2016 IL App (5th) 150049-U

NO. 5-15-0049

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TOM RHEINECKER, JANET RHEINECKER, JOHN GORDON, and DARRELL DUNHAM,	)	Appeal from the Circuit Court of Perry County.
Plaintiffs-Appellees and Cross-Appellants,	)	
v.	)	No. 13-CH-24
BURNING STAR GREEN ENERGY, LLC, a Florida Limited Liability Company,	)	Honorable Eugene E. Gross, Judge, presiding.
Defendant-Appellant and Cross-Appellee.	)	

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's finding that neither contract was terminated is affirmed where plaintiffs failed to make a showing that defendant breached its contractual obligations. The trial court's decision to not award defendant attorney fees is reversed where the contracts specifically provide for such an award to the prevailing party.

¶ 2 BACKGROUND

¶ 3 Plaintiffs, Tom Rheinecker, Janet Rheinecker, John Gordon, and Darrell Dunham, entered into two agreements with defendant, Burning Star Green Energy, LLC, a Florida limited liability company, in December 2010–an agreement for sale and purchase of

carbon deposits (carbon agreement) and a lease agreement. The carbon agreement provided that defendant would purchase carbon deposits from plaintiffs on the land described by the agreement. Specifically, the carbon agreement stated:

> "[Defendant] intends to conduct a coal recovery operation on the Land *** under a permit *** to be issued by the Illinois Department of Natural Resources[,] *** whereby upon recovering the Carbon Deposits it will treat the Carbon Deposits to the extent it deems necessary and then sell the treated Carbon Deposits to third party purchasers such as utility companies[.]"

¶ 4 The carbon agreement specified that plaintiffs agreed to sell, assign, and deliver carbon deposits to defendant. Further, defendant agreed to pay plaintiffs royalty payments and granted plaintiffs a security interest in the carbon deposits to secure the payment of the royalties. Defendant was obligated to use "reasonable commercial efforts" to complete certain activities within a particular timeframe.

¶ 5 The lease agreement provided for payment of initial rent with an option to extend the lease. The lease agreement also provided that defendant intended to conduct the recovery operation at the leased property under a permit to be issued by the Illinois Department of Natural Resources (IDNR). Defendant was obligated to procure $1 million in liability insurance under the terms of the lease. Defendant further agreed to promptly forward any notices it received from IDNR or any other regulatory authority relating to the leased property to plaintiffs.

¶ 6 On June 28, 2013, plaintiffs filed a two-count complaint against defendant, claiming the agreements had been terminated because defendant was in default. Count I

sought specific performance and damages, alleging defendant had a duty to assign its interest in the IDNR permit to plaintiffs. Count II sought declaratory judgment that plaintiffs were the owners of any rights defendant had in the IDNR permit, a mandatory preliminary injunction, without bond, requiring that defendant execute an assignment of any interest it may have in the IDNR permit, and a final injunction requiring defendant to execute an assignment of any interest it may have in the IDNR permit. Count II also sought declaratory judgment that any and all noncircumvention agreements entered into by defendant were void.

¶ 7 A bench trial was held on November 7, 2014. At trial, plaintiffs argued defendant had breached the contract and violated the implied covenant of good faith and fair dealing. Defendant asserted the agreements were still in place and that any breach would not constitute a material breach to justify rescission. The trial court indicated defendant's alleged breaches were: (1) failing to secure an IDNR permit in a commercially reasonable time period; (2) failure to provide plaintiffs copies of IDNR notices; and (3) failure to provide a proper declaration page for insurance coverage.

¶ 8 The trial court ruled in favor of defendant and against plaintiffs regarding whether the agreements had been terminated, but declined to award defendant attorney fees. Regarding the attorney fees, the court found "[i]n that this is a matter in chancery and because it is a close question of fact due to [d]efendant's failure to submit a timely certificate of publication, this [c]ourt declines to award attorney fees to either party even though the agreements do provide for such an award to the prevailing party."

¶ 9 Defendant subsequently filed a notice of appeal on the issue of attorney fees, and plaintiffs filed a notice of cross-appeal on the issue of whether either agreement had been terminated. For the reasons that follow, we affirm the trial court's finding that neither agreement was terminated, reverse the trial court's decision to not award defendant attorney fees, and remand with directions to award defendant reasonable attorney fees.

¶ 10 ANALYSIS

¶ 11 I. Carbon and Lease Agreements

¶ 12 Plaintiffs argue that by failing to file a responsive brief, defendant has agreed to the proposition that both contracts have been terminated. We disagree:

> "[R]eversal should not be automatic when an appellee fails to file a brief but, instead, when the record is simple and the claimed error is such that the reviewing court can easily decide the matter without the aid of an appellee's brief, the court should decide the merits of the appeal." *People v. Dovgan*, 2011 IL App (3d) 100664, ¶ 10, 959 N.E.2d 230.

