2017 IL App (1st) 152929-U
Nos. 1-15-2929 & 1-16-0140 (Cons.)
March 31, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MUSEUM POINTE CONDOMINIUM ASSOCIATION, Plaintiff-Appellee, v. THE TOWER RESIDENCES CONDOMINIUM ASSOCIATION, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court Of Cook County. No. 14 CH 4061 The Honorable Thomas R. Allen, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion when it denied a motion for additional discovery supported only by affidavits that did not state facts showing that the movant could not obtain an affidavit from the named witnesses, or that the witnesses knew facts essential to the movant's case. Where a party's proposed interpretation of a contract makes much of the language meaningless surplusage, the interpretation is not reasonable and it does not make the contract ambiguous.

¶ 2 Museum Pointe Condominium Association filed a complaint against Tower Residences Condominium Association, asking for a judgment declaring that Tower breached an

easement agreement by bringing heavy garbage trucks on Museum Pointe's land. The circuit court entered a summary judgment awarding Museum Point the declaratory judgment it sought. On appeal, Tower argues that the circuit court erred (1) by denying Tower's request for additional discovery, (2) by rejecting Tower's defense of *laches*, and (3) by awarding summary judgment in favor of Museum Pointe.

¶ 3 We hold that Tower's affidavits did not meet the requirements of Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. Jan. 4, 2013)), and therefore the circuit court did not abuse its discretion when it denied the request for additional discovery. Because Tower did not show that it detrimentally relied on Museum Pointe's delay in bringing suit, the circuit court did not abuse its discretion by rejecting the defense of *laches*. The easement agreement unambiguously forbids frequent use of the easement by trucks weighing significantly more than 6,000 pounds, including the garbage trucks that gave rise to the complaint. Therefore, we affirm the order granting summary judgment in favor of Museum Pointe.

¶ 4 BACKGROUND

¶ 5 MP 13th Street Tower, LLC, owned land north of 14th Street and east of Indiana Avenue in Chicago. Chicago Title Land Trust Company, as trustee under Trust No. 1080000, owned land that abutted part of MP 13th's lot. In 2002, as part of preparation for development of the two lots, MP 13th granted an easement to Trust No. 1080000, allowing Trust No. 1080000 to use a strip of MP 13th's land for access to Trust No. 1080000's land. MP 13th labeled the strip subject to the easement "13th Street," although MP 13th, and not the City of Chicago, owned the land.

¶ 6 The easement agreement identifies MP 13th as the Grantor and its lot as the Servient Parcel, while Trust No. 1080000 is the Grantee and its lot is the Dominant Parcel. The strip labeled 13th Street is the Easement Parcel. The agreement provides:

> "2. *** The use of the Easement Parcel shall be limited to pedestrian and vehicular ingress and egress. Commercial vehicles or trucks which are unsuitable for the Easement Parcel and which are incapable of making the necessary turns, including without limitation commercial vehicles or trucks having a loaded weight in excess of Six Thousand (6,000) Pounds, shall not be permitted over, across or upon the Easement Parcel. However, moving and delivery vehicles accessing the Dominant Parcel and the Servient Parcel and any and all construction vehicles used in the construction of improvements and repairs upon or under the Dominant Parcel and the Servient Parcel *** shall be permitted upon the Easement Parcel. A private parking garage will be constructed under the Easement Parcel as a part of the development of the Servient Parcel. ***
>
> * * *
>
> 3. *** Grantor shall be responsible for the construction of the surface improvements on the Easement Parcel at Grantor's sole cost and expense. Grantor, its successors and assigns, shall, at its sole cost and expense, be responsible for maintaining the Easement Parcel.
>
> * * *

9. NON-WAIVER OF COVENANTS: No covenant, restriction, condition, obligation or provision contained in this Agreement shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches which may occur.

10. PURPOSE OF EASEMENT: The purpose of this Easement is to provide access to the Dominant Parcel, to provide for public access over, upon and across the surface of the Easement Parcel, and to provide for the construction and maintenance of the Easement Parcel, and all improvements to be located thereon. ***

* * *

15. *** All provisions of this instrument, including the benefits and burdens, shall run with the land and are binding on and inure to the mortgagees, heirs, assigns, successors, tenants and personal representatives of the parties hereto. ***

* * *

18. *** Either party, or their respective successors, may enforce this instrument by appropriate action, and should such party prevail in such litigation, such party shall recover as a part of its costs a reasonable attorney's fee.

