2014 IL App (1st) 131153-U

FIRST DIVISION
SEPTEMBER 30, 2014

No. 1-13-1153

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLEN B. DANIELS and JUDITH DANIELS,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees and Cross-Appellants,	)	Cook County.
	)	
v.	)	
	)	
JAMES MOSER,	)	
	)	
Defendant-Appellant and Cross-Appellee,	)	No. 09 CH 27723
	)	
and	)	
	)	
1600 MUSEUM PARK, LLC, an Illinois Limited Liability Company,	)	
	)	Honorable
	)	Neil Cohen,
Defendant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in granting summary judgment in favor of assignee and against assignor on a claim for lost profits arising under an assignment agreement for the right to purchase a condominium unit; the circuit court did not err in granting summary judgment in favor of assignor and against assignee in an action for declaratory judgment and tortious conduct. Sanctions against assignor under Illinois Supreme Court Rule 375(b) are not warranted under the facts.

¶ 2 This appeal arises from the March 7, 2013 order entered by the circuit court of Cook County, which granted summary judgment in favor of defendants 1600 Museum Park, LLC (1600 Museum Park) and James Moser (Moser), and against plaintiffs Allen Daniels (Allen) and Judith Daniels (Judith) (collectively, the Daniels), in a dispute over the purchase of a condominium unit in Chicago, Illinois. The March 7, 2013 order also granted summary judgment in favor of the Daniels and against Moser on his amended counterclaim for lost profits, and granted summary judgment in favor of 1600 Museum Park on its counterclaim for declaratory judgment and breach of contract against the Daniels. Subsequently, the circuit court entered a final order on March 12, 2013, which dismissed a surviving count in Moser's amended counterclaim against the Daniels. On appeal, Moser challenges the circuit court's March 7, 2013 ruling, which granted summary judgment in favor of the Daniels on Moser's amended counterclaim for lost profits. On cross-appeal, the Daniels challenge the circuit court's March 7, 2013 order, which granted summary judgment in favor of Moser on the Daniels' action against Moser regarding the condominium unit. The Daniels do not appeal from the circuit court's ruling granting summary judgment in favor of 1600 Museum Park on the Daniels' action against it and on 1600 Museum Park's counterclaim for declaratory judgment and breach of contract against the Daniels. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On February 11, 2006, Moser entered into a pre-construction sales contract with developer 1600 Museum Park to purchase a condominium unit for the amount of $769,500. The sales contract specified that the property under contract was "Unit #3102" located at "1621 South

Prairie Avenue, Chicago, Illinois." The legal description attached to the sales contract denoted the same unit number and address for the property. Moser paid a total of $38,475 in earnest money toward the property. Subsequent to the execution of the sales contract, Unit 3102 was renumbered as Unit 3101. No substantive changes were made to the unit regarding its configuration or design. Thereafter, Moser and 1600 Museum Park modified the sales contract to reflect the new renumbered unit—Unit 3101.

¶ 5 On February 9, 2008, Moser and the Daniels executed an assignment agreement, by which Moser agreed to assign his rights under the sales contract to the Daniels. The assignment agreement specified that, conditional upon 1600 Museum Park's consent, the Daniels would purchase "Unit 3101" at "1629 S. Prairie Avenue" for a sum of $919,000. The assignment agreement stated that the Daniels acknowledged that, at the time of closing, a portion of the sum "representing the difference between [Moser's] purchase price from [1600 Museum Park] and the amount payable by [the Daniels] *** shall be distributed to [Moser] for and in consideration of this [a]ssignment." Pursuant to the assignment agreement, the Daniels paid $45,940 in earnest money to the escrow agent, Coldwell Banker. A copy of the amended sales contract, which reflected the newly renumbered unit (Unit 3101) and the deletion of Moser's original contract price of $769,500, was provided to the Daniels. On February 11, 2008, 1600 Museum Park approved the assignment agreement.

