2012 IL App (1st) 113429-U

Third Division
December 28, 2012

No. 1-11-3429

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTHONY F. CUTILLETTA and PATRICIA G. CUTILLETTA,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees/Cross-Appellants,	)	
v.	)	09 CH 29847
WILLIAM J. GRIFFIN and LESLIE FOX,	)	Honorable Mary L. Mikva, Judge Presiding.
Defendants-Appellants/Cross-Appellees.	)	

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Steele and Sterba concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court did not err when it granted plaintiffs' motion for summary judgment where the affidavit, depositions and pleadings on file failed to raise a genuine issue of material fact. However, the trial court did err when it awarded sellers $109,000 in liquidated damages where the contract did not contain clear and explicit language which provided that sellers, upon buyers' default, were entitled to the earnest money, if deposited or agreed to be deposited in escrow by the buyers.

¶ 2 The plaintiffs, Anthony Cutilletta and Patricia Cutilletta, entered into a residential real estate

purchase and sales contract (contract) with the defendants, Leslie Fox (Fox) and William Griffin (Griffin). Following the expiration of the attorney approval period, the defendants accepted the terms in plaintiffs' August 13, letter responding to their proposed contract modifications. Less than six hours later, the defendants "revoked" their acceptance and terminated the contract. Plaintiffs filed a complaint against the defendants for breach of contract and requested specific performance of the contract or damages in an amount not less than $110,000, and a declaration that defendants were not entitled to a refund of the $1,000 in earnest money that they had deposited in escrow at the time the contract was signed. The defendants filed an answer, affirmative defenses and a counterclaim, and they alleged that plaintiffs failed to disclose that the roof of the house leaked and that the basement had flooded in the past.

¶ 3 The trial court granted plaintiffs' amended motion for summary judgment and awarded plaintiffs $110,000 in liquidated damages. Plaintiffs also filed a motion for prejudgment interest, but the trial court denied the motion. On appeal, defendants present two issues for our review: (1) whether the trial court erred when it granted plaintiffs' amended motion for summary judgment when there were disputed issues of material fact regarding defendants' claim that plaintiffs misrepresented the fact that the property was free from leaks, and (2) whether the trial court erred when it awarded the plaintiffs (sellers) $110,000 in liquidated damages when $109,000 in earnest money had not been deposited in escrow by the defendants (buyers). Plaintiffs cross-appeal and we must also decide whether the trial court erred when it denied their request for prejudgment interest under section 2 of the Illinois Interest Act (Act). 815 ILCS 205/2 (West 2008).

¶ 4 We find that defendants' affidavit, depositions and pleadings on file failed to create issues

of material fact that would bar plaintiffs' right to a judgment. We also find that the contract did not contain clear and explicit language which provided that sellers, upon buyers' default, were entitled to recover as liquidated damages the earnest money, if deposited or agreed to be deposited in escrow by the buyers. Therefore, we hold (A) that the trial court did not err when it granted plaintiffs' motion for summary judgment; (B) that the trial court did err when it awarded the plaintiffs $109,000 in liquidated damages where the contract did not contain clear and explicit language that the sellers, upon buyers' default, were entitled to recover as liquidated damages the earnest money, if deposited or agreed to be deposited in escrow by the buyers; and (C) that the plaintiffs' request for prejudgment interest is rendered moot by our holding that plaintiffs were not entitled to $109,000 in liquidated damages.

¶ 5 Background

¶ 6 On August 4, 2009, the defendants entered into a contract to purchase the plaintiffs' house in Chicago for $2.2 million dollars.

¶ 7 The contract contained two provisions related to the earnest money:

A. A provision regarding the payment of earnest money:

> "4. Earnest Money. Upon Buyer's execution of this contract, Buyer shall deposit with Koenig & Strey ("Escrowee"), initial earnest money in the amount of $1,000, in the form of personal check ('Initial Earnest Money'). The Initial Earnest Money shall be returned and this Contract shall be of no force or effect if this Contract is not accepted by Seller on or before 8/5, 2009. The

> Initial Earnest Money shall be increased to *** 5% of the Purchase Price *** ('Final Earnest Money') within 2 business days after the expiration of the Attorney Approval Period (as established in Paragraph 13 of this Contract) (the Initial and Final Earnest Money are together referred to as the 'Earnest Money'). ***."

