2014 IL App (1st) 133533-U

First Division
Order filed: August 11, 2014

No. 1-13-3533

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANGEL LOPEZ, Plaintiff-Appellant, v. VILLAGE OF ROSEMONT, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2011 L 09114 Honorable Margaret A. Brennan, Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

Held: The trial court properly dismissed the plaintiff's complaint for breach of contract, because he failed to sufficiently allege that the defendant modified the payment terms of the contract or that the defendant otherwise waived its right to demand immediate payment of the balance due.

¶ 1 The plaintiff, Angel Lopez, brought suit for breach of contract against the defendant, the Village of Rosemont (Rosemont). The trial court dismissed the plaintiff's Fourth Amended Corrected Complaint (complaint) under section 2-615 of the Code of Civil Procedure (Code)

(735 ILCS 5/2-615 (West 2010)), and the plaintiff now appeals, claiming that (1) the complaint sufficiently alleged that Rosemont had modified the payment terms of the agreement and had waived its right to demand payment on the original due date set by the parties; and (2) that Rosemont breached the implied covenant of good faith and fair dealing. For the reasons that follow, we affirm.

¶ 2 The complaint alleged as follows. The plaintiff is in the business of planning and promoting Latin concerts and dances. Rosemont owns and operates the Donald E. Stephens Convention Center, and retains the services of its agent, Grant Bailey, as the assistant general manager of the convention center, with the authority to negotiate and execute contracts between Rosemont and third parties seeking to license the space for events. On February 25, 2011, the plaintiff and Rosemont entered into an agreement (hereinafter the agreement) for the plaintiff, as licensee, to use "Hall G" of the convention center for a three day period, from May 20, 2011, through May 22, 2011. The agreement, which was attached to the complaint, authorized the plaintiff to promote and host an entertainment event known as "Dance with Gran Combo." Rosemont reserved the right under the agreement to sell concessions at appropriate times and appropriate places during the event.

¶ 3 With regard to payment, the agreement stated that "[l]icensee agrees to pay licensor as a fee for the use of the Licensed Space the minimum sum of $15,000 payable as follows: $3,000 at the time this agreement is signed and the balance not later than 12:00 o'clock (*sic*) noon on Thursday, April 21, 2011." The plaintiff paid Rosemont the initial payment of $3,000 on or about March 31, 2011. On or about May 4 – 6, 2011, in accordance with the terms of the agreement, the plaintiff tendered to Bailey a certificate of liability insurance naming the convention center as certificate holder for the purpose of liability insurance coverage.

¶ 4 According to the complaint, "on or about the period from May 3, 2011 through Wednesday May 11, 2011," Rosemont, by and through Bailey, "expressly agreed in writing to amend the payment terms of the Agreement." Specifically, the plaintiff asserts that an email from Bailey to the plaintiff on May 11, 2011, stated, in relevant part, that in consideration for the expedited planning, set up and production of the dance event, Rosemont would accept payment of the second deposit "as soon as possible," without setting any certain due date. Accordingly, the plaintiff claims, Rosemont waived the April 21, 2011, deadline for the payment of the second deposit originally set forth in the agreement. The plaintiff accepted the alleged waiver on or about May 11, 2011, and as consideration therefor, engaged in activities in preparation for the event, including (1) entering into a contract with Rosemont's authorized ticket seller, Ticketweb.com, to sell tickets for the event; (2) selling tickets in the amount of $5,775, on or before May 12, 2011; (3) marketing the event between May 3 and May 11, 2011, by distributing promotional tickets through local radio stations and retail music outlets; and (4) communicating with Rosemont's catering service on May 3 for the purpose of locating sponsorships for the event. The plaintiff received an email from the catering director on May 9, 2011, leading him to believe that the caterer had begun to work with prospective sponsors and that the event was going forward.

¶ 5 Attached to the complaint was Bailey's email of May 11, 2011, in which Rosemont allegedly waived the April 21, 2011, deadline for the balance payment. That email, in its entirety, states as follows:

> "Good Morning Angel, as always it was a pleasure to speak with you and I hope you are feeling better. As per our discussion I have attached a copy of the invoice that we had mailed to your address. The Balance was due on April 21st as per the contract, we

will need payment in full as soon as possible. I am sure that RES Audio Visual will also be in need of a deposit as well. We cannot take a payment on a post dated check.

