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2014 IL App (3d) 120916-U

Order filed February 13, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

GARDNER FIRE PROTECTION DISTRICT,	)	Appeal from the Circuit Court
an Illinois municipal corporation,	)	of the 13th Judicial Circuit,
	)	Grundy County, Illinois.
Plaintiff-Appellee,)	
	)	Appeal Nos. 3-12-0916
v.	)	3-13-0063
	)	Circuit Nos. 10-MR-64
GARDNER VOLUNTEER FIRE	)	11-MR-63
DEPARTMENT, an Illinois not-for-profit	)	11-MR-69
corporation,)	
	)	Honorable Robert C. Marsaglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted the Fire District's motions for summary judgment. No genuine issue of material fact exists as to whether the plaintiff acted arbitrarily and capriciously when terminating the parties' agreement.
- ¶ 2 This appeal arises from a contract dispute between the Gardner Fire Protection District (the District) and the Gardner Volunteer Fire Department (the Department). As detailed below, each party filed suit against the other claiming violations of the parties' agreement. The circuit court of Grundy County entered judgment in favor of the District. The Department appeals,

claiming, *inter alia*, that the trial court erred: (1) in finding the District properly terminated the agreement based upon the Department's misappropriation of funds; (2) when holding the doctrine of *cy pres* required the Department to transfer its assets to the District; and (3) when finding the District did not act arbitrarily and capriciously when terminating the parties' agreement.

¶ 3 BACKGROUND

¶ 4 The Department is a not-for-profit corporation formed in 1958. Its articles of incorporation identify its stated purpose as:

"To unite fraternally and for the mutual benefit and protection of the property of the citizens of Gardner. To foster and cultivate the social, educational, and business relationships of the members. To broaden their interest in fire protection. To encourage, among the members, closer personal acquaintances and mutual co-operation. To purchase, lease, hold, sell, convey, or otherwise acquire or dispose of real and personal property necessary or proper for the carrying out of the purposes of this corporation. To hold festivals and other entertainment."

¶ 5 The District is an Illinois municipal corporation located in Grundy and Livingston counties formed in 1967 for the purpose of assessing and collecting taxes to provide fire protection services to Gardner, Illinois.

¶ 6 At issue in this dispute is an April of 1997 agreement entered into between the parties, as well as an addendum to that agreement. The parties executed the addendum in October of 2002. The parties' agreement calls for the Department to provide fire protection and emergency ambulance services to properties within the boundaries of the District. The District, in exchange, agreed to pay the Department tax revenues collected for fire protection and emergency

ambulance services each year the agreement is in effect. The District also agreed to pay to the Department all amounts received from the Village of Gardner pursuant to a tax incremented financing (TIF) agreement dated January 26, 1987. The agreement between the Department and the District states that it "is understood that these amounts shall be used in a manner consistent with the TIF statutes of Illinois."

¶ 7 The parties' agreement called for the Department to furnish yearly budgets to the District, as well as an audited financial statement of the Department's accounts. The original agreement included a termination clause, calling for "six (6) month notice in writing to the other party" in the event one desired termination.

¶ 8 The 2002 addendum states that the Department "acknowledges that it is, has been, and always will be a Not For Profit Volunteer Department whose only reason for acquiring assets is to afford the residents of the Fire Protection District, Fire Department, Ambulance and Emergency Medical Services ***." The addendum continues by defining a process through which either party may terminate the entire agreement, including a provision for terminating the contract for cause. We will detail this process below.

¶ 9 In October of 2010, the District proposed another addendum to the agreement that imposed additional duties upon the Department. Those duties include, but are not limited to, submitting for approval yearly a list of scheduled regular payments, submitting monthly requested expenditures for operations, transferring all accounts held by the Department to the District, and incurring no financial obligations unless approved by the District. An unsigned copy of this October 2010 proposed addendum in the record on appeal suggests that the Department rejected it.

¶ 10 On November 17, 2010, the Department filed a complaint against the District, alleging the District failed to pay real estate tax revenues and TIF funds to the Department as called for in

the parties' agreement. The trial court issued an order in that matter, on February 14, 2011, directing the District to pay the Department TIF funds, but declined to direct the District to pay the real estate tax monies. The court found the District had discretion to use those funds for other purposes.