¶ 6 In June 2009, despite prior closing extensions granted by 1600 Museum Park, the Daniels failed to close on the property.

¶ 7 On August 10, 2009, the Daniels filed an 8-count complaint against 1600 Museum Park and Moser for declaratory judgment, injunction, breach of contract, breach of the Illinois

Consumer Fraud Act, breach of the Federal Interstate Land Sales Act, common law fraud and punitive damages.

¶ 8 On September 15, 2009, 1600 Museum Park filed a "counter-complaint and third-party complaint" for declaratory judgment and breach of contract against the Daniels and third-party Coldwell Banker (the 1600 Museum Park counterclaim). Count I sought the declaration that 1600 Museum Park was entitled to retain the Daniels' earnest money ($45,940) as a result of the Daniels' failure to close on the purchase of the condominium unit, and asked that Coldwell Banker be ordered by the court to release the earnest money held in escrow. Count II alleged that the Daniels breached a purchase order for the installation of certain "extras/upgrades" in the condominium unit in the amount of $59,792; that the Daniels had only paid a 50% deposit on the cost of the upgrades ($29,896); that the Daniels refused to pay the remaining balance on the cost of the upgrades ($29,896); and that 1600 Museum Park was entitled to judgment in its favor on the entire cost of the upgrades ($59,792).

¶ 9 On November 16, 2009, Moser filed a counter-complaint against the Daniels, which was later amended on January 21, 2010. Moser's amended counterclaim alleged that the Daniels failed to comply with their contractual obligations under the assignment agreement, thus, depriving him of $149,500 in profits ($919,000 - $769,500) that he would have received had the Daniels closed on the property (count I). Moser's amended counterclaim also alleged that, as a result of the Daniels' breach of the assignment agreement, Moser was unable to recover the $38,475 earnest money that he had paid to 1600 Museum Park in February 2006 (count II).

¶ 10 On December 10, 2009, the Daniels filed a first amended complaint against 1600 Museum Park and Moser, seeking declaratory judgment and alleging constructive trust, rescission of contract, breach of the Federal Interstate Land Sales Act, breach of the Illinois

Consumer Fraud Act, punitive damages, breach of contract, breach of the Illinois Real Estate License Act, and common law fraud. On January 5, 2011, the Daniels filed a second amended complaint against 1600 Museum Park and Moser, alleging declaratory judgment, constructive trust, rescission of contract, breach of contract, professional negligence, and common law fraud.

¶ 11 On January 12, 2011, the Daniels filed an answer and affirmative defenses to Moser's amended counterclaim, arguing that Moser failed to comply with his obligations under the assignment agreement; that the Illinois Statute of Frauds barred Moser's claims against them; and that Moser failed to mitigate his damages.

¶ 12 On March 26, 2012, the Daniels filed a final amended complaint—the third amended complaint—alleging declaratory judgment (count I), constructive trust (count II), and rescission of contract (count III) against both 1600 Museum Park and Moser, as well as alleging breach of contract (count IV) against 1600 Museum Park, common law fraud (count VI) against Moser, and breach of contract (count VII) against Moser.[1] The premise underlying the allegations against Moser in the third amended complaint was that Moser had no enforceable interest in Unit 3101, but rather only in Unit 3102. Under the third amended complaint, the Daniels sought to recover damages "not less than $75,836," which represented the amount held in escrow for the earnest money ($45,940) paid by the Daniels, plus deposits for the cost of upgrades to the condominium unit ($29,896) which the Daniels had also paid in connection with the purchase of the property.