B. A general provision regarding the disposition of the earnest money in the event of default:

> "E. Disposition of Earnest Money. In the event of default by Buyer, the Earnest Money, less expenses and commission of the listing broker, shall be paid to Seller. ***. In the event of any default, Escrowee shall give written notice to the Seller and Buyer indicating Escrowee's intended disposition of the Earnest Money ***."

¶ 8 Pursuant to paragraph 4, upon execution of the contract, defendants deposited a check for $1,000 with the escrowee as the initial earnest money.

¶ 9 Plaintiffs provided defendants with a residential real property disclosure report (disclosure report), pursuant to the Residential Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/35 (West 2008)). The plaintiffs stated in the disclosure report that they were not aware of (A) flooding or recurring leakage problems in the crawlspace or basement, or (B) leaks or material defects in the roof, ceilings or chimney.

¶ 10 Defendants engaged Inspectrum, Inc., a professional home inspector, and an architect-

contractor to inspect the property and provide them with their opinions regarding the condition of the property. The contractor was also hired to provide the defendants with an estimated cost of any repairs that would be required following the inspection of the property. According to Fox's deposition testimony, the inspection of the property occurred sometime between August 4 and August 7, 2009.

¶ 11 On August 11, 2009, the last day of the attorney approval period, defendants' counsel sent a letter to plaintiffs' counsel that contained proposed modifications to the contract.

¶ 12 On August 13, 2009, plaintiffs' counsel sent defendants' counsel a letter and identified the modifications to the contract that they accepted. Plaintiffs' counsel's letter also stated that "Sellers hereby represent that the representations contained in the Illinois Residential Real Property Disclosure Report are true and correct as of the date hereof." Finally, plaintiffs' counsel's letter also stated that defendants were to deposit in escrow the balance of the of the earnest money, $109,000, by Monday, August 17, 2009.

¶ 13 Plaintiffs gave defendants until "the end of business" the following day, August 14, 2009, to countersign a copy of the letter if the new terms of the contract were acceptable. Defendants signed the letter and faxed their acceptance of the new contract terms on August 14, 2009, at 12:53p.m.

¶ 14 At 6:22 p.m., defendants' counsel sent an email to plaintiffs' counsel and stated: "this letter shall revoke my earlier acceptance letter whereby we agreed to your responses to our attorney review/inspection letter. At this time the [b]uyers disagree with all responses as specified in said letter and hereby elect to cancel the contract."

¶ 15 On August 17, 2009, defendants' counsel sent plaintiffs' counsel a letter stating that defendants had terminated the contract due to "a significant and material change in Buyers' circumstances."

¶ 16 On August 24, 2009, plaintiffs filed a complaint against the defendants for breach of contract and requested specific performance of the contract or damages in an amount not less than $110,000, and a declaration that defendants were not entitled to a refund of the $1,000 that they had deposited in escrow as the initial earnest money.

¶ 17 Defendants filed an answer, affirmative defenses and a counterclaim, which were later amended. In their amended affirmative defenses, defendants alleged, *inter alia*, (A) that plaintiffs knowingly made false representations in the contract when they stated that they were not aware of any material defects in the roof, and that they were not aware of any flooding in the basement; (B) that plaintiffs made these representations to induce the defendants to purchase the property; and (C) that the defendants relied upon these representations to their detriment. Defendants argued that plaintiffs should be barred from any recovery, or that any recovery should be limited to $1,000, the initial earnest money on deposit with the escrowee at the time defendants terminated the contract.

¶ 18 In their amended counterclaim, defendants alleged that plaintiffs' misrepresentations constituted fraud, a violation of the Disclosure Act and a breach of contract and that they had been damaged in the amount of $1,000, their earnest money deposit, plus other damages to be proven at trial.

