

NOTICE

Decision filed 11/06/14. 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.

2014 IL App (5th) 130448-U

NO. 5-13-0448

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).

CREE DEVELOPMENT CORPORATION,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 12-CH-57
)	
MOTO, INC.,)	Honorable
)	Carolyn B. Smoot,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justice Cates and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly found contract was not ambiguous and covenant restricting plaintiff from developing its property for convenience stores expired 20 years after contract was recorded.

¶ 2 This appeal concerns the interpretation of covenants and restrictions placed on plaintiff's property located on the west side of Marion, Illinois. At issue is the length of time plaintiff was required to restrict property it owned from being developed into convenience stores. The trial court determined that was 20 years from the date the covenants and restrictions were recorded after finding no ambiguity in the contract. The ambiguity argued by defendant concerns whether paragraph 12 of the covenants and

restrictions that makes reference to a 10-year extension automatically takes effect after expiration of the 20-year period stated in paragraph 2 of the contract. We agree with the trial court's determination finding no ambiguity in the contract and that the terms in paragraph 12 of the covenants and restrictions did not apply to the 20-year restriction listed in the second whereas clause on page 2 of the covenants and restrictions. Accordingly, the restrictive covenant restricting plaintiff from developing its property into convenience stores expired 20 years from the date it was recorded. We affirm.

¶ 3

BACKGROUND

¶ 4 The parties entered into a stipulation of facts that included six exhibits. The following facts were used by the trial court in making its determination.

¶ 5 Plaintiff, Cree Development Corporation, was the owner of certain real property located on the west side of Marion, Illinois, more accurately described as "the South One-Half of the Southwest Quarter of Section 14, Township 9 South, Range 2 East of the Third Principal Meridian, Williamson County, Illinois" (subject property).

¶ 6 In early 1988, plaintiff entered into an agreement with Gerald K. and Patricia A. Feezor (Feezor) for the purchase of a tract of plaintiff's land to be used as a convenience store. As a condition of said purchase, plaintiff agreed to restrict the subject property and all other of plaintiff's property within a two-mile radius from being used as a convenience store for a period of 20 years from the date of sale.

¶ 7 Prior to the sale of plaintiff's property to Feezor, plaintiff also entered into a real estate contract with Cracker Barrel Old Country Store, Inc. (Cracker Barrel), for the purchase of a section of plaintiff's property on March 7, 1988. The covenants and

restrictions in the contract with Cracker Barrel placed a similar restriction on plaintiff as the restrictions and covenants in the contract with Feezor requiring plaintiff to deliver a restrictive covenant restricting plaintiff's property and its surrounding property within two miles of the purchased tract from use as particular restaurants for a period of 20 years from the date of sale.

¶ 8 Before completing the sale of its property to Feezor, plaintiff executed the covenants and restrictions covering the subject property, which included the property Feezor purchased and the property purchased by Cracker Barrel. These covenants and restrictions were recorded in Williamson County on April 28, 1988. The first and second whereas clauses on page 2 of the covenants and restrictions in the contract state the following:

"WHEREAS, [plaintiff] has entered into an agreement with the Cracker Barrel Old Country Store, Inc. to purchase a tract of land in the development to use for restaurant purposes, and as a condition for this sale, [plaintiff] agrees to restrict the use of all other land or property as a restaurant within the development and all other land or properties that the developer's officers, directors, subsidiaries, and affiliates own or control within a radius of two (2) miles from the premises. These restrictions shall apply only to Shoneys, Dennys, Bob Evans and Big Boys Restaurants. This covenant and restriction shall remain in effect for twenty (20) years from the date this instrument is recorded; and,

WHEREAS, [plaintiff] has entered into an agreement with [Feezor] to purchase a tract of land in the development to use as a convenience store; and, as a

condition for this sale, [plaintiff] agrees to restrict the use of all other land or property as a convenience store within the development, and all other lands or properties that are owned by [plaintiff] or its officers, directors, and affiliates within two (2) miles from the premises. This covenant and restriction shall remain in effect for twenty (20) years from the date this instrument is recorded[.]"

¶ 9 The sale of plaintiff's tract of property to Feezor was completed on July 29, 1988, while the sale of plaintiff's tract of property to Cracker Barrel was completed on October 7, 1988. On July 7, 1993, Feezor transferred their interests in plaintiff's property to defendant, Moto, Inc., which has operated a convenience store on the land since that time.

