service of the notice. The contract's notice provision provides for sending notice *via* FedEx as one means of proper notice. Rather, unlike *Vole*, the amount of time given for the notice was insufficient and did not comply with the contract. Here, the date of delivery constituted the date of notice and here the notice was delivered a day late.

¶32 TED complains of the "extreme remedy" of termination of the contract in this case, yet the pleadings established that the contract stated the clear requirement that if notice was given via FedEx, the date of delivery would be the date of notice. It is a long-standing rule that though forfeitures are not regarded with favor by courts of equity, the parties to a contract for the sale of land may make time the essence of the contract, and a court has no power to disregard an express stipulation of the parties to that effect, where no fraud or mistake is involved. *Robnett v. Miller*, 303 Ill. 515, 522 (1922). We will enforce the terms, conditions precedent, and requirements in

sales contracts that the parties agreed to and are bound by.

¶33 CONCLUSION

¶34 Under the facts of this case, we conclude that TED's notice did not satisfy the clear condition precedent of fourteen days' notice prior to closing. Under the contract, if notice was sent by FedEx, the date of delivery constituted the date of notice and TED's notice was delivered a day late for the scheduled closing. Therefore, plaintiffs were within their right to exercise their option to terminate the contract. We affirm the judgment entered on the pleadings in favor of plaintiffs ordering the return of all earnest money, the letter of credit, and all amounts paid under the contract, and also awarding plaintiffs court costs.

¶35 Affirmed.