¶ 13 A court of review should not be compelled to serve as an advocate for a party if a case is complex. *Dovgan*, 2011 IL App (3d) 100664, ¶ 10, 959 N.E.2d 230. Here, we find this matter is not complex and that it can be decided without the aid of a responsive brief from defendant. Accordingly, we turn to the merits of plaintiffs' argument.

¶ 14 A. Judicial Admission

¶ 15 Plaintiffs first assert that Michael Sexton, an investor in defendant's project and the sole owner of defendant's membership interest, admitted the carbon agreement had been terminated, and such an admission was sufficient to prove that fact.

¶ 16 A judicial admission is a (1) deliberate, (2) clear, (3) unequivocal, (4) statement of a party, (5) about a concrete fact, (6) within that party's peculiar knowledge. *Brummet v. Farel*, 217 Ill. App. 3d 264, 266, 576 N.E.2d 1232, 1234 (1991). Such an admission is conclusive upon the party making it, and may not be controverted at trial or on appeal. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 17 A judicial admission is not evidence at all, but rather has the effect of withdrawing a fact from contention. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. Judicial admissions include "admissions made in pleadings, formal admissions made in open court, stipulations, and admissions pursuant to requests to admit." *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 18 The doctrine of judicial admission requires thoughtful consideration to ensure that "justice not be done on the strength of a chance statement made by a nervous party." *Thomas v. Northington*, 134 Ill. App. 3d 141, 147, 479 N.E.2d 976, 981 (1985). The general rule is qualified. Judicial admissions only apply when a party's testimony, taken as a whole, is unequivocal. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234. The rule is inapplicable when the party's testimony is inadvertent, uncertain, or amounts to an estimate rather than a statement of concrete fact. *Brummet*, 217 Ill. App. 3d at 267, 576 N.E.2d at 1234.

¶ 19 A ruling on an issue of judicial admission is a matter left to the trial court's sound discretion, and we are to affirm the trial court unless it abused that discretion. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 51, 33 N.E.3d 179. An abuse of discretion is found only where no reasonable person would take the view adopted by the trial court. *Dunning*, 2015 IL App (5th) 140168, ¶ 51, 33 N.E.3d 179.

¶ 20 Here, the following testimony was elicited from Sexton by plaintiffs' counsel during cross-examination:

> "Q. [Attorney for plaintiff:] What assets does [defendant] have?
>
> A. They have a ten-year lease on the property that [plaintiffs have] leased to us. It has a pending permit, which I consider to be goodwill of the company and a valuable asset.
>
> Q. Does it have a carbon sales agreement in your opinion?
>
> A. It does not have a carbon sales agreement.
>
> Q. And if you know, what is the ten-year lease worth in terms of dollars and cents?
>
> A. I–I couldn't put a value on it because, in fact, it's two things, it's the lease and the carbon agreement because the carbon was transferred. So the carbon that's there and the lease to mine it, so it's two documents together, so perhaps maybe there's–that's another asset."

¶ 21 The trial court determined Sexton's testimony was not a judicial admission, finding the court "assumed that counsel was inquiring as to whether [d]efendant had a contract to sell carbon to a third party. (i.e. broker or consumer)." After careful review, we cannot

conclude the trial court abused its discretion in ruling that Sexton's affirmative response to plaintiffs' counsel's question regarding the carbon sales agreement did not constitute a binding judicial admission. In order to constitute a judicial admission, a statement must not be a matter of opinion. *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468, 914 N.E.2d 1258, 1267 (2009). Rather, it must be an intentional statement that relates to concrete facts and not an unclear summary. *Smith*, 394 Ill. App. 3d at 468, 914 N.E.2d at 1267. In this case, plaintiffs' counsel's question to Sexton included the phrase "in your opinion."

¶ 22 Further, we find no indication that the court misplaced the context in which plaintiffs' counsel's question was asked. "Before a statement can be held to be a binding judicial admission, it must be given a meaning consistent with the context in which it was found, and it must be considered in relation to the other testimony and evidence presented." *Smith*, 394 Ill. App. 3d at 468-69, 914 N.E.2d at 1268. Here, the trial court determined counsel was inquiring whether defendant had a contract to sell carbon deposits to a third party. The record offers no suggestion that the court confused the context in which the question was asked. Accordingly, we reject plaintiffs' argument.