¶ 10 Plaintiff has recently been in negotiations with a company that desires to purchase a tract of plaintiff's land in the development encumbered by the covenants and restrictions for the purpose of building a convenience store. Plaintiff asserts the restriction prohibiting development of a convenience store on its property expired on April 28, 2008, 20 years from the date the restriction was recorded, relying on language stated in the second whereas clause on page 2 of the contract with Feezor.

¶ 11 Defendant asserts the restriction prohibiting development of a convenience store on plaintiff's property has not expired, alleging there is an automatic 10-year extension after expiration of the 20-year restriction. Defendant relies on paragraph number 12 on page 4 of the covenants and restrictions in the contract with Feezor, which states, in relevant part, the following:

"These covenants are to run with the land and shall be binding on all parties and persons claiming under them for a period of twenty years from the date of [sic] these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the tracts of land has been recorded agreeing to change said covenants in whole or in part."

¶ 12 On September 10, 2010, the first amendment to the covenants and restrictions concerning the subject property was recorded with the Williamson County recorder. On March 22, 2011, defendant recorded a declaration of invalidity of first amendment with the Williamson County recorder.

¶ 13 A complaint for declaratory judgment against defendant was filed by plaintiff on March 19, 2012, seeking a declaration that the restriction on plaintiff's property preventing a convenience store from operating on it expired on April 28, 2008, 20 years from the date the covenants and restrictions were recorded. Plaintiff amended its complaint on July 16, 2012, seeking the same relief.

¶ 14 Plaintiff and defendant filed a stipulation of facts with the trial court on February 6, 2013. The parties subsequently submitted their written arguments to the trial court, and appeared before the trial court to present oral arguments on July 16, 2013. On August 20, 2013, declaratory judgment was entered in favor of plaintiff. Defendant now appeals the trial court's determination, contending there is an ambiguity in the contract given there is a clause referencing a 10-year automatic extension after expiration of the 20-year restriction.

¶ 16 Plaintiff asserts the trial court's decision should be affirmed because there is no ambiguity in the covenants and restrictions of the contract. By the plain language of the second whereas clause on page 2 of the contract discussing restrictions on plaintiff's property, plaintiff contends the 20-year restriction restricting convenience stores from being developed on the land expired 20 years from the date it was recorded. Defendant claims the trial court's decision should be reversed because there is an ambiguity in the contract, alleging the language in paragraph 12 of the covenants and restrictions automatically extends the restriction for 10 years after its expiration.

¶ 17 The trial court determined the language in paragraph 12 of the covenants and restrictions referencing an automatic 10-year extension did not apply to the whereas clause on page 2 that defined the restrictions placed on plaintiff's property. We agree. Accordingly, there is no ambiguity in the contract, and the restriction preventing plaintiff from developing convenience stores on its property expired 20 years from the date it was recorded.

¶ 18 The classification of this agreement was originally a question of law for the trial court. It has been regularly held that whether a contract is ambiguous or not is a question of law for initial determination by the trial court. *Terracom Development Group, Inc. v. Coleman Cable & Wire Co.*, 50 Ill. App. 3d 739, 744, 365 N.E.2d 1028, 1032 (1977).

¶ 19 When a trial court has determined that the agreement is unambiguous, the intention of the parties must be determined from the language used. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 577, 594, 342 N.E.2d 65, 78 (1976). Illinois

courts have repeatedly determined intent of the parties from the language of their agreement alone. *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888, 652 N.E.2d 1233, 1238 (1995). In *Meyer*, the court held that where the terms of the agreement are unambiguous, the intent of the parties must be ascertained exclusively from the express language of the contract as a matter of law.

¶ 20 However, because the issue of whether the contract is ambiguous is a question of law, we independently determine the matter unrestrained by the trial court's judgment. *Hillenbrand v. Meyer Medical Group, S.C.*, 288 Ill. App. 3d 871, 876, 682 N.E.2d 101, 104 (1997). We agree with the trial court's determination finding this contract unambiguous.