¶ 13 On August 30, 2012, the Daniels filed a motion for summary judgment on Moser's amended counterclaim, arguing that they did not breach the assignment agreement; that Moser failed to fully comply with all of his obligations under the assignment agreement; that, under the

[1] Count V was "deleted" and left blank in the third amended complaint.

assignment agreement, Moser was obligated to close on the property upon the Daniels' failure to do so; that any foreseeable "lost profits" were predicated upon Moser's closing on the property and paying out-of-pocket to do so; and that Moser had already obtained full credit from 1600 Museum Park for the $38,475 in earnest money that he had paid to 1600 Museum Park. On December 3, 2012, Moser filed a response to the Daniels' motion for summary judgment on his amended counterclaim, arguing that he was entitled to recover lost profits of $149,500 as a result of the Daniels' failure to close on the property. In his response, Moser also noted that he "no longer makes any claim" for the loss of his earnest money under count II of his amended counterclaim. On December 14, 2012, the Daniels filed a reply in support of their motion for summary judgment as to Moser's amended counterclaim.

¶ 14 On October 11, 2012, Moser filed a motion for summary judgment on count I (lost profits count) of his amended counterclaim against the Daniels, and on all counts in his favor as to the Daniels' third amended complaint alleged against him (counts I, II, III, VI and VII). Moser's motion for summary judgment alleged that there was no genuine issue of material fact that he was entitled to a lost profit of $149,500 as a result of the Daniels' breach of the assignment agreement by failing to close on the property; and that there was no basis to sustain the Daniels' claims against him. On December 3, 2012, the Daniels filed a response to Moser's motion for summary judgment. On December 14, 2012, Moser filed a reply in support of his motion for summary judgment.

¶ 15 On October 12, 2012, 1600 Museum Park filed a motion for summary judgment, asserting that neither legal nor factual support existed to sustain the counts against it in the Daniels' third amended complaint (counts I to IV), that 1600 Museum Park was entitled to receive all the earnest money paid by the Daniels that were held in escrow, and that judgment

should be entered in 1600 Museum Park's favor for the $29,896 remaining balance on the cost of the upgrades owed by the Daniels.

¶ 16 On March 7, 2013, the circuit court entered a written order granting summary judgment in favor of both 1600 Museum Park and Moser on the Daniels' third amended complaint. The circuit court found that the evidence showed that the condominium unit that Moser originally contracted to purchase was the same unit assigned to the Daniels; that the evidence established that the originally numbered Unit 3102 was the same condominium unit as the renumbered Unit 3101; that the sales contract between Moser and 1600 Museum Park was modified to reflect this renumbering prior to Moser's execution of the assignment agreement with the Daniels; and that the Daniels offered no evidence to the contrary that Moser had an enforceable interest in Unit 3101. The circuit court also granted summary judgment in favor of 1600 Museum Park as to its counterclaim for the Daniels' earnest money under the sales contract, as well as for $29,896 in unpaid cost of the upgrades owed by the Daniels. The circuit court further granted summary judgment in favor of the Daniels and against Moser on count I (lost profits) of his amended counterclaim, finding that nothing in the assignment agreement required the Daniels to compensate Moser for his purported lost profits of $149,500 in the event that no closing occurred. The circuit court, however, found that the Daniels were not entitled to summary judgment on count II (loss of earnest money) of Moser's amended counterclaim, noting that the Daniels relied upon an unauthenticated "termination agreement" between Moser and 1600 Museum Park as evidence. Thus, the court noted that the only remaining claim was count II (loss of earnest money) of Moser's amended counterclaim.

¶ 17 On March 12, 2013, the circuit court entered a final order, which noted that Moser agreed to voluntarily dismiss count II of his amended counterclaim against the Daniels.

¶ 18 On April 5, 2013, Moser filed a notice of appeal, challenging the circuit court's March 7, 2013 ruling which granted summary judgment in favor of the Daniels on count I (lost profits) of his amended counterclaim. On April 10, 2013, the Daniels filed a notice of cross-appeal, challenging the circuit court's March 7, 2013 ruling which granted summary judgment in favor of Moser on the Daniels' third amended complaint (counts I, II, III, VI and VII). The Daniels do not appeal from the circuit court's ruling granting summary judgment in favor of 1600 Museum Park on the Daniels' third amended complaint (counts I to IV) and on 1600 Museum Park's counterclaim for the Daniels' earnest money and the remaining balance of the unpaid cost of the upgrades.