¶ 23 B. Reasonable Commercial Standards

¶ 24 Plaintiffs next allege that termination of the agreements is justified because defendant failed to follow reasonable commercial standards. A contract should be construed as a whole, and such construction should be natural and reasonable. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92, 902 N.E.2d 1178, 1190 (2009). Contracts are interpreted objectively and must be construed in accordance with the ordinary expectations of reasonable people. *Suburban*

Auto Rebuilders, Inc., 388 Ill. App. 3d at 92, 902 N.E.2d at 1190. Courts construe a contract reasonably to avoid absurd results. *Suburban Auto Rebuilders, Inc.*, 388 Ill. App. 3d at 92, 902 N.E.2d at 1190.

¶ 25 After a careful review of the record, we decline to conclude defendant failed to employ reasonable commercial standards. Here, defendant met the IDNR timeframes outlined in the carbon agreement. Moreover, the IDNR permit application was timely filed and accepted by IDNR. While we acknowledge the application may have been incomplete, there is no dispute that IDNR accepted it. For these reasons, we reject plaintiffs' argument.

¶ 26 C. Insurance

¶ 27 Plaintiffs allege the lease agreement was terminated because defendant did not procure insurance in a timely manner and did not procure a certificate as required by the agreement. Paragraph 10 of the lease agreement provides:

> "**LIABILITY INSURANCE.** Throughout the Lease Term (and any Extended Term, if applicable), Tenant, at its expense, shall provide and keep in force comprehensive general liability insurance on the Leased Property naming Landlord as an additional insured, with a minimum single limit of $1,000,000.00. Such insurance may be part of a policy covering other property in addition to the Leased Property. Upon request by Landlord, Tenant will provide Landlord with a certificate with respect to such insurance, together with evidence that premiums have been paid and that such insurance remains in force. The insurance shall

provide for at least ten (10) days' prior written notice to Landlord in the event of cancellation or material change."

¶ 28 Plaintiffs point out that defendant's certificate of liability insurance does not indicate plaintiffs will be entitled to 10 days' notice of cancellation. After careful review, we find this is of no consequence. A plain reading of paragraph 10 does not require that the certificate include language that the landlord is to receive 10 days notice of cancellation. Rather, paragraph 10 indicates the policy had to provide for notice of cancellation.

¶ 29 Further, while plaintiffs indicate defendant did not procure insurance until after plaintiffs sent defendant a notice that the lease was terminated, plaintiffs ignore the fact that they sent a notice to defendant after it had procured insurance requesting defendant to cure alleged defaults concerning the lease agreement. If the lease agreement was effectively terminated prior to defendant's procuring insurance, as plaintiffs allege, we find no reason why plaintiffs would request defendant to cure alleged defaults in the agreement after defendant procured insurance. Accordingly, we reject this argument.

¶ 30 D. IDNR Notices

¶ 31 Plaintiffs next argue defendant's failure to provide plaintiffs with IDNR notices constitutes a separate ground to terminate the contract. The lease agreement provides as follows:

"Any notices from the IDNR or any other regulatory authority relating to the Leased Property received by [defendant] during the Lease Term or any Extended Term shall be promptly forwarded by [defendant] to [plaintiffs]."

¶ 32 Plaintiffs indicate our Illinois Supreme Court has held that "deeds and contracts executed contemporaneously must be construed together." *Clodfelter v. Van Fossan*, 394 Ill. 29, 34, 67 N.E.2d 182, 184 (1946). Therefore, plaintiffs argue, because the carbon and lease agreements were intended to be one document and a single transaction, defendant was required to promptly forward IDNR notices to plaintiffs pursuant to the above provision in the lease agreement.

¶ 33 After careful consideration, we reject plaintiffs' argument. As the trial court noted, plaintiffs fail to present evidence of which IDNR notices were not provided by defendant. Although plaintiffs assert there is testimony that they never received a copy of the letter from IDNR regarding the enhancement plan not being submitted, plaintiffs have failed to cite to any pages of the record where the relevant evidence appears. Specifically, there is no citation to plaintiffs' assertion that "Rheinecker testified that he had never received a copy of the letter from IDNR that the enhancement plan had not been submitted."

¶ 34 This violates Illinois Supreme Court Rule 341(h)(7), which requires that in an appellant's argument, "reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Accordingly, we do not address this argument.

¶ 35 E. Good Faith and Fair Dealing

¶ 36 Finally, plaintiffs argue defendant breached the covenant of good faith and fair dealing. The law and public policy of Illinois permit and require that competent parties be free to contract with one another, and every contract contains an implied promise of

good faith and fair dealing between the contracting parties. *County of Jackson v. Mediacom Illinois, LLC*, 2012 IL App (5th) 110350, ¶ 11, 972 N.E.2d 738.

