2014 IL App (1st) 13-1853-U

THIRD DIVISION
September 10, 2014

No. 1-13-1853

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RYAN DELONG, Plaintiff-Counterdefendant-Appellee, v. WALTON ON THE PARK SOUTH, LLC, Defendant-Counterplaintiff-Appellant, and COLDWELL BANKER RESIDENTIAL REAL ESTATE, LLC, Defendant.	)	Appeal from the Circuit Court of Cook County. 10 L 14266 The Honorable Raymond Mitchell, Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: In this real estate sales contract dispute, the trial court erred in fully granting summary judgment in favor of plaintiff Buyer and denying defendant Seller's cross-motion for summary judgment. Contrary to the trial court's findings, the sales contract did not provide Buyer with a right to terminate the contract based on a construction delay. Rather, it only provided the option for Buyer to obtain the return of his earnest money. A question of fact existed as to whether Buyer waived enforcement of that option, however. This court reversed in part, affirmed in part, and remanded the case.

¶ 2 Defendant-appellant Walton on the Park South, LLC (Walton), the owner and developer of a residential condominium complex in Chicago, appeals from the circuit court order denying its cross-motion for summary judgment and granting summary judgment in favor of plaintiff-appellee, Ryan DeLong (DeLong). DeLong, who was the buyer of Walton's condominium unit, ultimately terminated the preconstruction sales contract on the property, citing a delay in construction, and demanded the return of his earnest money deposit. The trial court held the contract permitted such a termination right and the return of DeLong's deposit. On appeal, Walton now challenges the trial court's interpretation of the contract, arguing that under the plain language of the contract there was no right to termination and alternatively that DeLong waived his right to enforce the termination provision or was estopped from doing so. Walton instead urges this court to grant its summary judgment motion, which also seeks liquidated damages for DeLong's failure to close on the property. We reverse in part, affirm in part, and remand the case for further consideration.

¶ 3 BACKGROUND

¶ 4 This case arises out of a breach of contract action filed by DeLong to obtain the return of his earnest money deposit when he terminated his condominium sales contract. The record, together with the motions, complaints, and attached documents, reveals the following. In late October 2007, DeLong and Walton executed the preconstruction sales contract wherein DeLong agreed to purchase a condominium and parking space (the Unit) in Walton’s condominium complex, which was then in the preconstruction stage of development. The sales contract appeared to be a standard form contract prepared by Walton, allowing for review and modification by the parties’ attorneys. Certain provisions of the contract were modified, and these modifications were accepted by Walton on November 16, 2007, in the supplemental rider.

The rider amended, *inter alia*, the provisions at issue in this dispute: paragraphs 9(a), 10(a), and 10(b). The contract listed a purchase price of $488,000, 10 percent of which was to be paid as earnest money before construction of the Unit took place. DeLong accordingly paid 5 percent ($24,400) to Walton in October 2007 and an additional 5 percent ($24,400) 12 months thereafter, on October 13, 2008.[1] The earnest money was deposited to Coldwell Banker as escrowee.

¶ 5 Relevant to this appeal, paragraph 9 was entitled "CLOSING DATE AND TITLE INSURANCE." Paragraph 9(a) specifically provided that the Unit was to be substantially completed by Fall 2009, subject to delay by strikes, material shortages, labor shortages, casualties, or other causes beyond Walton's control. Paragraph 9(a) clarified that "substantial completion" meant the Unit would be "in a broom clean and otherwise habitable condition," excluding minor adjustments and matters. By way of illustration, this meant that the Unit would have fully completed wall and floor surfaces, operating appliances, mechanical systems, and cabinetry. Under paragraph 9(a), the closing date was to follow after substantial completion of the Unit, and per the rider, these issues were to be "as reasonably agreed upon by Seller and Buyer." The rider also provided that Walton was to give DeLong 30 days' notice of the closing, rather than the original 7 days' notice.

¶ 6 Paragraph 10, entitled "CONSTRUCTION," provided that Walton was to construct the Unit according to the "plans and specifications" on file. The pertinent provisions of 10(a) are provided as follows, with the strikethrough text indicating language that was deleted from the original contract by the rider, and the underlined text indicating language that was added:

[1] In his complaint, DeLong wrote that he deposited 10 percent of the purchase price as his earnest money, but then stated this totaled $48,400 (when in reality 10 percent would have been $48,800). This apparently was a scrivener's error, as Walton admitted in answer to the complaint that DeLong had deposited $48,800 as earnest money with Coldwell Banker. Walton now curiously identifies the escrowed money as $48,000. Given the admissions below, and the fact that the trial court's order states the earnest money amounts to $48,800, we presume the amount of earnest money is in fact $48,800.