In addition[,] the contract that Rosemont catering has with the Village of Rosemont prohibits them from entering a[n] agreement to partner in the sale of alcohol at the convention center.

Let us know when we can expect payment.

Thank you,

Grant"

¶ 6 The plaintiff alleged that Rosemont, without doing anything to alter or modify the above "express waiver," then purported to seek payment of the full balance due, in the following email from Bailey to the plaintiff on May 13, 2011:

"Angel, I know you are not feeling well, and am sorry about your illness. We do need to get the full payment for the space as we are a week out. We had began (*sic*) scheduling our traffic people but we have placed a hold on everything due to no payment. We had contracted for payment by April 21st. Basically at this point all is on hold."

¶ 7 The plaintiff asserted that, by postponing the event in its May 13, 2011, email, Rosemont breached the agreement between the parties, as modified in the May 11, 2011 email. In further reliance upon the May 11 "waiver," the plaintiff proceeded to incur an expenditure of $7,511 on May 13, 2011, to pay for airline tickets for the Grand Combo and its band leader to fly to Chicago for the event. Accordingly, the plaintiff sought damages arising from the breach, including the loss of its security deposit for the license, his out-of-pocket expenses, and the loss of future ticket sales and profits.

¶ 8 Rosemont moved to dismiss the complaint under section 2-615 of the Code, on the basis that it failed to allege that the May 11 email constituted a modification to the original contract, or that it contained any express waiver of the payment terms of the original agreement. The circuit court dismissed the complaint with prejudice, and the instant appeal followed.

¶ 9 The plaintiff now argues that the complaint properly alleged that Rosemont breached the parties' agreement on May 13, 2011, by placing the event "on hold" pending payment of the outstanding remaining balance. He asserts that Bailey's email of May 11, 2011, modified the terms of the original agreement to permit remittance of the balance "as soon as possible," rather than requiring it at any certain date. The plaintiff further asserts that the email constituted a waiver of Rosemont's right to collect the balance on the original due date of April 21, 2011. At the very least, he contends, the modification created an ambiguity in the contractual terms which must be construed against Rosemont as the drafter of the contract. See *Guerrant v. Roff*, 334 Ill. App. 3d 259, 264-65, 777 N.E.2d 499 (2002). We disagree.

¶ 10 A section 2–615 motion challenges the legal sufficiency of a complaint based on defects apparent on its face. *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291, 938 N.E.2d 471 (2010). In ruling on such a motion, the court may consider only those facts apparent from the face of the pleadings, judicial admissions in the record, or matters of which the court can take judicial notice. *Id.* In addition, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences permissible from those facts. *Id.* In an appeal from the dismissal of a complaint under section 2-615, we apply a *de novo* standard of review. *Id*. In addition, the construction of a contract is generally also a question of law, and subject to *de novo* review (*Asset Recovery Contracting, LLC, v. Walsh Construction Co.*, 2012 IL App (1st) 101226 ¶ 57, 980 N.E.2d 708; *In re Nitz*, 317 Ill. App. 3d 119, 124, 738 N.E.2d 93 (2000)), as is the

issue of whether the contractual terms are ambiguous, or capable of more than one reasonable interpretation. *River's Edge Homeowners' Ass'n v. City of Naperville,* 353 Ill. App. 3d 874, 878, 819 N.E.2d 806 (2004); see also *West Bend Mutual Insurance Co. v. Talton*, 2013 IL App (2d) 120814 ¶ 19, 997 N.E.2d 784.

