

NOTICE

Decision filed 02/10/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110148-U

NO. 5-11-0148

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

ANGELICA McATEER,

Plaintiff-Appellee,

v.

DENNIS DUGAN,

Defendant-Appellant.

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Appeal from the
Circuit Court of
St. Clair County.

No. 10-CH-1547

Honorable
Stephen P. McGlynn,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment is proper where contract terms are clear and unambiguous.

¶ 2 On September 15, 2010, the plaintiff and the defendant entered into an operating agreement (Operating Agreement) for the Children's Academy, LLC. As set forth in the Operating Agreement, the plaintiff owned 49% of the Children's Academy, LLC, and the defendant owned 51%. Section 4.04.1 of the Operating Agreement provided, "No Member will transfer, pledge, assign, or encumber all or any part of his or her interest in the Limited Liability Company except as provided in this agreement." The only provisions of the Operating Agreement regarding the transfer of a member's interest are the "Buy-sell Agreement" contained in section 4.04.2 of the Operating Agreement, which provides:

"If any member desires to sell *** his or her interest in the Limited Liability Company (Transferring Member), he or she shall give written notice to the non-selling Member (Remaining Member) of its intention to do so (Transfer Notice). The Transfer Notice,

in addition to stating the Transferring Member's intention to transfer his or her interest, shall state the amount of the consideration and other terms of the sale for the disposition of the Transferring Member's entire interest. The Transfer Notice shall be in writing. Upon receipt of the Transfer Notice, the Remaining Member will have up to 14 days to elect to either purchase the entire interest at the set price or to convey his or her own entire interest in the Limited Liability Company for the same price, with closing to occur not later than 30 days after the notice of election, cash to be paid at closing. This election must be made in writing. If the Remaining Member does not deliver such an election of the Transferring Member within the 14 day period then the Remaining Member shall be deemed to have elected to purchase the Transferring Member's interest."

¶ 3 Around November 5, 2010, the defendant faxed a written document to the plaintiff which was signed and dated by the defendant and was entitled "Notice of Intent to Sell." In the notice, the defendant gave the plaintiff notice of his intention to sell the plaintiff his interest in the Children's Academy, LLC. The notice expressly stated, "This Notice is given pursuant to section 4.04.2 of the Operating Agreement for the Children's Academy, LLC." On November 8, 2010, within the 14-day period, in accord with section 4.04.2 of the Operating Agreement, the plaintiff signed and dated a written document entitled "Notice of Election" whereby the plaintiff exercised her right to elect "to convey her own entire interest in the Children's Academy, LLC [to the defendant] for the same price (\$135,100.00), with closing to occur not later than 30 days after this Notice of Election, cash to be paid at closing, as set forth specifically in Section 4.04.2 of the Operating Agreement for the Children's Academy, LLC."

¶ 4 Pursuant to sections 4.04.2 and 4.04.5 of the Operating Agreement:

"The Buying Member shall pay to the Selling Member, in immediately available

funds, a sum equal to the price set in the Transfer Notice. The Selling Member shall deliver to the Buying Member a complete and absolute assignment of one hundred percent (100%) of the Selling Member's Interest."

¶ 5 According to the plaintiff, the defendant has not paid, and refuses to pay, the \$135,100 or any funds to the plaintiff for the plaintiff's interest in the Children's Academy, LLC. Section 4.04.3 of the Operating Agreement allows the plaintiff the right to pursue specific performance of the contract. Section 4.03 of the operating agreement provides that each LLC member interest certificate must contain written notice that its transfer is restricted by the buy-sell agreement within the operating agreement.

¶ 6 On November 24, 2010, the plaintiff filed a complaint for specific performance. On January 3, 2011, the defendant filed a motion to transfer venue and an affidavit, which was not signed or notarized, in support of the motion to transfer venue. On January 5, 2011, the plaintiff served the defendant with a request to admit facts. On January 6, 2011, the plaintiff filed a motion for summary judgment and a notice of hearing scheduling a hearing on the motion on February 1, 2011. On January 24, 2011, the defendant filed a motion to continue the hearing set for February 1, 2011. On that same date, the defendant also filed a motion for extension of time to respond to the plaintiff's request to admit facts.