¶ 19 ANALYSIS

¶ 20 We determine the following issues on appeal: (1) whether the circuit court erred in granting summary judgment in favor of the Daniels and against Moser on count I (lost profits) of his amended counterclaim; and (2) whether the circuit court erred in granting summary judgment in favor of Moser on the Daniels' third amended complaint.

¶ 21 We first determine whether the circuit court erred in granting summary judgment in favor of the Daniels and against Moser on count I (lost profits) of his amended counterclaim, which we review *de novo*. See *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 45 (2008).

¶ 22 Moser argues that the circuit court erred in granting summary judgment in favor of the Daniels and against him on count I of his amended counterclaim. He contends that there was no dispute that the Daniels were represented by counsel during all relevant times, that they failed to close on the property as required by the assignment agreement, and that, as a result, Moser lost profits in the amount of $149,500—the monetary difference between his original purchase price ($769,500) and the Daniels' contract price for the condominium unit ($919,000). Moser

maintains that he presented facts that required the entry of summary judgment in his favor on his lost profits claim. Moser argues that, because the Daniels' conduct was a material breach of the parties' contract, he was excused from having to close on the property himself and from performing any further obligations under the assignment agreement.

¶ 23 The Daniels counter that the circuit court properly granted summary judgment in their favor on count I of Moser's amended counterclaim. The Daniels argue that Moser "induced" them to enter into the assignment agreement for Unit 3101, rather than Unit 3102; that Moser never had a contract to purchase Unit 3101; that Moser concealed critical facts in his sales contract to purchase the condominium unit by deleting his original purchase price from the copy of the sales contract that was provided to the Daniels; and that the "lost profits" sought by Moser were not within the contemplation of the Daniels at the time they signed the assignment agreement. The Daniels further contend that although the circuit court granted judgment in favor of 1600 Museum Park on its claim for the Daniels' earnest money and costs incurred for the upgrades, that did not automatically entitled Moser to an entry of summary judgment on his claim for lost profits against the Daniels. Further, they argue that any renumbering of the condominium units occurred after the execution of the assignment agreement; that they had no duty to Moser under the assignment agreement to purchase Unit 3101; that the assignment agreement did not set forth any damages to which Moser would be entitled upon the Daniels' failure to close on the property; that Moser was not excused from his obligations under the assignment agreement; and that Moser failed to produce evidence that he mitigated his alleged "lost profits" damages.

¶ 24 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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." 735 ILCS 5/2-1005(c) (West 2012). In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party. *Pielet v. Pielet*, 2012 IL 112064, ¶ 29. "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002). When parties file cross-motions for summary judgment, as was the case here, they agree that only a question of law is involved and invite the court to decide the issues based on the record. See *Pielet*, 2012 IL 112064, ¶ 28. "However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Id.* A reviewing court may affirm a circuit court's grant of summary judgment on any basis apparent in the record, regardless of whether the circuit court relied on that basis or whether the court's reasoning was correct. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

¶ 25 In count I of Moser's January 21, 2010 amended counterclaim, he alleged that the Daniels failed to comply with their contractual obligations under the assignment agreement, thus, depriving him of $149,500 in profits ($919,000 - $769,500) that he would have received had the Daniels closed on the property. In the Daniels' answer and affirmative defenses to Moser's amended counterclaim, they argued that Moser failed to comply with his obligations under the assignment agreement; that the Illinois Statute of Frauds barred Moser's claims against them; and that Moser failed to mitigate his damages. Thereafter, the Daniels and Moser filed cross-motions for summary judgment on count I of Moser's amended counterclaim. In their motion for summary judgment, the Daniels argued that they did not breach the assignment agreement; that Moser failed to fully comply with all of his obligations under the assignment agreement; that,

under the assignment agreement, Moser was obligated to close on the property upon the Daniels' failure to do so; and that any foreseeable "lost profits" was predicated upon Moser's closing on the property and making out-of-pocket payments. In Moser's motion for summary judgment, Moser argued that there was no genuine issue of material fact that he was entitled to a lost profit of $149,500 as a result of the Daniels' breach of the assignment agreement by failing to close on the property. In its March 7, 2013 ruling, the circuit court granted summary judgment in favor of the Daniels and against Moser on count I of his amended counterclaim, finding that nothing in the assignment agreement required the Daniels to compensate Moser for his purported lost profits of $149,500 in the event that no closing occurred.