19. CONSTRUCTION: This instrument shall be construed in conformity with the laws of the State of Illinois and in accordance with the usage in said State of Illinois regarding easements. The rule of strict construction does not apply to

> this grant. This grant shall be given a reasonable construction so that the intention of the parties to confer a commercially usable right of enjoyment by the Grantee and its successor is carried out."

¶ 7 Managers of EDC Management, Inc., Georgia, LLC, and Forest City Central Station, Inc., signed the easement agreement on behalf of MP 13th.

¶ 8 Museum Pointe acquired MP 13th's property, the Servient Parcel to the easement, and Tower acquired the Dominant Parcel. Both properties now hold large buildings with hundreds of condominiums. Garbage trucks have used the easement to collect Tower's garbage ever since condominium owners started living in Tower. In May 2006, Tower entered into a contract under which Roy Strom Company agreed to provide waste and recycling services for Tower. Strom collected garbage from Tower at least four times every week after May 2006. All of Strom's garbage trucks weigh more than 37,000 pounds.

¶ 9 In December 2013, Museum Pointe sent Tower a letter demanding either that Tower stop using the easement for garbage removal, or that Tower pay for repairs to Museum Pointe's parking garage located under the easement parcel. Tower responded that it "will not be able to accommodate Museum Pointe's demand at this time."

¶ 10 Museum Pointe filed a complaint against Tower, seeking a judgment declaring that the easement agreement prohibits Tower from having garbage trucks that weigh more than 6,000 pounds use the easement parcel. Museum Pointe also sought attorney's fees. Museum Pointe filed a motion for summary judgment on the complaint, and in support it filed affidavits from the operations manager of Strom, and from Charles Boersema, sales manager of Strom.

Boersema and the operations manager admitted that Strom's trucks weighed more than 37,000 pounds when empty, and the trucks used the easement parcel six days a week.

¶ 11 In opposition to the summary judgment motion, Tower filed a request for additional discovery, which it supported with affidavits from the president of Tower's board of directors and from Tower's property manager. The board president said he believed a single developer built both the Museum Pointe building and the Tower building. The developer incorporated into Tower's building design a garbage bay that trucks can access only via the easement parcel. The board president said Tower needed to take depositions of Boersema and Strom's operations manager before it could fully respond to the motion for summary judgment. The board president expected Boersema and the operations manager to testify that Strom needed to use the easement parcel to collect garbage from the garbage bay. The affidavit of Tower's property manager essentially repeated the statements in the board president's affidavit. Neither the board president nor the operations manager explained why Tower could not obtain affidavits from Boersema and Strom's operations manager.

¶ 12 On March 23, 2015, the circuit court entered an order denying Tower's request for additional discovery. The court scheduled a date for Tower to file its response to the motion for summary judgment.

¶ 13 Tower obtained an affidavit from Boersema and appended it to its response to the motion for summary judgment. Boersema said that Strom owned no garbage trucks that weighed less than 6,000 pounds, and "[t]here are no commercially available waste hauling trucks on

the market which weigh 6,000 pounds or less." Boersema said the dumpsters Strom provided to Tower weigh up to 1,500 pounds when full of waste. He added:

> "The Dumpster Bay at the Tower Building is only accessible by traversing East 13th Street. ***
>
> ***
>
> *** If Strom, or any waste hauling contractor, were not permitted to access East 13th Street with its compacting trucks, the dumpsters would have to be rolled by hand by Tower Building staff out of the Dumpster Bay and westward down 13th Street to Prairie Street to be positioned for emptying into the compacting trucks. This would be unreasonable and impractical given the weight of the dumpsters and the difficulty rolling them over the uneven paving stone surface of 13th Street. This would likely not even be possible in winter weather with snow and/or ice accumulation."

