SIXTH DIVISION
May 6, 2016

No. 1-14-1866

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEYOND THE IVY II, Inc., a Domestic Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	2010 L 11760
JONATHAN ARNOLD, ANITA W. GARTEN, STEVEN SAMUELS, and MICHAEL KAUFMAN,	)	Honorable Joan E. Powell,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

HELD: The circuit court did not err in granting summary judgment in favor of plaintiff.

¶ 1 In this contract interpretation case, defendants Jonathan Arnold, Anita W. Garten, Steven

Samuels and Michael Kaufman appeal from an order of the circuit court of Cook County granting summary judgment in favor of plaintiff, Beyond the Ivy II, Inc., a domestic Illinois corporation. The circuit court made the order granting summary judgment final and appealable pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). This interlocutory appeal centers around the interpretation and construction of the word "encumbrance" as that term is used in the parties' contract which provides for plaintiff to purchase all membership interests in the subject business "free and clear of liens and encumbrances." For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Defendants were members of a limited liability company known as "1038 LLC" which owned a parcel of real property commonly known as 1038 W. Waveland Avenue, Chicago, Illinois. The property is located across the street from Wrigley Field. Defendants were also members of a separate limited liability company known as Skybox on Waveland, LLC (Skybox). Skybox operates a business that allows patrons to view Chicago Cubs baseball games from the rooftop of the building at 1038 W. Waveland Avenue.

¶ 4 On or about April 1, 2004, defendants entered into a written real estate contract to sell the subject building to BJB Partners, LLC, an Illinois limited liability company (BJB). BJB is plaintiff's predecessor in interest.[1] On or about April 15, 2004, defendants had their counsel execute a letter agreement selling their interests in Skybox to BJB. The letter agreement amended and modified the terms of the earlier executed real estate contract. The real estate contract and the letter agreement merged into a single contract.

[1] BJB assigned all of its interests in the contract to plaintiff, which had been created to operate Skybox's rooftop business.

¶ 5 The agreement to purchase the real property at 1038 W. Waveland Avenue is set forth in paragraph 1(ii)(a) of the contract. This section of the paragraph is followed by section (ii)(b) relating to the purchase of the Skybox business and includes a covenant that these interests are "free and clear of liens and encumbrances." Section (ii)(b) states in relevant part:

"(ii) Purchasers agree to purchase: *** (b) all of the membership interests in Skybox (the 'Membership Interests'), free and clear of liens and encumbrances, from the members of Skybox consisting of Jonathan Arnold, Anita W. Garten, Steven Samuels and Michael Kaufman (collectively, the 'Members') for a purchase price of $4,029,900 ***. "

¶ 6 The contractual provisions relating to the sale of the Skybox business allocate income and expenses according to the date of sale, so that the sellers retain the income and pay for the expenses relating to presale operations, while the purchaser obtains the income and pays for expenses relating to postsale operations. Specifically, paragraph 16(v) of the contract credits the purchaser with prepaid revenues and customer deposits, while requiring the purchaser to credit the seller for "services paid for but not yet received ***."

¶ 7 Pursuant to the terms of the contract, a closing took place on or about April 30, 2004. Approximately a year later, in the spring of 2005, plaintiff was notified by city and state taxing authorities that the defendants had not properly calculated the correct amounts of "amusement tax" due with respect to the operation of Skybox's business for the years 2000-2004. Following an audit and negotiation, plaintiff reached agreements with the taxing authorities. Of the total amount paid by plaintiff to the taxing authorities, $151,012.57 was attributable to the operations of Skybox prior to the date of sale.

¶ 8 On December 3, 2012, after defendants refused to reimburse plaintiff for the sum of $151,012.57, plaintiff filed an amended breach of contract action against defendants, seeking

reimbursement, prejudgment interest and attorney fees and costs. Following discovery, the parties filed cross-motions for summary judgment.