¶ 26 An assignment agreement is interpreted or construed according to the rules of contract construction. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 48. The principal objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the agreement. *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 24. The plain and ordinary meaning of the language of the contract is the best indication of the parties' intent. *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 31. "The agreement is to be interpreted as a whole and, when possible, effect and meaning must be given to every provision in the contract." *Federal Insurance Co. v. Konstant Architecture Planning, Inc.*, 388 Ill. App. 3d 122, 128 (2009). Where the terms of the contract are clear and unambiguous, they will be given their plain and ordinary meanings. *Id.* "In the absence of an ambiguity, the parties' intent is ascertained solely from the words of the contract itself, and this court will not interpret a contract in a manner that would nullify or render provisions meaningless or that is contrary to the plain and obvious meaning of the language used." *Id.*

¶ 27 Under the assignment agreement, the parties agreed that, at the time of closing, "a portion of [a] sum, representing the difference between [Moser's] purchase price from [1600 Museum Park] and the amount payable by [the Daniels] hereunder [$919,000] *** shall be disbursed to [Moser] for and in consideration of this [a]ssignment." Paragraph 6 of the assignment agreement specified that in the event the Daniels "fail to complete the closing of this transaction, by default or otherwise, [Moser] shall, at all times, remain obligated to complete the acquisition of the [p]remises in accordance with the terms of the [sales contract between Moser and 1600 Museum Park]." Nothing in the plain language of the assignment agreement required the Daniels to make any payments to Moser directly at closing or any other time, nor did it require the Daniels to compensate Moser for his "lost profits" in the event that no closing occurred. Nothing in the language of the assignment agreement obligated the Daniels to make any payments other than the $919,000 purchase price for the property at the time of closing. Therefore, Moser has not presented any evidence to raise a genuine issue of material fact from which a reasonable jury could conclude that the Daniels were liable to pay Moser $149,500 in expected profits, notwithstanding that the condition precedent—the closing of property—did not occur.

¶ 28 Moreover, we find that no evidence was presented to raise a genuine issue of material fact as to whether the lost profits were reasonably within the contemplation of the Daniels at the time of the execution of the assignment agreement. "Lost profits may be recovered as damages resulting from a breach of contract if both parties at the time of entering into the contract contemplated that such profits would be lost if the contract was breached." *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 706 (2010). A court will award lost profits only if the loss is proved with a reasonable degree of certainty; the court is satisfied that the wrongful act of the defendant caused the loss of profits; and the profits were reasonably within the contemplation of

the defaulting party at the time the contract was executed. *Id.* The record shows that, at the time the assignment agreement was executed, Moser provided the Daniels with a copy of the amended sales contract between Moser and 1600 Museum Park, which reflected the newly renumbered unit (Unit 3101). However, Moser's original purchase price of $769,500 was deleted from that copy of the amended sales contract. Although the terms of the assignment agreement stated that a sum representing the difference between Moser's original purchase price and the Daniels' purchase price of $919,000 would be disbursed to Moser at closing, nothing in the assignment agreement, or the pleadings, affidavits and depositions in the record, shows that the Daniels knew what profit Moser expected to make at the time of closing. The record fails to show that the Daniels knew Moser's original purchase price was $769,500 when they agreed to buy the property for $919,000 and, thus, the Daniels would have no knowledge that Moser stood to gain a profit of $149,500 had the closing on the property taken place. Thus, nothing in the record which was presented to the trial court raised a genuine issue of material fact as to whether the Daniels had knowledge of Moser's original purchase price for the property. Therefore, no reasonable jury could conclude that the amount Moser now seeks as lost profits—$149,500—was reasonably within the contemplation of the Daniels at the time of the execution of the assignment agreement. Additionally, under the plain language of the assignment agreement, Moser was obligated to close on the property himself in the event that the Daniels failed to do so. While Moser argues that he was excused from closing on the property because the Daniels materially breached the assignment agreement, it is not the place of this court to determine whether the Daniels' conduct was a material breach of the parties' agreement. See *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006) (the materiality of a breach is a question of fact to be determined by the trier of fact). However, regardless of whether or not the Daniels