¶ 21 Plaintiff contends two separate and distinct sets of covenants and restrictions were placed on plaintiff's property by the covenants and restrictions in the contract controlling plaintiff and defendant, and that the contract was unambiguous. Plaintiff asserts the first set of covenants (set forth in the whereas clauses on page 2 of the contract) is an agreement whereby plaintiff consented to a restriction of the use of its land for use as certain types of businesses for a period of 20 years. Plaintiff asserts the second set of covenants placed certain restrictions on land use and building type, architectural control, nuisances, temporary structures, oil and mining operations, livestock and poultry, garage and refuse disposal, sight distance at intersections, walls and fences, membership and procedure for a period of 20 years from the date the covenants and restrictions were recorded with automatic extensions of successive 10-year periods thereafter unless an instrument signed by a majority of the then owners of the tracts of land has been recorded

agreeing to change the covenants in whole or in part. We agree.

¶ 22 The primary objective in contract construction is to give effect to the intention of the parties and that intention is to be determined from the language of the contract. *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 34, 628 N.E.2d 1165, 1168 (1993). As plaintiff indicates, a covenant is a contract and the ordinary rules of contract construction apply to its interpretation. *Xinos v. Village of Oak Brook*, 298 Ill. App. 3d 520, 524, 698 N.E.2d 667, 670 (1998). As with all forms of contracts, "[c]ovenants should be interpreted to give effect to the actual intent of the parties at the time the covenant was made." *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182, 188, 457 N.E.2d 1226, 1230 (1983).

¶ 23 Plaintiff and defendant have been unable to locate a copy of their contract. However, plaintiff's contract with Cracker Barrel entered into around the same time as the contract between plaintiff and Feezor is useful for determining what covenants and restrictions were created by plaintiff on the subject property.

¶ 24 The first whereas clause on page 2 of the covenants and restrictions required plaintiff to deliver a restrictive covenant restricting plaintiff's surrounding property and plaintiff's property within a two-mile radius of Cracker Barrel's purchased land from use as a Bob Evans, Denny's, Shoney's, or Big Boy's restaurant for a period of 20 years. Similarly, the restriction concerning defendant's property restricted plaintiff's land within a two-mile radius from being developed into a convenience store for a period of 20 years. There is no ambiguity concerning the 20-year restriction in plaintiff's contract with Cracker Barrel. Comparably, we find no ambiguity concerning the 20-year restriction in

plaintiff's contract with defendant.

¶ 25 An ambiguous contract is one capable of being understood in more than one sense or an agreement vague through indefinite expression or having a double meaning. *Mid-City Industrial Supply Co. v. Horwitz*, 132 Ill. App. 3d 476, 481, 476 N.E.2d 1271, 1275 INR 13 (1985). A contract is not rendered ambiguous merely because the parties dispute its meaning. *Joseph v. Lake Michigan Mortgage Co.*, 106 Ill. App. 3d 988, 991, 436 N.E.2d 663, 666 (1982). Whether a contract is ambiguous is also a question of law. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288, 565 N.E.2d 990, 994 (1990). In the absence of an ambiguity, the intention of the parties must be ascertained by the language utilized in the contract itself. *Lenzi v. Morkin*, 103 Ill. 2d 290, 293, 469 N.E.2d 178, 179 (1984).

¶ 26 Plaintiff indicates "there is a strong presumption against terms that could have been easily included by the parties as terms of the contract but were not." *McWhorter v. Realty World-Star, Inc.*, 171 Ill. App. 3d 588, 594, 525 N.E.2d 1205, 1208 (Dist. 1988). The intention of a party to a contract can be determined from the circumstances surrounding the execution of the contract. *Westfield Homes, Inc. v. Herrick*, 229 Ill. App. 3d 445, 451, 593 N.E.2d 97, 101 (Dist. 1992).

¶ 27 In the contract at issue, there are two whereas clauses that specifically restrict plaintiff from use of the land for a particular purpose. The whereas clause concerning Cracker Barrel provides, in pertinent part, "This covenant and restriction shall remain in effect for twenty (20) years from the date this instrument is recorded[.]" The whereas clause concerning plaintiff and defendant's contract immediately follows the whereas

clause concerning Cracker Barrel, and also provides, in pertinent part, "This covenant and restriction shall remain in effect for twenty (20) years from the date this instrument is recorded[.]" There is no mention whatsoever in either of these whereas clauses that define the duration of the restriction alluding to a 10-year automatic extension.