¶ 14 Tower also filed in support the affidavit of a civil engineer, who said that trucks can access Tower's garbage bay only by using the easement, and "[i]f garbage truck access over East 13th Street were not permitted, the dumpsters would have to be moved by hand from the Dumpster Bay at least 340 feet west, down 13th Street to Prairie Street. This would require rolling dumpsters weighing 500 pounds to 1,500 pounds by hand over an irregular surface of paving stones in order to be emptied by the garbage trucks."

¶ 15 Tower's board president filed a new affidavit in which he said,

> "An effort was made to obtain the affidavit of a representative of the developer of the Museum Pointe and Tower Residences properties – John Shipka – however, on the advice of his counsel, Mr. Shipka was not agreeable to provide an affidavit. It is believed that Mr. Shipka would testify, by way of deposition by agreement and/or subpoena, that the Easement Agreement pertaining to 13th Street was intended by the developer/grantor (a matter conclusively known only to that party) to allow garbage trucks exceeding 6,000 pounds to traverse 13th Street to ac[c]ess the Tower Residences building at the Dumpster Bay. The developer/grantor's intent is a matter the developer/grantor [*sic*]. The basis of this belief is the design of the Tower Residences building which incorporates *** the available garbage dumpster staging area at the bay and the use of the bay for that very purpose since the building became occupied."

¶ 16 The circuit court heard oral argument on the motion for summary judgment on September 14, 2015. The court granted the motion, and it explained:

> "Certainly when you construct an underground garage, if you got 40,000-pound trucks coming there six days a week, that requires a different construction than if you have *** a weight limitation of 6,000 pounds ***. [The easement agreement] puts a weight limit on there, admittedly so it's not as crystal clear as it could be, but you have to give effect to all the provisions in here, and out of nowhere they don't just put 6,000 pounds in there *** if there wasn't a logical reason, and the logical reason is that *** all their cars are parked underneath this

> roadway. *** And it's certainly not unreasonable because their cars are all parked underneath there. *** They have to repair it. They have to brace it up if it starts weakening. And this is six days a week. This is *** not just an intermittent move.
>
> * * *
>
> It's not a perfect draftsmanship of the easement, but I've never seen a perfect one. *** I think this is a legal question. And I find that that 6,000-pound weight limit as set forth in the easement agreement is binding."

¶ 17 Museum Pointe filed a petition for attorney fees, seeking more than $82,000 in fees and $3,700 in other costs. The circuit court awarded Museum Pointe fees of $66,647.25 and other costs of $500, for a total of $67,147.25. Tower filed timely notices of appeal from the order for summary judgment and the order awarding fees. This court consolidated the two appeals.

¶ 18 ANALYSIS

¶ 19 Tower contends that the circuit court (1) should have granted Tower's motion for additional discovery; (2) should have entered a judgment in favor of Tower based on *laches*; and (3) misinterpreted the easement agreement when it entered a summary judgment in favor of Museum Pointe and against Tower. Tower challenges the award of fees only on grounds that the circuit court should not have entered a judgment in favor of Museum Pointe on the complaint.

¶ 20 Discovery

¶ 21 "A trial court is afforded great latitude in ruling on matters of discovery. [Citation.] We will not disturb a trial court's ruling on discovery matters unless it abuses its discretion." *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1150 (2005).

¶ 22 Tower relied on Rule 191 affidavits in support of its request for additional discovery. Rule 191(b) provides:

> "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

¶ 23 Tower presented two Rule 191 affidavits, in both of which its witnesses said Tower needed to take depositions of Boersema and Strom's operations manager, who would testify that Strom needed to use the easement to take away Tower's garbage. After the trial court denied the motion for additional discovery, Tower obtained an affidavit from Boersema, and he said exactly what Tower expected him to say – Strom's 37,000 pound trucks needed to use

the easement daily to access the garbage bay. Tower's Rule 191 affidavits did not state facts showing that Tower could not obtain affidavits from Boersema and from Strom's operations manager. Thus, the affidavits "failed to state *** that the material facts were known only to persons whose affidavits the affiant was unable to procure." *Crichton*, 358 Ill. App. 3d at 1151. Because Tower's affidavits did not meet the requirements of Rule 191, the circuit court did not abuse its discretion when it denied the motion for additional discovery.