materially breached the assignment agreement, we find that, as discussed, nothing in the record raises a genuine issue of material fact that Moser was entitled to $149,500 under the assignment agreement in the absence of a closing on the property; or that the $149,500 was reasonably within the contemplation of the Daniels at the time they executed the assignment agreement. Accordingly, we hold that the circuit court did not err in granting summary judgment in favor of the Daniels and against Moser on count I of his amended counterclaim.

¶ 29 We next determine whether the circuit court erred in granting summary judgment in favor of Moser on the Daniels' third amended complaint.

¶ 30 We note that the Daniels state in their brief that if this court affirms the circuit court's judgment against Moser on count I (lost profits) of his amended counterclaim, the Daniels "consider this matter at an end and have no desire to proceed with their claims [in the third amended complaint] against Moser." Thus, our analysis could end here. However, we choose to address this issue briefly.

¶ 31 The Daniels' third amended complaint alleged declaratory judgment (count I), constructive trust (count II), rescission (count III), common law fraud (count VI), and breach of contract (count VII) against Moser. In its March 7, 2013 ruling, the circuit court granted summary judgment in favor of both Moser and 1600 Museum Park.[2] The circuit court found that the evidence showed that the condominium unit that Moser originally contracted to purchase was the same unit assigned to the Daniels; that the evidence established that the originally numbered Unit 3102 was the same condominium unit as the renumbered Unit 3101; that the sales contract

[2] As discussed, the Daniels do not appeal from the circuit court's granting of summary judgment in favor of 1600 Museum Park on the Daniels' third amended complaint counts against it, nor on 1600 Museum Park's counterclaim for the Daniels' earnest money and the remaining balance of the unpaid cost of the upgrades.

between Moser and 1600 Museum Park was modified to reflect this renumbering prior to Moser's execution of the assignment agreement with the Daniels; and that the Daniels offered no evidence to the contrary that Moser had an enforceable interest in Unit 3101.

¶ 32 We find that the primary basis upon which the Daniels asserted counts I, II, III, VI and VII against Moser in their third amended complaint, was that Moser had no enforceable interest in Unit 3101, but rather only an enforceable interest in Unit 3102.

¶ 33 In his affidavit, Moser asserted that, in February 2006, he entered into a sales contract with 1600 Museum Park to purchase a 1900 square foot, three-bedroom penthouse condominium unit on the northeast corner of the 31st floor of the building. At that time, the building was in the preliminary planning stage and had yet to be built. The condominium unit contracted for under the sales contract was initially designed as "Unit #3102 and Garage Unit #130, 131." He stated that, after he entered the sales contract, he was advised by representatives of 1600 Museum Park that the final architectural and construction plans for the 31st floor of the building resulted in a renumbering of the units. The condominium unit he contracted to purchase, which was originally designated as Unit 3102, was relabeled as Unit 3101. The renumbered Unit 3101 was the exact same 1,900 square foot, three-bedroom penthouse condominium unit on the northeast corner of the 31st floor as contemplated by the original sales contract, and the renumbered Unit 3102 was a one-bedroom unit. Moser asserted that he and a representative of 1600 Museum Park, Ronald Shipka, Jr. (Shipka), amended the sales contract to reflect the new unit number, and the change was initialed by both Moser and Shipka. He stated that the legal description of the initial Unit 3102 and the renumbered Unit 3101 was the same.