"Seller reserves the right to substitute or change materials or brand names to those of similar color or similar or better quality or utility and to make such changes in construction as may be required by material shortages, strikes, work stoppages, labor difficulties, or such emergency situations as may, ~~in Seller's judgment~~, require the same. Seller agrees to proceed diligently with construction work. ~~Seller shall not be liable, and the obligation of Buyer hereunder shall not in any manner be excused or varied~~. Seller shall return all escrow money to Buyer upon request for same from Buyer to Seller, if construction shall be delayed beyond January 1, 2010 or prevented by war, acts of God, riots, civil commotion, governmental regulation, strikes, labor or material shortage, unreasonable weather conditions or other causes beyond the control of Seller."

Furthermore, paragraph 10(b) provided:

"Notwithstanding *** Paragraph 10(a), it is understood and agreed that Seller is not custom building the Unit for Buyer ***. Accordingly, Seller expressly reserves the right to change or deviate from the Plans and Specifications, including changes and adjustments in the floor plan and room dimensions, provided that such modification shall not materially impair the value of the Unit. If *** significant changes or alterations in the Plans and Specifications for the Unit must be made, ~~Seller shall have the right to terminate this Contract by written notice thereof to Buyer~~. Buyer shall have the right to terminate this Contract by written notice thereof to Seller. Upon receipt of such notice, the Contract shall terminate and be of no further force and effect and the Earnest Money (less any escrow account fees) shall be returned to Buyer." (C041, C460).

¶ 7 In addition, Paragraph 7, entitled "DEFAULTS," provided that DeLong's failure to perform any obligation under the contract would constitute a "default," and, upon default, Walton was to provide written notice to DeLong with a chance to cure the default. Absent a cure, paragraph 7 provided: "Seller shall retain the Earnest Money *** as liquidated damages." Paragraph 7 specified that "retention" of the earnest money was Walton's "sole and exclusive remedy."

¶ 8 In spite of the deadlines identified in the contract, January 1, 2010, passed, and DeLong had neither moved into the Unit nor received a certificate of occupancy by that date. At the same time, nothing in the record demonstrates that, before May 18, 2010, Walton received any communication from DeLong that he intended to back out of the purchase agreement. In fact, on

April 7, 2010, DeLong conducted a preclosing walkthrough inspection of the Unit, during which time he was required to wear a hard-hat, and he compiled a "punch list" of finishing items to be done to the Unit. These requested modifications appeared to be minor in nature, dealing mostly with paint blemishes, finishing on the cabinets, and verification that utility devices functioned properly. DeLong nonetheless insisted he had "no anticipation of closing on the property," and denied the "punch list" qualified as a manifestation of intent to proceed with the contract. DeLong also claimed to have mentioned during a pre-walkthrough phone call with one of Walton's agents that he was considering backing out of the deal, although DeLong was unsure whether his intention was actually communicated to Walton.

¶ 9 On May 18, a month after conducting the walkthrough, DeLong sent a letter to Walton stating that he was terminating the contract under paragraph 10(a) because construction had been delayed beyond the January 1, 2010, deadline. He also requested the return of his $48,800 earnest money. In deposition testimony, however, DeLong added that he terminated the contract because the unfinished state of the entire building would have made renting his Unit difficult and stated that he was not satisfied with the final price. Walton challenged DeLong's allegation that the Unit was not constructed by January 1, and remained under construction through May 2010, although Walton's representative admitted that trim was installed in the Unit after January 1 and indicated the Unit was not complete until the occupancy permit issued in March 2010.

¶ 10 Following the May 18 termination letter, DeLong neither received the requested escrow money, nor received any explanation from Walton as to why the earnest money had not been returned. In spite of DeLong's stated termination of the contract, Walton sent two separate closing notices, with the last closing date set for September 13, 2010. DeLong recited his contract termination as reason for his failure to appear at the closings.

¶ 11 Never having recovered the requested escrow money, DeLong filed suit on December 17, 2010, in the circuit court of Cook County. DeLong sought judgment against Walton in the amount of $48,800, with accrued and prejudgment interest, citing Walton's alleged breach of contract for failing to construct the Unit by January 1, 2010. DeLong also sought an order that escrowee Coldwell Banker release the aforementioned earnest money, plus interest. Walton filed a motion to dismiss the complaint, which was granted as to five counts, with the exception of certain allegations set forth in breach of contract count. The court held DeLong had pleaded sufficient facts specifically to move forward with his claim that Walton failed to construct the Unit by January 1, and the cause therefore proceeded. In answer to the complaint, Walton denied the Unit was under construction on January 1, 2010, or that DeLong was entitled to his earnest money. In addition, Walton filed affirmative defenses of waiver and estoppel and also a counterclaim for breach of contract, wherein it claimed DeLong in fact had defaulted by failing to close on the contract and by failing to cure the default.