¶ 11 On May 11, 2011, the District sent the Department notice of its intent to terminate the agreement without cause on November 11, 2011.

¶ 12 On September 7, 2011, the Department filed a complaint for declaratory relief seeking an order declaring that the agreement remained in effect despite the actions of the District.

¶ 13 On October 3, 2011, the District approved a resolution which stated that the "District has determined that the Department or its Directors have committed a misappropriation of funds and as a result is terminating the contract effective October 3, 2011." The resolution recited numerous specific bases for termination. These included a \$19 check written from the Gardner Emergency Squad Standard Bank Account to pay for transcripts in a divorce case. The transcripts were used to challenge the petitions of candidate Gary Morris, who was running for election to the District Board.

¶ 14 From the same account, a director of the Department wrote a check for \$8,081 to a law firm seeking an opinion of whether a trustee of the District may also serve as county sheriff. The third factual basis centered around \$2,201.76 in checks written to local restaurants, which the District claimed "were never authorized by the District."

¶ 15 The fourth factual basis noted that checks totaling \$1,897.34 were written by Chief Wilkey. However, the "individual receiving the payment was left blank." The final "factual basis for termination" as explained in the resolution noted that the Department opened a "CITI A Advantage Business credit card account" and accumulated \$47,196.46 in charges from January 1, 2007, through the date of the resolution (October 3, 2011). The resolution stated that the

"District has on numerous occasions requested a detailed statement of the Department's transactions under this account. The Department has refused to provide the District with this information."

¶ 16 The District provided the Department notice that the Department had 10 days to request the District's Board of Trustees to reconsider its termination of the agreement. The next day, on October 4, 2011, the District filed a complaint seeking an order declaring that all the Department's assets belonged to the District, as the agreement was terminated for cause.

¶ 17 The Department made its request for reconsideration, leading to a special meeting of the District's Board of Trustees, which took place on October 25, 2011. The Department's chief, Randy Wilkey, testified at the hearing that he had been chief since 1998. Wilkey noted the Department was formed in 1958; it existed and functioned separately from the District that was formed approximately 10 years later.

¶ 18 Wilkey stated that the Department received funds from many sources. In addition to the funds provided by the District, the Department charged customers for ambulance services, and received monies from private donations and memorials. The Department received money for filling swimming pools, CPR training, and other various safety classes provided to private entities.

¶ 19 Regarding the five alleged misappropriations, Wilkey testified that the Department ordered the transcript to investigate the residency of one of the District's trustees. He opined that both the Department's members and the taxpayers have an interest in who obtains the position of trustee. He believed it is his duty as fire chief to promote the interest of the Department and respond to the opinions of its members. As to the legal fees, such items were always within his budget, and his members felt the expenditure was appropriate.

¶ 20 Chief Wilkey noted the money spent at restaurants for social outings supports the morale of the Department members and showed appreciation for the members' extra efforts. He further testified that the Department approved all the expenditures related to the checks issued with blank payee lines. Finally, he stated that the Department used the credit card to pay for expenses such as purchasing training equipment and office supplies. Following the hearing, the District reconfirmed the termination of the agreement for cause: that being, misappropriation of funds.

¶ 21 On May 3, 2012, the District filed a second amended complaint, which consisted of six counts, seeking: (1) a declaration that the contract was properly terminated for cause; (2) an order directing the Department to immediately return all assets to the District; (3) compensation for breach of contract, claiming the District used money for purposes other than fire protection and emergency medical services; (4) the imposition of a constructive trust over any assets rightfully belonging to the District; (5) an accounting of all assets of the Department; and (6) a declaration that the contract and the addendum were void *ab initio*.

¶ 22 The next day, on May 4, 2012, the Department filed its second amended complaint, which also consisted of six counts. Count I sought a declaration that the District improperly terminated the agreement. Count II sought a declaration that the agreement had not been terminated for cause, claiming the District failed to hold a proper hearing as required by the agreement. Count III sought judicial review and reversal of the decision issued by the District's Board of Trustees, as well as an order reinstating the agreement. Count IV sought a declaration that all tax revenues collected by the District must be paid to the Department. Count V sought a money judgment, claiming the Department detrimentally relied on representations made by the District when entering into loan agreements. Count VI requested a declaration that the agreement remain in effect until September 10, 2012.