¶ 19 Plaintiffs' Amended Motion for Summary Judgment

¶ 20 On June 27, 2011, plaintiffs filed an amended motion for summary judgment in which they

argued that they were entitled to summary judgment on their breach of contract action. Plaintiffs denied the allegations in defendants' affirmative defenses that they were aware of material defects in the roof or recurring leakage problem in the basement. Plaintiffs maintained that the contract entitled them to recover $110,000 as liquidated damages for defendants' breach of the contract.

¶ 21 Plaintiffs supported their motion for summary judgment with their depositions. Patricia Cutilletta testified at her deposition that some years ago about an inch of water accumulated in the lower level of their home and soaked the carpet due to a broken pipe at one of their neighbors' houses. Anthony Cutilletta testified at his deposition that he was not aware of any leaks in their house. Both plaintiffs testified that the water did not enter their house because of a material defect in the basement or foundation of their house.

¶ 22 Defendants' Response to Plaintiffs' Motion for Summary Judgment

¶ 23 Defendants responded to plaintiffs' amended motion for summary judgment by arguing (A) that summary judgment was improper because there were material issues of fact regarding whether plaintiffs knowingly made false representations in the disclosure report when they stated that they were not aware of (i) flooding or recurring leakage problems in the crawlspace or basement, or (ii) leaks or material defects in the roof, ceilings or chimney; and (B) that the earnest money provisions in the contract were ambiguous and plaintiffs were only entitled to the $1,000 in earnest money that was in escrow at the time of default.

¶ 24 In support of their arguments, defendants attached four exhibits: (1) Fox's affidavit, (2) Fox's deposition, (3) Dr. Lauren Streicher's deposition, and (4) an email from Jeani Jernstedt, plaintiffs' realtor, addressed to Anthony Cutilletta.

¶ 25 In Fox's affidavit, she averred that on or about August 10, 2009, the contractor informed her that he had noticed moisture seeping from the exterior walls on both sides of the property, which he attributed to the existence of EIFS, a material commonly referred to as Drivitt.

¶ 26 Fox also averred that approximately five hours after they communicated their acceptance of the contract, she received a message from a representative at the Chicago Board of Education informing her that their children would not be admitted into the Chicago public school of their choice, which caused Fox and her husband to reconsider their acceptance of the contract. Fox further averred that their decision to terminate the contract was also based on the fact that they had concerns that the property was not "leak free" as the plaintiffs had stated on the disclosure report.

¶ 27 In Fox's deposition, she testified that during the inspection of the property she observed water on the sidewalk, the exterior side of the house, and she also observed dampness on the roof.

¶ 28 Dr. Lauren Streicher, one of plaintiffs' former neighbors, testified at her deposition that the new owners told her that the roof of the house was leaking.

¶ 29 In the email from Jernstedt to Anthony Cutilletta, dated April 9, 2010, Jernstedt stated that she was told to request receipts or some kind of documentation for "[r]oof replacement 3 and 7 years ago."

¶ 30 Trial Court's Findings and Order

¶ 31 After reviewing the evidence, the court found: (1) that the contract language regrading the earnest money provision was not ambiguous; (2) that an award of liquidated damages in the amount of $110,000, which represented 5% of the purchase price of the property was enforceable; and (3) that defendants did not produce any admissible evidence to support their counterclaim alleging

common law fraud. Therefore, the trial court granted plaintiffs' motion for summary judgment.

¶ 32 However, the trial court entered a judgment for plaintiffs in the amount of $110,000, but denied plaintiffs' motion for prejudgment interest because there was a dispute as to the amount that would be due upon a breach of the contract.

¶ 33 The Appeal and Cross-appeal

¶ 34 Defendants timely filed their notice of appeal pursuant to Supreme Court Rule 301. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Plaintiffs filed a cross-appeal pursuant to Supreme Court Rule 303(a)(3). Ill. S. Ct. R. 303(a)(3) (eff. May 30, 2008).

¶ 35 Analysis

¶ 36 Standard of Review

¶ 37 We review an order granting a motion for summary judgment *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams*, 228 Ill. 2d at 417. The purpose of summary judgment is not to try an issue of fact, but to determine if any genuine issue of material fact exists. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203 (1996). To survive a motion for summary judgment, the non-moving party need not prove his case at this preliminary stage but must present sufficient evidence to create a genuine issue of material fact, which would arguably entitle him to a judgment. *Allegro Services, Ltd. v. Metropolitan Pier and Exposition Authority*, 172 Ill. 2d 243, 256 (1996); *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 60.