¶ 34 Shipka's affidavit stated that, in February 2006, Moser and 1600 Museum Park entered into a pre-construction sales contract for the purchase of a condominium unit, Unit 3102, at 1621

South Prairie Avenue in Chicago, Illinois. At that time, the City of Chicago had yet to assign a common address for the development of the building. Shipka asserted that the City of Chicago later assigned the development a common address of 1629 South Prairie Avenue. No building exists with an address of 1621 South Prairie Avenue. Shipka also stated that, after the execution of the sales contract, 1600 Museum Park renumbered the 31st floor units and Unit 3102 became Unit 3101. Shipka asserted that 1600 Museum Park and Moser then amended the sales contract to reflect this change. The legal description of Unit 3102 became the legal description for Unit 3101. On February 11, 2008, 1600 Museum Park approved the assignment agreement entered into between Moser and the Daniels, assigning to the Daniels Moser's right to purchase Unit 3101 under the sales contract.

¶ 35 The affidavit of Jeff Renterghem (Renterghem), an architect for the condominium building, stated that as of February 11, 2006, there was no formal post office address designation for the building, and that the street address for the building was estimated to be 1621 South Prairie Avenue at the time Moser and 1600 Museum Park entered into the sales contract. As of February 11, 2006, the 31st floor units in the building were designated as Units 3102 through Unit 3105. Renterghem stated that between February 11, 2006 and February 9, 2008, Unit 3102 was relabeled as Unit 3101 as a result of an architectural modification on the 31st floor. He asserted that, "[w]hether labeled as [U]nit 3102 or 3101, this [u]nit was always a 3-bedroom unit, located at the northeast corner of the 31st floor." Renterghem stated that the newly numbered Unit 3102 was a one-bedroom unit. Between February 11, 2006 and February 9, 2008, the address for the condominium building changed from 1621 South Prairie Avenue to 1629 South Prairie Avenue. Renterghem's deposition testimony supports the statements in his affidavit.

¶ 36 Allen testified in his deposition that he did not know "one way or the other" whether Moser had a contractual right to purchase Unit 3101. He assumed that Moser had no assignable interest in Unit 3101, based solely on the fact that the amended sales contract between Moser and 1600 Museum Park showed that "Unit 3102" had been crossed out and changed to "Unit 3101" by handwriting. He testified that no representative of 1600 Museum Park ever told him that Moser did not have an assignable interest in Unit 3101. Allen testified that the only reason he did not participate in the closing on the property was because he and his wife, Judith, were unable to sell their home in Seattle, Washington.

¶ 37 Judith testified in her deposition that the only basis upon which she believed Moser had no assignable interest in Unit 3101 was that the amended sales contract between Moser and 1600 Museum Park showed that Unit 3102 had been crossed out and replaced with Unit 3101. She testified that she never asked any representatives of 1600 Museum Park whether there was any issue as to Moser's right to purchase Unit 3101.

¶ 38 Viewing the pleadings, depositions, and affidavits of record in the light most favorable to the Daniels, we find that no reasonable trier of fact could conclude that Moser had no enforceable interest in Unit 3101. The Daniels point to certain floor plans attached to the appendix of their brief, in support of their claim that Units 3101 and 3102 were two separate units. We find that, even assuming this evidence to be properly before this court, the floor plans referenced by the Daniels indeed show Units 3101 and 3102 as separate units. However, nothing on the floor plans indicate that they were side-by-side comparisons of the original Unit 3102 and the newly numbered Unit 3101. Rather, the two units both appear to be the newly renumbered units depicting Unit 3101 as a three-bedroom unit and Unit 3102 as a one-bedroom unit. We do not see how this advances the Daniels' argument in any way. Therefore, no evidence was

presented which raised a genuine issue of material fact as to whether Moser had the right to assign the newly numbered Unit 3101 to the Daniels under the assignment agreement. Accordingly, because, as discussed, the primary basis upon which the Daniels asserted their claims against Moser was that Moser had no enforceable interest in Unit 3101, we hold that the circuit court did not err in granting summary judgment in favor of Moser on counts I, II, III, VI and VII of the Daniels' third amended complaint.