¶ 24 After the circuit court denied the motion for additional discovery, Tower submitted a supplemental affidavit from its board president, again asserting grounds for additional discovery. The new affidavit said Tower sought to take the deposition of John Shipka, a representative of the developer. According to the affidavit, Shipka had refused to sign an affidavit for Tower. Tower's witness said Shipka would testify that the developer intended that the easement agreement would permit garbage trucks weighing far more than 6,000 pounds to use the easement to remove Tower's garbage.

¶ 25 However, the affidavit gives no basis for concluding that Shipka, as a representative of the developer, could testify about the intention of the developer concerning the easement, or how the developer's intention bears on the issue before the court. The affidavit does not include any allegation that Shipka took part in the designs of the buildings or the negotiations for the easement. The developer did not sign the easement agreement. Three agents of MP 13th signed the agreement, but the easement agreement in the record bears no signature labeled as the signature of a developer. Shipka did not sign the easement agreement. Thus, the supplemental affidavit of the president of Tower's board does not meet the requirements

of Rule 191(b). See *Rush v. Simon & Mazian, Inc.*, 159 Ill. App 3d 1081, 1085 (1987); *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 456 (2000). The trial court did not abuse its discretion when it denied Tower's request for additional discovery.

¶ 26 *Laches*

¶ 27 Next, Tower argues that the circuit court should have entered a judgment in favor of Tower based on *laches*.

> "*Laches* is an equitable doctrine that bars an action if, because of the plaintiff's unreasonable delay in bringing suit, the defendant is misled or prejudiced or takes a course of action that he or she would not have otherwise taken. [Citation.] Mere delay in bringing suit is not enough to establish *laches*; the defendant must show prejudice or hardship from the delay, i.e., the delay induced him to change his position adversely. [Citation.] A trial court's application of the doctrine of *laches* will not be reversed unless the trial court abused its discretion." *Gacki v. Bartels*, 369 Ill. App. 3d 284, 292-93 (2006).

¶ 28 Tower did not allege that it changed its position or suffered prejudice due to its reliance on its ability to have garbage trucks use the easement. Therefore, we find that the trial court did not abuse its discretion when it refused to enter a judgment in favor of Tower based on laches.

¶ 29 Interpretation of the Easement Agreement

¶ 30 Tower argues that the circuit court erroneously granted summary judgment in favor of Museum Pointe based on a misunderstanding of the easement agreement. We review *de*

novo the order granting the motion for summary judgment. *River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill. App. 3d 874, 877 (2004). "A court interprets an easement in the same manner it would interpret any agreement between parties. [Citation.] Generally, an instrument creating an easement is construed in accordance with the intention of the parties, which is ascertained from the words of the instrument and the circumstances contemporaneous to the transaction, including the state of the thing conveyed and the objective to be obtained. [Citation.] However, if the language of an agreement is facially unambiguous, then the trial court interprets the contract as a matter of law without the use of extrinsic evidence." *River's Edge*, 353 Ill. App. 3d at 878.

¶ 31 Contract language "is ambiguous only if it is susceptible to more than one reasonable interpretation. [Citation.] That is to say, [contract] language is not ambiguous simply because the parties disagree on its meaning. [Citation.] Rather, we may consider only reasonable interpretations." *Atwood v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 861, 863 (2006). "[F]undamental rules of contract construction requir[e] that to the extent possible, all words used in a contract be given effect." *International Minerals & Chemical Corp v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 378 (1988).

¶ 32 The parties' dispute centers on the following language:

> "Commercial vehicles or trucks which are unsuitable for the Easement Parcel and which are incapable of making the necessary turns, including without limitation commercial vehicles or trucks having a loaded weight in excess of Six Thousand (6,000) Pounds, shall not be permitted over, across or upon the

> Easement Parcel. However, moving and delivery vehicles accessing the Dominant Parcel and the Servient Parcel and any and all construction vehicles used in the construction of improvements and repairs upon or under the Dominant Parcel and the Servient Parcel *** shall be permitted upon the Easement Parcel."