¶ 38 Affirmative Defense of Fraud

¶ 39 The defendants contend on appeal that the trial court erred when it granted plaintiffs' motion for summary judgment because there were disputed issues of material fact related to their affirmative defense of fraud.[1] An affirmative defense is one in which the defendant admits the allegations in plaintiffs' complaint, but asserts a new matter, herein fraud, which bars plaintiffs' right to relief. *Doherty v. Kill*, 140 Ill. App.3d 158, 165 (1986). The presumption in the law is that all transactions are fair and honest, and fraud is not presumed. *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 191 (2005). Therefore, the burden is on the defendants to prove fraud by clear and convincing evidence. *Avery*, 216 Ill. 2d at 191-92.

¶ 40 Thus, defendants have admitted that they entered into a contract with the plaintiffs. Pursuant to the terms of the parties' contract, after defendants accepted the modifications to the contract on August 14, 2009, they had no further right or ability to terminate the contract, except in the event of sellers' default. Therefore, the defendants' email terminating the contract on August 14, 2009, within hours of accepting the contract, before the date scheduled for closing, constituted an anticipatory repudiation of the contract. See *In re Marriage of Olsen*, 124 Ill. 2d 19, 23-24 (1988); *Eager v. Berke*, 11 Ill. 2d 50, 54 (1957) (a definitive statement by one contracting party to the other that the

[1]Defendants are asserting a claim for common law fraud because plaintiffs, allegedly, made false representations in their disclosure report. Case law makes it clear that the provisions of the Disclosure Act are deemed to be a part of the contract. See Fox *v. Heimann*, 375 Ill. App. 3d 35, 45 (2007) (citing *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217(1997)). Therefore, because the Disclosure Act is a part of the contract, and because it required the plaintiffs to disclose material defects, defendants may invoke the affirmative defense of common law fraud if plaintiffs misrepresented facts in their disclosure report.

party will not perform the contract on the date of performance constitutes an anticipatory repudiation of the contract).

¶ 41 Here, the defendants maintain that because plaintiffs engaged in fraud– made false statements in their disclosure report– they are excused from any further performance under the contract, including being required to pay $109,000 in liquidated damages to the plaintiffs. In order to prove fraud, defendants must establish: (A) that plaintiffs made a false statement of material fact; (B) that plaintiffs had knowledge that the statement was false; (C) that plaintiffs intended that the statement induce the defendants to act; (D) that defendants relied upon the truth of the statement; and (E) that defendants suffered damages resulting from reliance on the statement. *Connick v. Suzuki Motor Co. Ltd.*, 174 Ill. 2d 482, 496 (1996).

¶ 42 Defendants proffered the following evidentiary materials in an attempt to create a material issue of fact and establish fraud: (1) Fox's affidavit, (2) Fox's deposition, (3) Dr. Lauren Streicher's deposition, and (4) an email from Jeani Jernstedt, plaintiffs' realtor, addressed to Anthony Cutilletta. We must determine whether the defendants' evidentiary materials, along with the pleadings on file, created a material issue of fact that would necessitate a trial on their affirmative defense of fraud.

¶ 43 Plaintiffs argue that defendants' evidentiary materials are based on inadmissible hearsay; therefore, they do not create material issues of fact. Hearsay is an out of court statement offered to prove the truth of the matter asserted and is inadmissible at trial or when ruling on a motion for summary judgment unless the statement falls within one of the recognized exceptions to the rule. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 728 (2003). Affidavits filed in support of and in opposition to a motion for summary judgment cannot be based on hearsay but must be

based on the personal knowledge of the affiant. See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 132 (1992); Ill. S. Ct. R. 191(a) (eff. July 1, 2002). Illinois case law is clear that any evidence which would be inadmissible at trial cannot be considered by the court in support of or in opposition to a motion for summary judgment. Watkins, 172 Ill. 2d at 203-04.