¶ 9 After reviewing the parties' briefs and hearing argument, the circuit court granted summary judgment in favor of plaintiff in the amount of $151,012.57. The court also awarded plaintiff attorney fees of $56,657.00 and costs of $9,216.09.

¶ 10 Defendants filed a motion to reconsider. In their motion, defendants argued, among other things, that the covenant against encumbrances contained in section (ii)(b) of the contract applied only to the sale of the real property and did not apply to the purchase of the Skybox business. Defendants also argued that if the term "encumbrance" was given a broader definition than that provided by Illinois law, then this rendered the contract ambiguous. The circuit court disagreed and in denying the motion to reconsider, emphasized that it did not find the term "encumbrance" to be ambiguous in the context of the parties' contract.

¶ 11 Since there was a pending counterclaim, the circuit court made a finding pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason to delay enforcement or appeal of the court's orders.

¶ 12 ANALYSIS

¶ 13 Our review of the circuit court's order granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171, (2003). Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999).

¶ 14 When, as in this case, the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law. *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill. App. 3d 128, 134 (2001). The construction and interpretation of a contract is a question of law subject to *de novo* review and is well suited for disposition by summary judgment. *W.H. Lyman Construction Co. v. Village of Gurnee*,131 Ill. App. 3d 87, 93 (1985).

¶ 15 In construing a contract, the primary objective is to give effect to the intent of the parties as evidenced by the language used in the contract. *Monroe Dearborn Limited Partnership v. Board of Education*, 271 Ill. App. 3d 457, 462 (1995). A contract is to be construed as a whole, giving meaning and effect to every provision if possible, since we presume that every clause in the contract was inserted deliberately and for a purpose. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1034 (2006).

¶ 16 Defendants first contend that the term "encumbrance" has a fixed and definite meaning under Illinois law and applies only to real property and not personal property and therefore the circuit court erred in granting plaintiff's motion for summary judgment. We must disagree.

¶ 17 Under Illinois law, an encumbrance has been defined as a third party's right to, or interest in land that diminishes its value and is a burden on its transfer. *Brown v. Lober*, 75 Ill. 2d 547, 551 (1979). Examples of encumbrances include liens, attachments, leases, and easements. *Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 808 (2010); *Village of Buffalo v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 591, 597 (1989). In certain jurisdictions, there can be encumbrances on personal property as well. See *e.g.*, *Hartford Fire Ins. Co. v. Jones*, 31 Ariz. 8, 250 P. 248, 251 (Ariz. 1926). We have found no Illinois case law directly on point

which has considered the concept of an encumbrance beyond its traditional scope and plaintiff cites none.

¶ 18 However, defendants ignore the fact that in drafting the contract, they themselves specifically chose to use the term "encumbrance" outside the context of real property and in relation to the sale of the membership interests in the Skybox business. Competent parties are generally free to contract as they wish for whatever terms they might agree on provided the terms and agreement are not contrary to public policy. *P.I. & I. Motor Express, Inc./For U, LLC v. Industrial Comm'n*, 368 Ill. App. 3d 230, 236 (2006); see also *In re Marriage of Schlichting*, 2014 IL App (2d) 140158, ¶ 63 ("a court should not interfere with the terms of a contract that parties entered into freely"); *Saba Software, Inc. v. Deere and Co.*, 2014 IL App (1st) 132381, ¶ 55 ("Courts are traditionally reluctant to relieve parties of their contractual agreements, especially when they drew up a provision and obtained the consent of the other party"). Defendants have not argued or presented any evidence that the use of the term encumbrance in the contract violates public policy.

¶ 19 Moreover, we reject defendants' assertion that the contract was ambiguous or that the intent of the parties was ambiguous. The issue of whether a contract is ambiguous and requires additional evidence for interpretation is a question of law. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 275 (2007). In this case, the contract and the intent of the parties to the contract were not rendered ambiguous by the inclusion of the covenant against encumbrances because the context in which defendants used the term "encumbrance" in the contract clearly indicated that it was used in relation to the sale of the membership interests in the Skybox business.