¶ 7 On February 3, the plaintiff filed an amended notice of hearing rescheduling for the motion to be heard on February 8, 2011. During the hearing on February 8, the defendant orally requested a continuance of his answer to the plaintiff's motion for summary judgment, but requested that his motion to transfer venue be heard. The court held a hearing on the defendant's motion and denied the motion to transfer. The court allowed the defendant's continuance and gave the defendant an additional 30 days in which to answer the plaintiff's complaint for specific performance and to file his response to the motion for summary judgment. The trial court rescheduled the hearing on the complaint and the motion for

summary judgment to be heard on March 10, 2011.

¶ 8 On March 10, 2011, the defendant filed his answer to the plaintiff's complaint for specific performance and answer to the plaintiff's motion for summary judgment. Attached to the defendant's answers was another affidavit in opposition to the plaintiff's motion for summary judgment. Although the affidavit was notarized, it had not been signed. On that same date, the defendant requested another continuance, which the court granted. The court noted that the affidavit was not signed and ordered the defendant to file a fully executed affidavit within seven days.

¶ 9 On March 14, 2011, the plaintiff filed a motion to strike the defendant's reply to the request to admit facts for failure to comply with Supreme Court Rule 216 (eff. Jan. 1, 2011). On March 22, 2011, the plaintiff filed a motion to strike the defendant's affidavit in opposition to the plaintiff's motion for summary judgment. The plaintiff also filed her brief in opposition to the defendant's motion to reconsider the denial of the motion to transfer venue.

¶ 10 On March 24, 2011, a hearing was held on all pending motions. At that time, the defendant's counsel had not obtained the defendant's signature on the "affidavit in opposition to summary judgment" and still had not filed a response to the plaintiff's request to admit facts.

¶ 11 During the hearing, defendant's counsel orally announced that she would file a notice of appeal on the issue of the trial court's denial of the motion to transfer venue. Based on the plaintiff's affidavit, the defendant's lack of an affidavit, the plaintiff's request to admit facts, and the defendant's failure to file a proper response to the request to admit facts, the trial court granted the plaintiff's motion for summary judgment and granted the complaint for specific performance. After the hearing, defendant's counsel filed a handwritten document entitled "notice of appeal." On April 12, 2011, the defendant filed a typewritten notice of

appeal. However, at no time did the defendant file a petition for leave to appeal.

¶ 12 At the outset we note that the appellee argues that the appellant's motion to transfer venue was filed late and is therefore waived pursuant to section 2-104(b) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-104(b) (West 2010). Section 2-104(b) provides the following:

"All objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by the defendant on or before the date upon which he or she is required to appear or within any further time that may be granted him or her to answer or move with respect to the complaint ***." 735 ILCS 5/2-104(b) (West 2010).

¶ 13 The defendant was served with the summons and complaint on November 24, 2010. The defendant was required to appear by December 24, 2010. However, the defendant did not file his "motion to transfer–wrong venue" until January 3, 2011. On March 24, 2011, the trial court agreed and found that the motion could be denied solely on the basis of it being late. The trial court had denied the defendant's "motion to transfer–wrong venue" on February 8, 2011. There is nothing in the record that indicates that the defendant filed a motion to reconsider on March 10, 2011. However, it appears it was discussed during hearing on March 10, 2011.

¶ 14 Pursuant to Supreme Court Rule 306(c)(1) in order to properly appeal the trial court's order of February 8, 2011, the defendant had to properly and timely file a petition for leave to appeal within 30 days after entry of the order. Ill. S. Ct. R. 306(c)(1) (eff. Feb. 26, 2010). A motion to reconsider a court's denial of a motion to transfer venue does not toll the 30-day appeal period. *Leet v. Louisville & Nashville R.R. Co.*, 131 Ill. App. 3d 763 (1985). In the instant case the defendant did not timely file a petition for leave to appeal the venue issue. Accordingly, the appellee argues that this court does not have jurisdiction over the venue

issue. According to the appellant, the appellee did not raise the issue of timeliness of the "motion to transfer—wrong venue" until March 24, 2011, during the argument on the reconsideration of the denial of the motion to transfer. At that time, the defendant's counsel orally stated on the record that she would appeal the trial court's denial of the motion to transfer venue and filed a handwritten document entitled "notice of appeal."

¶ 15 Nevertheless, the defendant argues that the trial court improperly dismissed his motion to transfer venue to Madison County, Illinois. The defendant argues that the LLC is registered in Madison County, Illinois, and that the Operating Agreement was negotiated, prepared, signed, and executed in Madison County.