¶ 23 During the litigation, the District moved for an order of replevin. The trial court conducted hearings on the matter on May 29 and June 6, 2012. Trustee Baker from the District testified that she is the secretary for the Board of Trustees. She confirmed that the District terminated the agreement for cause: to wit, misappropriation of funds. She claimed the Department is funded by tax revenues as evinced by one of the Department's accounts marked "public funds" at the bank that holds the account. She did not know who at the bank labeled the account in that manner.

¶ 24 Chief Wilkey testified at the hearing. He noted that the Department's primary purpose is to provide fire protection and emergency ambulance services to the District. The Department also provides other services, such as fire prevention education, drinking and driving education to the high school, backup dispatch for the 911 center, first-aid and CPR training services for teachers. The Department also receives revenues for lending its facilities to other organizations such as the Office of the State Fire Marshall.

¶ 25 Wilkey continued, noting that other purposes include holding festivals and entertainment, as well as fostering or cultivating the social and business relationships of its members. He claimed that a third-party agency bills customers for the Department's ambulance services and then deposits funds directly into the Department's accounts. These monies were placed in any one of six departmental accounts from which funds can be withdrawn. He did not know who labeled one of the accounts "public funds" but it was someone at the bank. The bank subsequently removed the label.

¶ 26 On June 18, 2012, the trial court issued its order regarding the replevin matter. In it, the court noted that both parties agree that the Department is not a unit of government. The court specifically found that claiming misappropriation of funds for restaurant tabs is "arbitrary and capricious given the corporate purpose of the not-for-profit corporation which includes: 'To unite

fraternally and for the mutual benefit and protection of the property of the citizens of Gardner. To foster and cultivate the social, educational and business relationship of the members,' and 'To hold festivals and other entertainment.' "

¶ 27 The court concluded that the central issue is "whether the funds held by the Department remain 'government funds' after they are transferred to the Department by the District." It continued, noting "[t]he fact that the agreement calls for termination for cause for 'misappropriation of funds' weighs heavily against the argument that it is not possible for the Department to misappropriate its own funds. *** Considering all of the above, this Court finds that the Gardner Fire Protection District has shown the probability of success on the merits and that their determination that the funds expended for pursuing ballot challenges is political activity and, therefore, the misappropriation of funds pursuant to the letter and spirit of the relevant contract."

¶ 28 The District then moved for summary judgment on its second amended complaint. The Department submitted an affidavit in response, clarifying the percentage of the Department's funds received from the District. In 2010, the Department's total revenue equaled \$379,266 of which \$191,960, or 50.61% came from tax and TIF money supplied by the District. In 2011, the Department's revenue totaled \$409,176 of which \$276,452, or 67.56% was received from the District.

¶ 29 On October 11, 2012, the trial court reaffirmed its previous finding that the Department misappropriated funds "for direct political purposes." The court found no genuine issue of material fact existed as to whether the District acted in an arbitrary and capricious manner when terminating the contract for cause. As such, the trial court awarded the District summary judgment on counts one through five of its second amended complaint. The District then

dismissed count VI of its second amended complaint. The Department filed a timely notice of appeal from the October 30, 2012, order.

¶ 30 In the companion case, on October 23, 2012, the District filed a motion for summary judgment against the Department's second amended complaint. The trial court granted that motion as to all counts on January 14, 2013. On January 22, 2013, the Department filed a timely notice of appeal from the January 14, 2013, order.

¶ 31 These consolidated appeals followed.

¶ 32 ANALYSIS

¶ 33 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307 (2004). We review an order awarding summary judgment *de novo*. *Id.* We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied on that ground. *Id.*

¶ 34 In reviewing a grant of summary judgment, we construe the pleadings, depositions, admissions and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Lake County Grading Co., LLC v. Village of Antioch*, 2013 IL App (2d) 120474, ¶ 12. A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004).

¶ 35 I. Termination "for Cause"

¶ 36 The District's second amended complaint against the Department sought, *inter alia*, a declaration that the District properly terminated the agreement for cause. The Department's final complaint against the District sought, *inter alia*, a determination that the District acted arbitrarily and capriciously when terminating the agreement. While the ultimate issue on appeal is, of course, whether the trial court properly awarded the District summary judgment, to make that determination, we must decide if the trial court properly found no genuine issue of material fact existed as to whether the District acted arbitrarily or capriciously when terminating the agreement for cause.