¶ 28 Defendant makes reference to paragraph 12 in the covenants and restrictions, which includes the language "said covenants shall be automatically extended for successive periods of ten years." Defendant contends this reference to a 10-year extension confirms the restrictions on plaintiff's property had not expired. However, this is an entirely separate clause from the two whereas clauses that define the specific restrictions in the covenants and restrictions. The terms of paragraph 12 concern a list of preceding covenants that run with the land related to the property within a two-mile radius of the tract of land. The terms of paragraph 12 do not apply to the whereas clause that specifically defines the restriction of the property and the duration of that restriction.

¶ 29 Restrictive covenants in a contract are to be considered in their entirety rather than from a single specific clause. A contract "is to be construed as a whole, giving meaning and effect to every provision thereof, if possible, since it will be presumed that everything in the contract was inserted deliberately and for a purpose." *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 283, 154 N.E.2d 683, 689 (1958). It is improper to determine the parties' intent by looking at a contract clause or provision in isolation. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 47 (2011).

¶ 30 Accordingly, defendant's contention that paragraph 12 of the contract including an automatic 10-year extension by itself governs the entire contract is a misreading. The

contract specifically establishes a 20-year restriction in the whereas clauses with no reference to an automatic 10-year extension except for paragraph 12, which concerns a different covenant rather than the restriction at issue.

¶ 31 Defendant points out that a covenant is to be construed more strongly against the person who prepared it. *Goldblatt Bros. v. Addison Green Meadows, Inc.*, 8 Ill. App. 3d 490, 496, 290 N.E.2d 715, 718 (1972). Defendant alleges that because plaintiff drafted the covenants and restrictions at issue, the contract should be construed against it. However, the rule that a contract must be construed most strongly against its author only applies when the contract is ambiguous and when other rules of construction fail. *Farber v. Fleck*, 51 Ill. App. 2d 145, 148, 200 N.E.2d 903, 904 (1964). The rule does not apply if the agreement between the parties is unambiguous.

¶ 32 In the contract at issue, the covenants and restrictions clearly state, "This covenant and restriction shall remain in effect for twenty (20) years from the date this instrument is recorded[.]" This 20-year time restriction is included in the same paragraph plaintiff agrees to restrict the use of all other land as a convenience store within the development, whereas paragraph 12 that references a 10-year automatic extension does not include plaintiff's agreement to restrict use of all other land as a convenience store. Accordingly, the contract should not be construed against plaintiff because the contract is unambiguous. It should also be noted that even if the contract were found ambiguous, restrictive covenants are to be strictly construed and interpreted by the courts and any ambiguities should be resolved against the restriction. *Northwest Podiatry Center, Ltd. v. Ochwat*, 2013 IL App (1st) 120458, 990 N.E.2d 347.

¶ 33 Plaintiff contends any ambiguity in the terms of the covenants and restrictions should be resolved in favor of the free use of land. Because we find no ambiguity in the contract, this court need not address this issue. If the terms of the contract were determined to be ambiguous, it should be noted that covenants are strictly construed so they will not extend beyond what is expressly stipulated and all doubts must be resolved in favor of the free use of property and against restrictions. *Fairways of Country Lakes Townhouse Ass'n v. Shenandoah Development Corp.*, 113 Ill. App. 3d 932, 935, 447 N.E.2d 1367, 1369 (1983).

¶ 34 Lastly, plaintiff indicates defendant's purchase of Feezor's property does not give it the right to modify the terms of the covenants and restrictions in the original contract between plaintiff and Feezor. We agree. Illinois law has been consistent with regard to this matter, as "mere disparity of bargaining power is not sufficient grounds to vitiate contractual obligations." *Streams Sports Club, Ltd.*, 99 Ill. 2d at 191, 457 N.E.2d at 1232.

¶ 35 As revealed in the record, defendant purchased subject property from Feezor five years after Feezor and plaintiff agreed to the 20-year restriction on use of other property owned by plaintiff as a convenience store. Defendant is bound by the original agreement between plaintiff and Feezor even though defendant itself did not negotiate a restrictive covenant with plaintiff. It does not matter that defendant lacked bargaining power concerning the creation of the restrictive covenant because defendant accepted ownership of the property from Feezor with a restrictive covenant attached to the property, thereby binding defendant to the restrictive covenant on the property.

¶ 36

CONCLUSION

¶ 37 For the reasons stated herein, we affirm the judgment of the circuit court of Williamson County granting declaratory judgment in favor of plaintiff.

¶ 38 Affirmed.