¶ 39 The Daniels further argue that this court should reinstate the Illinois Real Estate License Act claim (count VIII) of their first amended complaint, as well as the professional negligence claim (count V) of their second amended complaint, which had been dismissed by the circuit court on November 16, 2010 and December 1, 2011, respectively. We find that the Daniels have procedurally forfeited any challenge to the prior dismissals of those claims pursuant to the circuit court's November 16, 2010 and December 1, 2011 orders. See *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713 (2010).

¶ 40 In order to avoid forfeiture on appeal, "a party wishing to preserve a challenge to an order dismissing with prejudice fewer than all of the counts in his complaint has several options." *Id.* at 719. "First, the plaintiff may stand on the dismissed counts and argue the matter at the appellate level." *Id.* Second, the plaintiff may file an amended complaint realleging, incorporating by reference, or referring to the claims set forth in the prior complaint." *Id.* Under this second option, a simple paragraph or footnote in the amended pleadings notifying the defendant and the court of the plaintiff's intention to preserve the dismissed portions of his former complaints for appeal is sufficient. *Id.*, citing *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114 (1996). "Third, a party may perfect an appeal from the order dismissing fewer than all of the counts of his or her complaint prior to filing an amended pleading that does

not include reference to the dismissed counts." *Vilardo*, 406 Ill. App. 3d at 719. In the case at bar, we find that the Daniels had not pursued any one of these options and, thus, forfeited review on appeal of all previously dismissed counts of their original complaint, first amended complaint and second amended complaint. See *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 28 (plaintiff forfeited his right to seek review of the circuit court's dismissed claims, where the second and third amended complaints did not "incorporate, reallege or otherwise refer to those counts, and no appeal was taken before the filing of the second and third amended complaints"); *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 30 ("[w]here there is a completed amendment that does not refer to or adopt a prior pleading, the earlier pleading ceases to be part of the record and is abandoned and withdrawn for most purposes"). Therefore, we hold that neither the Daniels' prior Illinois Real Estate License Act claim nor the professional negligence claim are properly before this court on appeal.

¶ 41 The Daniels next request that this court impose sanctions against Moser under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). They contend that the assignment agreement imposed no obligation upon them to close on the property, but merely obligated them to sign the contract for the purchase of Unit 3101. They argue that because Moser did not close on the property himself, he never paid his purchase price of $769,500 and, thus, had no profits to lose under the assignment agreement. The Daniels further argue that Moser "did not even lose his earnest money deposit of $38,475, since 1600 [Museum Park] credited that amount to Moser in allowing him to purchase a new piece of property ***," and that Moser had not established that the Daniels' conduct was the direct cause of his alleged lost profits.

¶ 42 Moser counters that he is pursuing this appeal in good faith because his arguments on appeal are "objectively and reasonably well-grounded in the record and in the authority argued and cited."

¶ 43 Rule 375(b) provides that, "[i]f, after consideration of an appeal or other action pursued in the reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, *** an appropriate sanction may be imposed upon any party or the attorney ***. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 44 We decline to impose sanctions against Moser under Rule 375(b). Based on our review of Moser's briefs on appeal, we find that the appeal was brought in good faith in an attempt, *albeit* unsuccessful, to argue that his alleged lost profits of $149,500 were within the reasonable contemplation of the Daniels, where language existed in the assignment agreement that, at closing, Moser would receive a portion of a sum representing the difference between Moser's undisclosed original purchase price of the condominium unit and the Daniels' purchase price of $919,000. Thus, we cannot conclude that Moser's appeal from the circuit court's March 7, 2013 ruling on count I of his amended counterclaim was frivolous. Therefore, we decline to impose Rule 375(b) sanctions against Moser.

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.