¶ 44 The plaintiffs point to the following hearsay statements in defendants' evidentiary materials: (1) the averment in Fox's affidavit concerning what the contractor told her about moisture seeping from the walls; (2) Dr. Streicher's deposition testimony that the new owners told her that the roof leaked; and (3) Jernstedt's email to Anthony Cutilletta advising him that she was requesting receipts for roof replacement. We find that the averment in Fox's affidavit concerning moisture seeping from the exterior wall is hearsay because the averment was not based on Fox's personal knowledge, but on the contractor's observations; that Dr. Streicher's deposition testimony concerning the leaking roof is also hearsay because it was based on what the new owners told her about the plaintiffs' roof. Finally, the receipts referenced in Jernstedt's email would also be hearsay because she does not indicate that she possessed personal knowledge that the roof was replaced but was seeking receipts prepared by a third party to establish that the roof was replaced.

¶ 45 Next, we turn to Fox's deposition testimony that she observed water on the roof. According to the defendants, Fox's testimony permits the court to draw an inference that the roof leaked. We note that Fox never testified at her deposition that she repairs roofs or that she has special knowledge or expertise about roofs and how they function. Therefore, we find that the inference we are to draw from Fox's testimony is pure speculation, and we note that speculation or conjecture is insufficient to create a material issue of fact that would require a trial and permit a party to avoid a motion for

summary judgment. See *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 25.

¶ 46 Finally, plaintiffs maintain that the real reason the defendants terminated the contract was because their children were not accepted into the public school of their choice. We agree. Fox averred in her affidavit that the message from the Chicago Board of Education stated that their children would not be accepted into the school of their choice, and the message caused Fox and her husband to reconsider their acceptance of the contract. Fox also averred in her affidavit that immediately after receiving this message, they instructed their counsel to terminate the contract. We note that defendants' counsel's August 14, 2009, email terminating the contract did not mention any of the plaintiffs' alleged fraudulent representations which defendants are now asserting in their affirmative defenses as their basis for terminating the contract.

¶ 47 We find that the defendants' evidentiary materials failed to create a material issue of fact that would establish that the plaintiffs engaged in fraud– made representations to defendants concerning the roof and the basement in their disclosure report that they knew to be false– that would bar plaintiffs' right to relief. Accordingly, because the defendants' evidentiary materials failed to create a material issue of fact, we hold that the trial court did not err when it granted plaintiffs' motion for summary judgment on their breach of contract claim.

¶ 48 Damages

¶ 49 Next, because the defendants breached the contract and are not excused from paying damages, we must determine whether the contract entitled plaintiffs to recover $109,000 in liquidated damages that the defendants had not deposited in escrow when they terminated the

contract. Defendants argue that plaintiffs' recovery should be limited to the $1,000 in earnest money that they had deposited as the initial earnest money. Defendants assert that the applicable law governing contracts prevents the plaintiffs from obtaining a judgment for $109,000 in final earnest money because the contract does not contain specific language entitling the plaintiffs to recover as liquidated damages earnest money that has not been deposited in escrow. Therefore, without specific language in the contract, defendants maintain that case law does not permit the plaintiffs to recover earnest money that was not deposited in escrow and they cite several cases in support of their position. *Newcastle Properties*, Inc. *v. Shalowitz*, 221 Ill. App. 3d 716 (1991)*; Brown v. Real Estate Resource Management, LLC*, 388 B.R. 338 (*In re Polo Builders, Inc.*) (Bankr. N.D. Ill. 2008); *Brecker v. Furman*, 508 So. 2d 514 (Fla. App. 1987); *In re Ocean Blue Leasehold Property LLC*, 393 B.R. 792 (Bankr. S.D. Fla. 2008).

¶ 50 The plaintiffs respond that in addition to the $1,000 in initial earnest money that was deposited in escrow, they were also entitled to recover $109,000 in final earnest money that defendants were suppose to deposit but did not deposit in escrow. Plaintiffs maintain that two provisions in the contract support their position: (A) the earnest money provision, paragraph 4, which defined the "earnest money" as the initial and final earnest money, and (B) the term "shall be paid" in section E, the disposition of earnest money provision.