¶ 16 In response, the plaintiff argues that this matter arises out of the defendant's breach of contract. It is the contract that forms the subject matter of the lawsuit. According to the plaintiff, the contract was partly executed in St. Clair County, Illinois, and in other counties.

¶ 17 Pursuant to section 2-101 of the Code of Procedure (735 ILCS 5/2-101 (West 2010)) venue is proper in the county in which the transaction or some part thereof occurred out of which the cause of action arose. In determining the proper venue, the site where part of the transaction occurred includes the place where any significant transactions were carried out between the parties and where the agreement was signed. When contractual documents are signed in two counties, jurisdiction and venue are appropriate in either county. *Superior Structures Co. v. City of Sesser*, 277 Ill. App. 3d 653 (1996); *Patel v. Lacey*, 203 Ill. App. 3d 1048 (1990).

¶ 18 In the instant case, the "Notice of Intent to Sell" was received in St. Clair County, the "Notice of Election" was drafted and signed in St. Clair County, and the "Notice of Election" was sent to the defendant from St. Clair County. Certainly the transaction occurred partly in one county and partly in the other. Accordingly, we cannot conclude that the trial court improperly ruled that venue was proper in St. Clair County, Illinois.

¶ 19 It appears from the record that on March 10, 2011, the defendant filed his motion to reconsider the trial court's denial of his motion to transfer venue. In this motion to reconsider, the defendant raised the issue of *forum non conveniens*. However, we note that the defendant's motion to reconsider filed on March 10, 2011, is nowhere in the record on appeal. It is the duty of the appellant to provide the reviewing court with an adequate record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Absent the sufficient record on appeal, it will be presumed that the trial court's order was in conformity with the law and had a sufficient factual basis. *Foutch*, Ill. 2d at 392. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Foutch*, Ill. 2d at 392. Without the motion to reconsider the trial court's denial of the defendant's motion to transfer venue, we cannot hold that the trial court improperly denied the motion.

¶ 20 Next on appeal, the defendant argues that there were genuine issues of material fact that should have precluded the trial court from granting the motion for summary judgment in favor of the plaintiff. The defendant argues a vast list of supposed genuine issues of material facts listed in the pleadings.

¶ 21 We will conduct a *de novo* review of a circuit court's grant of a summary judgment. *Young v. Mory*, 294 Ill. App. 3d 839, 844 (1998). A summary judgment is appropriate where the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). The opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material facts. *Carroll v. Curry*, 392 Ill. App. 3d 511 (2009).

¶ 22 The court's primary duty in construing a contract is to give effect to the intention of the parties, and the contract's terms must be given their ordinary natural meaning where the terms are clear and unambiguous. *Lucas v. Beaton*, 201 Ill. App. 3d 341, 346-47 (1990). Where the contract is unambiguous, there is no need to inquire about the intention of the

parties. *Lucas*, 201 Ill. App. 3d at 347. Whether a contract has been formed is a question of law for the court. *Bennet v. Evanston Hospital*, 184 Ill. App. 3d 1030 (1989).

¶ 23 In the instant case, we find the terms of the contract to be clear and unambiguous. The only way the members could transfer their interests was to comply with the buy-sell provision set forth in section 4.04.2 of the Operating Agreement. The parties complied with section 4.04.2. The defendant sent his written "Notice of Intent to Sell" to the plaintiff. Within the 14-day period, in accord with section 4.04.2 of the Operating Agreement, the plaintiff sent her written "Notice of Election" to the defendant in which the plaintiff exercised her right to elect to convey her entire interest in the Children's Academy to the defendant for the price of \$135,100 with closing to occur no later than 30 days after the "Notice of Election," with the cash to be paid at the closing. The defendant failed to pay the plaintiff and thereby breached the contract. Section 4.04.3 of the Operating Agreement specifically provided the plaintiff the right to pursue specific performance. The trial court found that there was a contract formed between the parties and that pursuant to the contract, the defendant had agreed to buy the plaintiff's interest in the amount of \$135,100, but he failed to pay the plaintiff and breached the contract. Accordingly, specific performance was ordered. We cannot conclude that the trial court improperly granted summary judgment.

¶ 24 Affirmed.