¶ 37 If the record supports the Department's contention that a genuine issue of material fact exists as to whether the District acted arbitrarily and capriciously when terminating the contract, then reversal is mandated. However, affirmation is appropriate if the record supports the contrary conclusion. Our analysis begins with the agreement itself.

¶ 38 Relevant portions of the original agreement state as follows:

"The Fire Department, prior to June 1st each year hereafter, shall furnish to the Fire Protection District separate budgets for said fire protection service and for emergency medical service for the succeeding calendar year, which budgets shall set forth, including but not limited to, items of expenses to be incurred by the Fire Department, the surplus, if any, in said items or expense and reserves for equipment and building. The words, 'items of expense', as used herein, mean the various expenses incurred by the Fire Department as, for example, training and medical supplies, and not an inventory of the materials used for such expenses. The budget shall include sums necessary to pay loans for capital projects such as apparatus and building.

On or before July 1st of each year hereafter, the Fire Department shall deliver to the Fire Protection District audited financial statements of the Fire Department's accounts for said fire protection service and for said emergency medical service by a person or persons authorized to practice public accounting under the laws of the State of Illinois. Such audits shall be made as of the close of the last fiscal or calendar year of the Fire Department and shall include where and in what manner such reserves are deposited."

¶ 39 As noted above, the parties amended the original agreement via an addendum. The addendum states:

"This contract may be terminated without cause by first giving 6-month notice in writing to the other party of intent to terminate without cause.

This contract may be terminated for cause in the following circumstances:

A) Fraud, misappropriation of funds, commission of a felony. ***

In the event the Fire Protection District determines that the Department or its directors have committed a fraud, misappropriation of funds or is charged with a felony for its conduct this Contract may be immediately terminated by written notice of termination stating the factual basis for the same. The department shall have 10 days after notice to request the Fire Protection District Board to reconsider its termination.

The Fire Protection District shall within 10 days of request to reconsider hold a meeting to reconsider the termination and hear evidence from the

department negating the alleged fraud, misappropriation of funds or felony action. Should the Fire Protection district reconfirm its termination, then this contract shall be terminated.

In the event the Department is terminated for cause, then all assets of the Department and other items utilized to afford fire protection services in the District shall be transferred to the Fire Protection District. In the event the Contract is terminated without cause, then all assets of the Department remain the property of the Department."

¶ 40 Our research has revealed no reported decisions, and the parties cite none, which analyze allegations that a fire protection district arbitrarily and capriciously terminated its contract with a volunteer fire department. However, allegations that one party arbitrarily and capriciously terminated a contract without cause have been analyzed in other arenas.

¶ 41 In *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536 (2009), the plaintiff worked for the defendant who terminated plaintiff's employment due to "plaintiff's failure to follow direct orders as well as due to shortcomings with his interpersonal skills and management style." *Id.* at 537. Plaintiff's contract guaranteed 6 months of salary in the event of early termination or 60 days of salary in the event of termination "for substantial cause." *Id.* Ultimately, the defendant corporation terminated plaintiff's contract, claiming the termination was for substantial cause. *Id.* at 541. Plaintiff sued, alleging his termination was not for substantial cause and, therefore, he was entitled to six months' pay. *Id.* Defendant moved for summary judgment which the trial court granted. *Id.*

¶ 42 In affirming the trial court's grant of summary judgment to the *McLaughlin* defendant, the court noted that the "plain language of the contract therefore provides the defendant with the discretion to determine whether the plaintiff's termination was for substantial cause." *Id.* at 546.

¶ 43 The court continued:

"The real issue thus is not whether the term 'substantial cause' is ambiguous but whether the defendant reasonably exercised its contractual discretion in determining that the termination of the plaintiff's employment was for 'substantial cause.' [Citation.] *** Here, the undisputed facts reveal that the plaintiff's employment was terminated for (1) failure to improve his interpersonal relationships as he was directed in a performance review and (2) failure to comply with a direct order from his superior. Based on these facts, and because there is nothing in the record to suggest that the defendant acted in bad faith in determining that the termination of the plaintiff's employment was for substantial cause, we reject the plaintiff's argument that the trial court erred in granting the defendant's motion for summary judgment as to this issue." *Id.*

¶ 44 Similarly, the agreement in question here provided the District with discretion to terminate the contract for cause. While the parties chose to define potential causes for termination in the agreement, the issue we are faced with is analogous to that in *McLaughlin*: that is, did the terminating party reasonably exercise its contractual discretion or did the Department raise a genuine issue of material fact as to whether the terminating party acted arbitrarily and capriciously when exercising that discretion?