¶ 37 The implied obligations of good faith and fair dealing are a derivative principle of contract law used as a construction aid in determining the intent of the parties where an instrument is susceptible of two conflicting constructions. *St. Mary's Hospital, Decatur v. Health Personnel Options Corp.*, 309 Ill. App. 3d 464, 469, 721 N.E.2d 1213, 1217 (1999). Notwithstanding these implied covenants, parties may still enforce the terms of the negotiated contracts to the letter without being penalized for lack of good faith. *St. Mary's Hospital, Decatur*, 309 Ill. App. 3d at 469, 721 N.E.2d at 1217.

¶ 38 In the instant case, Scott Fowler, the supervisor of the Land Reclamation Division for IDNR, testified at trial. Fowler indicated the Land Reclamation Division is responsible for the issuance of permits, specifically for coal mining operations. He testified that his agency made a mistake in accepting defendant's application for an IDNR permit. Fowler further testified that understaffing and increased volume caused significant delays in the permitting process. Since a nonparty, namely the IDNR, caused delays in the permitting process, we cannot conclude defendant breached the covenant of good faith and fair dealing.

¶ 39 II. Attorney Fees

¶ 40 Defendant alleges the trial court abused its discretion by not awarding it attorney fees. A trial court's decision to award or deny attorney fees will not be disturbed absent an abuse of discretion. *In re Marriage of Pond*, 379 Ill. App. 3d 982, 987, 885 N.E.2d 453, 458 (2008). A trial court's exercise of its discretion should not be set aside unless

the opposite conclusion is readily apparent. *Buettner v. Parke-Davis & Co.*, 217 Ill. App. 3d 316, 327-28, 576 N.E.2d 1125, 1133 (1991). An abuse of discretion is found where the trial court "acts arbitrarily, acts without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *Pond*, 379 Ill. App. 3d at 987-88, 885 N.E.2d at 458.

¶ 41 Generally, a party is responsible for its own attorney fees. *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 281, 757 N.E.2d 1271, 1276 (2001). However, an exception exists when a contract provides for an award of attorney fees. *J.B. Esker & Sons, Inc.*, 325 Ill. App. 3d at 281, 757 N.E.2d at 1276. Contractual provisions for an award of attorney fees are strictly construed, and the court must determine the intention of the parties regarding the payment of the fees. *J.B. Esker & Sons, Inc.*, 325 Ill. App. 3d at 281, 757 N.E.2d at 1276.

¶ 42 In the instant case, both agreements contain provisions concerning attorney fees. The lease agreement provides:

> "If any litigation is instituted for the purpose of enforcing or interpreting any provision of this Lease, the prevailing Party, as determined by the court having jurisdiction thereof, shall be entitled to recover, in addition to all other relief, an amount equal to all costs and expenses incurred in connection therewith, including reasonable attorneys' fees."

¶ 43 The carbon agreement provides:

"If any litigation is instituted for the purpose of enforcing or interpreting any provision of this Agreement, the prevailing Party, as determined by the court having jurisdiction thereof, shall be entitled to recover, in addition to all other relief, an amount equal to all costs and expenses incurred in connection therewith, including reasonable attorneys' fees at the trial level and in connection with all appellate and bankruptcy proceedings."

¶ 44 "In an action for breach of contract, a party is a 'prevailing party' for the purposes of awarding attorney fees when a judgment is entered in his favor or when he obtains an affirmative recovery." *Tomlinson v. Dartmoor Construction Corp.*, 268 Ill. App. 3d 677, 687, 645 N.E.2d 376, 383 (1994). We reiterate that contractual provisions regarding attorney fees must be strictly construed. Here, the trial court entered judgment in favor of defendant and against plaintiffs. For this reason, we conclude defendant was the sole prevailing party and is entitled to recover all costs and expenses, including reasonable attorney fees it incurred regarding this dispute. Accordingly, we reverse the trial court's decision and remand with directions to award defendant reasonable attorney fees.

¶ 45 In support of their argument that attorney fees should not be awarded, plaintiffs cite to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act, which provides:

"In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding

is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2014).

¶ 46 Considering the instant case does not concern a dissolution matter, we fail to see how this clause lends support to plaintiffs' position. Accordingly, we reject this argument.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we affirm the finding by the circuit court of Perry County that neither agreement was terminated. We reverse the circuit court's decision to not award attorney fees to defendant as the prevailing party under the terms of the agreements, and remand with directions to award defendant reasonable attorney fees.

¶ 49 Affirmed in part and reversed in part; cause remanded.