¶ 20 Under the rules of contract construction discussed above, we presume that the parties to a contract intended every clause to have some effect. *Olson v. Olson*, 114 Ill. App. 3d 28, 32 (1983). "A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011).

¶ 21 The term "encumbrance" is defined in Black's Law Dictionary as "A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage." Black's Law Dictionary 568 (8th ed. 2004). A "lien is a legal claim upon the property of another for payment or in satisfaction of a debt." *N.C. ex rel. L.C. v. A.W. ex rel. R.W.*, 305 Ill. App. 3d 773, 775 (1999).

¶ 22 Here, the parties agreed to the provision at issue which stated that the membership interests were purchased "free and clear of liens and encumbrances." Defendant Jonathan Arnold, who was the chief financial officer of Skybox, stated in his affidavit that the "Contract contains an entirely separate provision pertaining to the sale of the membership interests in Skybox, in which Plaintiff would purchase all membership interests in Skybox, free and clear of liens and encumbrances, for a purchase price of $4,029,900.00." To accept defendants' argument that the covenant against encumbrances applied only to the sale of the real property would be contrary to the rules of contract interpretation which prohibit us from rendering this provision meaningless. Thus, the parties expressly agreed that the membership interests in Skybox were sold without any type of encumbrance or claim that would reduce the value of the interests. We find that the taxing authorities claims for amusement taxes did in fact reduce the value of these interests.

¶ 23 Defendants next contend that even if the covenant against encumbrances applies, it is not actionable in this case because at the time of closing there had been no business tax deficiency raised or assessed; the alleged deficiency was raised a year after the sale closed. Again, we must disagree.

¶ 24 The underpaid tax obligations for the pre-sale operations of the Skybox business were an encumbrance as of the date of the sale. See, *e.g.*, *Jones v. Washington*, 412 Ill. 436, 443 (1952) (unpaid taxes as an encumbrance); *Bertrand v. Jones*, 58 N. J. Super. 273, 284, 156 A.2d 161, 167 (App. Div. 1959) ("where the contract of sale contains a covenant against encumbrances, the existence of an encumbrance constitutes a breach of the covenant"). The fact that the taxing authorities did not discover and demand payment until after the sale was consummated does not take away from the fact that the presale underpaid taxes were an encumbrance on the Skybox business at the time of sale.

¶ 25 Defendants next contend that the circuit court's construction of the contract was inconsistent with the parties' intentions for allocating pre and postsale income and expenses. Again, we disagree.

¶ 26 The circuit court correctly relied on paragraph 16(v) of the contract as evidence of the parties' intent to allocate pre and postsale income and expenses. This paragraph allocates income and expenses according to the date of sale, so that defendants retain the income and pay for expenses relating to presale operations, while the plaintiff obtains the income and pays for expenses relating to postsale operations. In relevant part, paragraph 16(v) credits the plaintiff with prepaid revenues of Skybox and customer deposits received by Skybox, while requiring plaintiff to credit defendants for "services paid for but not yet received."

¶ 27 Paragraph 16(v) manifests a clear intention to allocate expenses and revenue according to whether they related to pre or postsale events. Requiring defendants to pay for taxes incurred with respect to presale operations is consistent with the parties' intentions. That clear intention supports a construction obligating the defendants, pursuant to their covenant, to pay previously unasserted tax obligations relating to the presale operations of Skybox.

¶ 28 Finally, we reject defendants' suggestion that the circuit court's decision granting summary judgment in favor of plaintiff, was not clear and free from doubt. In support of this contention, defendants point to various comments the court made in ruling on the defendants' motion to reconsider. These comments do not support the defendants' position. Our review of the comments in the context of the entire hearing show they were made during the court's summary of the case, where the court stated that the case was unusual and that it had been unable to find Illinois case law directly on point to the issues raised in the cross-motions for summary judgment.

¶ 29 Accordingly, for the reasons set forth above, we affirm the judgments of the circuit court of Cook County.

¶ 30 Affirmed.