¶ 12 After discovery, the parties filed cross-motions for summary judgment. DeLong argued that paragraph 10(a) allowed for his termination of the contract after January 1, 2010, despite the absence of explicit language allowing for termination, and the return of his earnest money. DeLong asserted that construction was not complete by the aforementioned due date, citing Walton's admissions through interrogatories, the March issuance of the certificate of occupancy, and the late closing notices. Regarding wavier, DeLong argued the evidence fell short of establishing he had relinquished a known right, and further stated there were no misrepresentations to support an estoppel claim.

¶ 13 In response, Walton asserted that DeLong had no termination right under paragraph 10(a) of the contract, that the purported termination was a nullity, and therefore it was DeLong who

had committed breach of contract. Walton argued, even assuming *arguendo* that the contract did provide DeLong with a termination right, DeLong could not properly exercise it because: (1) construction, as distinguished with the contract term substantial completion, *had* been completed by January 1, 2010; and (2) DeLong's actions, including waiting several months before attempting to terminate the contract and conducting a walkthrough of the Unit while compiling a "punch list" of proposed changes to be made, constituted waiver or estoppel of his termination right. Walton cited these as reasons for rightfully refusing to return the deposit. Accordingly, Walton claimed it was entitled to the escrowed $48,800 as liquidated damages under paragraph 7 for DeLong's alleged breach in failing to close.

¶ 14 In addressing the parties' cross-motions for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2012)), the circuit court granted DeLong's motion and denied Walton's motion. The court held that Walton's proffered interpretation of paragraph 10(a) was unreasonable, since under the court's reading Walton "could return the earnest money and then wait an indefinite period before substantially completing construction and setting a closing date." The court also noted that Walton's conduct illustrated that it did not truly believe it could return the escrow money and still proceed to closing because Walton never returned the earnest money upon DeLong's request. Therefore, the court entered judgment against Walton and in favor of DeLong in the amount of $48,800, plus interest and costs, and further ordered that Coldwell Banker release the earnest money in accordance with the order.

¶ 15 Walton filed a motion to reconsider, which was denied on May 28, 2013. This timely appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, Walton first argues that the trial court's order granting summary judgment in favor of DeLong and denying its motion for summary judgment should be reversed. Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits, when viewed in a light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 13. Where, as here, the parties file cross-motions for summary judgment, they concede there are no genuine issues of material fact and invite the court to decide the questions presented as a matter of law. *Ruby*, 2012 IL App (1st) 103210, ¶ 13. We observe, "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," and we proceed in our *de novo* review of the trial court's decision. See *Pielet v. Pielet*, 2012 IL 112064, ¶¶ 28, 30.

¶ 18 The focus of this appeal is the interpretation of paragraph 10(a) of the contract, as amended by the rider, providing that "[s]eller shall return all escrow money to Buyer upon request for same from Buyer to Seller, if construction shall be delayed beyond January 1, 2010." Walton argues now, as it did below, that paragraph 10(a) does not give DeLong a termination right. The primary goal of contract construction is to give effect to the intentions of the parties at the time the contract was executed by examining the language the parties agreed upon. *William Blair and Co., LLC, v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 341 (2005). "A court must construe a contract according to its own language, not according to the parties' subjective constructions." *Id*. at 335. Illinois follows the four corners rule: if the contract language is clear and unambiguous, extrinsic evidence will not be considered. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). "A contract term is ambiguous if it can reasonably be

interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair*, 358 Ill. App. 3d at 334. However, the mere fact that the parties disagree over the meaning of a contractual term does not make that term ambiguous. *Id.* Furthermore, as Walton notes, Illinois law does not favor the forfeiture of contracts. *Denis F. McKenna Co. v. Smith*, 302 Ill. App. 3d 28, 32 (1998). Indeed, the party seeking to enforce the forfeiture must prove that the right to forfeiture is clear and unequivocal. *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 314 (1994).

¶ 19 Viewing the contract terms in their plain and ordinary meaning and in the context of the contract as a whole, as we must, we agree with Walton that the trial court erred in reading a termination right into the contract. See *William Blair*, 358 Ill. App. 3d at 335. Paragraph 10(a) does not explicitly provide for a termination right, and we disagree that such a right can be implied. Paragraph 10(a), which originally provided that Walton would not be liable for any construction delays, was amended to create a contractual obligation by Walton to return DeLong's earnest money should construction be delayed beyond January 1, 2010. The rider also deleted the language "the obligation of Buyer hereunder shall not in any manner be excused or varied." At the same time, the rider *did not state* that DeLong's obligation under the contract would be terminated or excused in the event of a construction delay. Where, as here, the parties agree to and insert language into a contract, it is presumed that it was done purposefully, so that the language employed is to be given effect. *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011).