¶ 45 While the trial court focused on the Department's use of funds for political purposes, terming such use a misappropriation under the contract, we may sustain the court's decision on

any grounds that are called for by the record regardless of whether they were relied on by the trial court. *First Chicago Insurance Co, v. Molda*, 408 Ill. App. 3d 839, 845 (2011). We find we need not reach the issue of whether the funds used for political purposes equate to misappropriation as the District was well within its rights to terminate the contract for cause given the Department's failure to produce statements relating to \$47,196.46 in credit card charges accumulated by the Department.

¶ 46 As noted above, the contract imposed upon the Department to not only provide the District with a yearly budget, but also a meaningful audit of the Department's financial accounts. It is undisputed that the Department repeatedly refused to provide the District with a statement from a credit card on which it charged \$47,196.46. The chief testified that the charges were for authorized expenditures, but refused to provide easily accessible documentation. The resolution passed by the District seeking to terminate the agreement identified the Department's refusal to provide the statement despite the "numerous" requests the District made of the Department to do so. The Department does not deny that it failed to comply with the District's request, rendering that fact undisputed. We cannot say that the District exercised its discretion arbitrarily or capriciously when terminating the agreement based upon the Department's refusal to comply with its reporting duties.

¶ 47 Many courts have noted that the "duty of good faith and fair dealing is implied in every contract and requires a party vested with contractual discretion to exercise it reasonably, and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 443 (2011); *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183 (2011); *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676.

¶ 48 Undoubtedly, the reasonable expectations of the parties are paramount when determining whether a party exercised its contractual discretion arbitrarily and capriciously. The District, being a public entity empowered to levy and collect taxes, disbursed the public's tax dollars to the not-for-profit Department bearing the seemingly public name, Gardner Volunteer Fire Department. The Department and District agreed that associated with these tax dollars came the Department's duty to provide a meaningful accounting of its expenditures in the form of providing budgets and audits to the District. Any claim by the Department that it reasonably expected it could accept public tax dollars without having to account for more than \$47,000 in credit card charges strains credulity.

¶ 49 It would be disingenuous for the Department to claim that the parties' reasonable expectations included denying the District the ability to review the Department's accrual of the credit card charges. With an eye toward financial oversight, the agreement calls for the Department to provide rather detailed budgets. These budgets must separate fire protection services and emergency medical services. The budgets must also include "items of expenses," any surplus or reserves for buildings and equipment, as well as expenses for training and medical supplies. In addition to those budgets, the Department must "deliver to the Fire Protection District audited financial statements." These statements must include information regarding the Department's finances, including "where and in what manner" reserves are deposited.

¶ 50 We find the Department failed to adduce any evidence raising a genuine issue of material fact as to whether the District acted arbitrarily or capriciously when terminating the parties' agreement for cause. As such, we hold the trial court properly granted the District's motion for summary judgment. Pursuant to the parties' agreement, all of the Department's assets passed to the District once the agreement terminated for cause.

¶ 51 Having found that the decision of the District to terminate the contract for cause was neither arbitrary nor capricious and, therefore, the Department's assets passed to the District via contract, we need not address the issue of whether the trial court erred in holding that the doctrine of *cy pres* operated to vest the District with ownership of the Department's assets. As all of the Department's assets are now controlled by the District, we also need not address the Department's contention that the trial court erred in refusing to order the District to turn over various tax funds to the Department.

¶ 52 Finally, the Department claims on appeal that the trial court erred in ordering it to provide the District with an accounting, as it is unable to do so since the District is now in possession of all the Department's records. The District agrees that the issue is moot as it possesses all the records and, as such, does not require an accounting. As the District has effectively withdrawn its claim for a further accounting, we need not address this issue.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Grundy County is affirmed.

¶ 55 Affirmed.