¶ 33 Tower contends that the agreement precludes the use of trucks only if they meet both of two criteria. The agreement forbids trucks which are (1) "unsuitable for the Easement Parcel" and (2) "incapable of making the necessary turns." The restriction on trucks weighing over 6,000 pounds applies only to trucks which are both unsuitable and incapable of making necessary turns. Tower claims that the restriction does not apply to Strom's garbage trucks because the trucks can make the necessary turns.

¶ 34 If vehicles cannot make necessary turns, then, as a practical matter, they cannot use the easement parcel, regardless of weight. The vehicles also cannot qualify as suitable for the easement parcel if they cannot make the necessary turns, regardless of any other qualities the vehicles may have. Tower's interpretation of the easement agreement makes both the weight clause and the provision regarding unsuitable vehicles meaningless surplusage, with no effect on the application of the restriction. Under Tower's interpretation the agreement permits all vehicles that can make the necessary turns, regardless of any other characteristics of the vehicles. Vehicles that cannot make necessary turns cannot use the parcel, as a practical matter, regardless of whether the easement agreement includes any restriction on the use of the easement parcel.

¶ 35 We find that Tower has not offered a reasonable interpretation of the easement agreement, because Tower's interpretation renders much of the language meaningless. See *International Minerals*, 168 Ill. App. 3d at 378; *Bank of America National Trust & Savings Ass'n v. Schulson*, 305 Ill. App. 3d 941, 946-50 (1999). We agree with the circuit court that the easement agreement unambiguously precludes frequent use of the easement by trucks weighing more than 37,000 pounds. We also agree with the circuit court that it did not rely on a strict reading of the clause at issue. It did not forbid use of the easement parcel by a truck weighing only a little more than 6,000 pounds, and it did not interpret the clause strictly to forbid infrequent use of the easement parcel by heavier trucks.

¶ 36 Tower argues that the garbage trucks qualify as "moving and delivery vehicles" expressly permitted by the easement agreement in the sentence after the weight restriction. Tower claims that the trucks move garbage and deliver necessary services. The parties to the agreement limited the use of the easement parcel by heavy vehicles because of the damage such vehicles cause to the garage located under the easement parcel. The parties expressed an intent to permit occasional use of the easement parcel by vehicles used for helping residents relocate to and from other residences, and for residents to accept delivery of large items, such as furniture, to their homes. Vehicles that take garbage away from the building neither help residents relocate to or from other residences nor deliver items to the building and its residents. We reject Tower's strained interpretation of the "moving and delivery vehicles" exception to the weight restriction.

¶ 37 Tower most vigorously contends that the circuit court's interpretation of the easement agreement makes use of Tower's building much more difficult. Tower will need to pay some persons to roll the full dumpsters out to a public street every day, or it will need to reach an agreement with Museum Pointe for the cost of repairing Museum Pointe's garage. As the circuit court noted, the developer could have avoided the problem by designing the building on Tower's property so that the garbage bay abutted a public street and not the part of 13th Street Museum Pointe owned. The developer also could have avoided much of the problem by placing Museum Pointe's garage so that it did not lie under 13th Street. The added costs to Tower do not permit this court to ignore the language of the easement agreement. We affirm the circuit court's order granting a declaratory judgment stating that the easement agreement forbids the regular use of the easement parcel by garbage trucks weighing significantly more than 6,000 pounds.

¶ 38 Finally, Tower formally appealed from the award of attorney fees, but on appeal it argues only that the circuit court should not have awarded fees at all because it should not have entered a judgment in favor of Museum Pointe on the complaint. Because we affirm the award of a declaratory judgment in favor of Museum Pointe, we also affirm the award of fees.

¶ 39 CONCLUSION

¶ 40 The affidavits Tower presented in support of its request for additional discovery did not meet the requirements of Supreme Court Rule 191. Therefore, we find that the circuit court did not abuse its discretion when it denied the request for additional discovery. Because

Tower did not show that it detrimentally relied on Museum Pointe's delay in bringing suit, the circuit court did not abuse its discretion by rejecting the defense of *laches*. The easement agreement unambiguously forbids frequent use of the easement by trucks weighing significantly more than 6,000 pounds. Accordingly, we affirm the order granting summary judgment in favor of Museum Pointe, and the order awarding Museum Pointe attorney's fees.

¶ 41 Affirmed.