¶ 11 When construing a contract, the role of the court is to give effect to the intent of the parties as expressed through the plain and ordinary meaning of the contractual language. *In re Nitz,* 317 Ill. App. 3d at 124. As with an initial contract, a contractual modification requires an offer, acceptance, and consideration between the parties. *Schwinder v. Austin Bank of Chicago,* 348 Ill. App. 3d 461, 468-69, 809 N.E.2d 180 (2004); see also *Janda v. United States Cellular Corp.*, 2011 Ill. App. (1st) 103552 ¶ 62, 961 N.E.2d 421. Modification cannot be done in an *ex parte* fashion or without the assent of the opposite party. *Urban Sites of Chicago, LLC, v. Crown Castle, U.S.A.*, 2012 IL App (1st) 111880 ¶ 35, 979 N.E.2d 480; *Schwinder*, 348 Ill. App 3d at 469. However, a party to a contract may be deemed to have acquiesced to a contractual modification if, by its conduct, it expresses its consent to the modification. *Corrugated Metals, Inc. v. Industrial Comm'n,* 184 Ill. App. 3d 549, 556, 540 N.E.2d 479 (1989); see also *Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 640 N.E.2d 1000 (1994). Similarly, a waiver occurs where a party voluntarily and intentionally relinquishes its rights under a contract by engaging in conduct inconsistent with an intent to enforce those rights. *In re Nitz,* 317 Ill. App. 3d at 130.

¶ 12 The agreement in this case contained the following relevant provisions:

> "28. This document and the attachments and exhibits hereto constitute the entire agreement between the Licensor and Licensee with respect to the subject matter hereof

***. This agreement may be modified or amended only by a written instrument signed by both the Licensor and Licensee."

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30. In case Licensee shall default in the payment of any sums of money or fail to comply with any one of the terms, conditions or covenants contained in this Agreement, Licensee's right to the use of the Licensed Space shall terminate without notice or demand, and the retention of possession thereafter by Licensee shall constitute a forcible detainer, and if Licensor so elects, but not otherwise, this Agreement shall thereupon terminate ***.

* * *

35. *The failure of Licensee or Licensor to insist on the other party's strict compliance with the terms and conditions contained in this Agreement shall not constitute a waiver of Licensor's and Licensee's right to insist that the other party in the future strictly comply with any and all of the terms and conditions contained in this Agreement* and to enforce such compliance by any appropriate remedy." (Emphasis added.)

¶ 13 In light of the above provisions, and based upon the clear language of the May 11, 2011, email, there was neither a modification to the original payment terms nor a waiver of Rosemont's right to seek immediate payment on the contract. To the contrary, the email contained a copy of an invoice for the balance due, which it noted had previously been sent to the plaintiff, and, making reference to the April 21, 2011, due date, a demand for payment "in full as soon as possible." There is no equivocation in the language of the email and no indication that, at this point, Rosemont would continue to allow the plaintiff to withhold payment of the balance. Then,

in the email of May 13, after apparently still having received no response from the plaintiff, Bailey again referenced the April 21 due date, demanded payment of the balance, and placed Rosemont's performance "on hold" until payment was received. Under paragraph 35 of the agreement, Rosemont was within its rights to insist upon strict compliance with requirement that the balance be paid, despite the fact that it had initially relaxed the April 21 deadline. There is no dispute that the plaintiff failed to tender any further payment beyond the initial $3,000 deposit made on March 31, 2011. Once Rosemont sent the May 11 demand email, there could be no allegation of waiver on its part, and the plaintiff was not justified in expecting continued performance by Rosemont in the absence of payment of the balance due. Accordingly, his breach of contract claim must fail.

¶ 14 The plaintiff also contends that, in sending the May 11 demand, Rosemont breached its implied covenant of good faith and fair dealing by creating the reasonable expectation that the event was going forward despite the nonpayment of the balance. In particular, the plaintiff relies upon Bailey's statement in that email that "I am sure that RES Audio Visual will also be in need of a deposit as well." As RES was allegedly going to set up the event, the suggestion regarding the deposit lead the plaintiff to believe preparations for the event were continuing.

¶ 15 In Illinois, contracts are presumed to contain an implied covenant of good faith and fair dealing. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367, 657 N.E.2d 1095 (1995). However, the obligation is essentially used as a rule of construction to ascertain the intent of the parties where a contract is susceptible to conflicting constructions. *Id*.

¶ 16 As stated above, the terms of the agreement as well as the relevant emails in this case were clear and unambiguous, and Rosemont appropriately exercised its right to demand the overdue balance payment under the agreement. The mere suggestion of a payment that may be

due to a third party did nothing to induce unfair reliance on the part of the plaintiff. Accordingly, the covenant of good faith and fair dealing is inapplicable to this case.

¶ 17 For the foregoing reasons, the complaint for breach of contract was properly dismissed.

¶ 18 Affirmed.