¶ 20 In that sense, we find Walton's argument pointing this court to section 10(b), persuasive. As part of the same rider, DeLong's attorney specifically amended section 10(b) to afford DeLong the right to the return of his earnest money should significant changes or alterations be made to the building plans and specifications, and, significantly, he also amended that provision

to allow for the right to terminate the contract. The fact that paragraph 10(b) allows for both termination and the return of the escrow money, while 10(a) merely references the escrow money, demonstrates that paragraph 10(a) was not meant to give DeLong a termination right. Indeed, such an implied right would make paragraph 10(b)'s termination provision superfluous. See *Dolezal v. Plastic and Reconstructive Surgery, S.C.*, 266 Ill. App. 3d 1070, 1081 (1st Dist. 1994) (noting, under the rules of contract construction, we presume all provisions were inserted for a reason); see also *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 511 (2005) (a contract must be construed such that none of its terms are regarded as mere surplusage). This conclusion is strengthened by the fact that paragraph 7 also allows for termination and return of earnest money should Walton have been unable to deliver title of the premises. Based on the foregoing, we conclude the trial court's imposition of a termination right was contrary to well-settled law, which provides that a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented. *Thompson*, 241 Ill. 2d at 449. "Further, there is a presumption against provisions that easily could have been included in a contract but were not." *Id*. The parties were both represented by attorneys and so had relatively equal bargaining power; DeLong could have easily negotiated a termination right in paragraph 10(a), but he did not. In short, we will not imply a term allowing for forfeiture where it does not exist. See *Denis F. McKenna Co. v. Smith*, 302 Ill. App. 3d at 32.

¶ 21 We reference the same contract construction rules in resolving the parties' disagreement regarding the import of the term "construction" in paragraph 10(a). Walton concedes the Unit was not "substantially completed" by January 1, 2010 (referencing the term in paragraph 9), but argues that is of no moment because the Unit was "constructed" or "built" and "in distinct physical existence" by January 1. Walton thus asserts that "construction," is a lesser standard

than "substantial completion," so that DeLong is not now entitled to his earnest money under paragraph 10(a). For the reasons to follow, we find Walton's interpretation illogical.

¶ 22 Paragraph 9(a) specifically provided that the Unit was to be substantially completed by Fall 2009, subject to delay by strikes, material shortages, labor shortages, casualties, or other causes beyond Walton's control. Paragraph 9(a) clarified that "substantial completion" meant the Unit would be "in a broom clean and otherwise habitable condition," excluding minor adjustments and matters. The closing date was to follow soon after substantial completion. Paragraph 10(a), on the other hand, provided that the earnest money was to be returned "if construction shall be delayed beyond January 1, 2010," and stated that "war, acts of God," or other causes beyond Walton's control served as *no excuse* for the delay.

¶ 23 We hold that while it is unclear why the parties used the term "[s]ubstantial [c]ompletion" in paragraph 9 and the term "construction" in paragraph 10(a), our reading of the contract provisions establishes that "construction," if not synonymous with "substantial completion," must mean "habitable." Walton's own citation to Black's Law Dictionary for the definition of the word, "construct," indicates as much, as the phrase means "make ready for use." Reading paragraph 9(a) together with 10(a), in light of the contract as a whole, it is clear the parties intended that the Unit was to be ready, fully constructed, completed, habitable, and closed on by January 1, 2010. That is, the parties contemplated that fall 2009 was the projected date the deal was to be complete, with January 1, 2010, serving as the outlying deadline. This conclusion is buttressed by the contract's "time is of the essence" clause, which signifies the parties intended the contract to be performed as soon as possible. See *Guel v. Bullock*, 127 Ill. App. 3d 36, 42 (1984).

¶ 24 In reaching this result on the contract interpretation issues, we thus reject the trial court's reasoning behind granting DeLong summary judgment. For example, the court held that allowing DeLong the return of his earnest money, while disallowing termination, would not "be practical for a seller" because Walton would have no remedy should DeLong commit a later breach. The liquidated damages provision in paragraph 7 allowed Walton to retain DeLong's earnest money as the sole remedy for breach. While this might be a harsh result, the parties were free to negotiate the terms of the contract, and we must read the contract according to its plain and ordinary meaning, with no additions or deletions. Moreover, we would note that it is not unreasonable or absurd that DeLong should have the remedy of access to additional money based on a construction delay in a preconstruction sales contract, where there is real potential for delay (see, *e.g.*, *Siegel v. The Levy Organization Development Co., Inc.*, 153 Ill. 2d 534, 548-49 (1992)).

¶ 25 Having clarified the terms of the contract, we next address whether construction was in fact delayed beyond January 1, 2010. We find that the record clearly evinces that it was. Walton's own representative, John Shipka, for all intents and purposes, admitted that the Unit was not complete or habitable until after the January 1 deadline when he stated during his deposition: "I don't recall exactly when it [(the Unit)] was completed, when we received our last certificate of occupancy," which was in March 2010. Walton also admitted trim was installed in the Unit in January 2010, and it was then ready for a final coat of paint. The notice of closing also was not sent until well after the January deadline.

¶ 26 Our conclusion that construction was delayed beyond January 1, 2010, does not mean DeLong was necessarily entitled to return of his earnest money. Although the parties assert there is no question of fact in this case, our review of the record reveals that a conflict exists regarding

whether DeLong waived his right to collect the earnest money by his conduct. Waiver consists of an intentional relinquishment of a known right and may be either expressed or implied, arising from acts, words, conduct, or knowledge of the one waiving the right. *Home Ins. Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004). An implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it. *Id*. Implied waiver, however, is not easily established – the Supreme Court has held that an implied waiver must be proved by a "clear, unequivocal, and decisive act." *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 105 (1991).

¶ 27 Here, DeLong waited over four months, until May 2010, to request the return of his earnest money. Furthermore, he conducted a walkthrough of the Unit in April and compiled a "punch list" of items he wanted changed before moving into the Unit. Indeed, the rider to the contract, amending paragraph 10(e), specifically contemplated that DeLong would create a punch list during his inspection of the Unit and in anticipation of closing. Where, as here, the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Pielet*, 2012 IL 112064, ¶ 53; see also *Giannetti*, 263 Ill. App. 3d at 313 (summary judgment is particularly inappropriate where parties seek to draw inferences on questions of intent). We conclude the evidence gathered from pleadings, depositions, and interrogatories, at least raised a question of fact that DeLong could have waived his right to enforce the delay provision. Moreoever, DeLong's stated reason for termination was that he was dissatisfied with the original agreed-upon purchase price. We thus reject DeLong's contention on appeal that "Buyer's subjective motivation is legally irrelevant." To the contrary, his stated

motive contributes to the existence of a question of fact as to whether his conduct was inconsistent with this right to enforce the delay provision of the contract.

¶ 28 While we conclude that issues of material fact regarding the claim of waiver exist, we reject out of hand Walton's equitable estoppel argument. Walton makes its estoppel argument only as a means of challenging DeLong's purported right to terminate the contract, a matter which we have already disposed of above. Even assuming the argument extended to DeLong's right to collect his earnest money, the argument still would fail. Equitable estoppel may be defined as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his position for the worse. *Geddes v. Mill Creek Country Club, Inc*, 196 Ill. 2d 302, 313 (2001). Here, apart from its conclusory allegations, Walton has not established that it relied on DeLong's representations to its detriment or that it was necessarily prejudiced by the representations, such that DeLong should be barred from enforcing his right to collect his earnest money under paragraph 10(a). Based on the foregoing, we remand this case for trial as to whether DeLong waived his right to enforce paragraph 10(a) of the contract for the return of his earnest money and, if so, whether Walton is entitled to relief with respect to its counterclaim.

¶ 29 Because the summary judgment in favor of DeLong has been reversed, the duplicative judgment issue is now moot, and we trust the trial court will ensure that its order is clear following remand.

¶ 30 CONCLUSION

¶ 31 Based on the foregoing, we reverse the judgment of the circuit court of Cook County granting summary judgment fully in favor of DeLong. Pursuant to our authority under Supreme

Court Rule 366(a)(5) (eff. February 1, 1994), we grant Walton's summary judgment motion to the extent Walton argued there was no termination right in the contract. See *G.M. Sign, Inc. v. Pennswood Partners, Inc.*, 2014 IL App (2d) 121276, ¶ 54. We deny Walton's summary judgment motion to the extent he argued construction could extend beyond January 1, 2010, and to the extent he argued construction was completed by January 1, 2010. On those specific grounds we grant DeLong's summary judgment motion. Finally, we remand the case for trial and resolution of the fact issue of whether DeLong waived his contractual right to receive the earnest money upon his request.

¶ 32 Reversed in part; affirmed in part; and remanded.