¶ 51 In order to address this issue, we must construe the terms of the parties' contract. The construction of a contract presents a question of law, which is subject to *de novo* review. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). When construing a contract, the primary objective is to give effect to the intention of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). A court will

first look to the language of the contract to determine the parties' intent. *Thompson*, 241 Ill. 2d at 441. "A contract must be construed as a whole, viewing each provision in light of the other provisions." *Thompson*, 241 Ill. 2d at 441. A court cannot determine the parties' intent by viewing a clause in isolation, or by looking at detached portions of the contract. *Thompson*, 241 Ill. 2d at 441. Therefore, if the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Thompson*, 241 Ill. 2d at 441.

¶ 52 The relevant contract provisions are: (A) paragraph 4, which addressed the payment of the earnest money and provided that buyer shall make two deposits of earnest money, an initial earnest money deposit of $1,000 and a final earnest money deposit of $109,000, and provided that the initial earnest money and final earnest money shall be referred to as the "Earnest Money;" and (B) section "E", which addressed the sellers' rights and remedies upon buyers' default, and provided that "[i]n the event of default by Buyer, the Earnest Money *** shall be paid to Seller."

¶ 53 The foregoing provisions of the contract are unambiguous. Pursuant to paragraph 4 of the contract, defendants were obligated to make two separate deposits of earnest money in escrow. Defendants deposited $1, 000, the initial earnest money in escrow, but they did not deposit $109,000, the final earnest money in escrow on or before August 17, 2009. Instead, defendants defaulted by terminating the contract on August 14, 2009. Therefore, pursuant to section E, the earnest money was to be paid to the seller because of the buyers' default.

¶ 54 We must determine if the contract contained any language which explained what the escrowee was to pay the seller if the final earnest money was not deposited in escrow at the time the buyers defaulted on the contract.

¶ 55 The defendants cite cases that hold that a seller of real property may not recover as liquidated damages earnest money which has not been deposited in escrow, unless the contract provides otherwise. *Newcastle Properties,* 221 Ill. App. 3d at 725; *In re Polo Builders,* 388 B.R. at 366; See *Brecker*, 508 So.2d at 515; *In re Ocean Blue*, 393 B.R. at 802-03.

¶ 56 In *Newcastle*, the defendants entered into a purchase agreement for the purchase of a condominium unit. *Newcastle Properties,* 221 Ill. App. 3d at 719. The purchase agreement provided that "[i]f Purchaser defaults on any of Purchaser's covenants or obligations, *** all sums theretofore paid to Seller (including without limitation earnest money and payments for Extras) by Purchaser shall be forfeited as liquidated damages and shall be retained by Seller." *Newcastle Properties,* 221 Ill. App. 3d at 719. Defendants posted an irrevocable standby letter of credit in the amount of $109,500 as an earnest money deposit. Thereafter, defendants breached the agreement and refused to proceed with the closing. At the time the defendants breached the purchase agreement, they had only paid the $3,122 for "extras" under the contract. Plaintiff retained the $3,122 and sued defendants for the $109,500 that defendants were required to pay as the earnest money deposit. The *Newcastle* court found that the purchase agreement established the amount of liquidated damages as the amount "theretofore paid," and "retained" by plaintiff, not the amount that would have been payable if plaintiff had presented the letter of credit. *Newcastle Properties,* 221 Ill. App. 3d at 726. Therefore, because the only amount "paid" and "retained" by plaintiff was the $3,122 for extras, the court held that the plaintiff was not entitled to recover the $109,500 from the buyers because this sum was not "theretofore paid" to the seller, as required by the contract. *Newcastle Properties,* 221 Ill. App. 3d at 726.

¶ 57 In *In re Polo Builders*, the defendants (buyers) contracted with plaintiff (trustee) for the purchase of certain real estate. The contract required the buyers to make a single earnest money deposit, and the contract provided that "if Purchaser fails to perform *** seller may elect to terminate this Agreement, and receive the Earnest Money as liquidated damages *** ." *In re Polo Builders*, 388 B.R. at 364. When the buyers failed to pay the earnest money, the plaintiff brought suit for breach of contract. Plaintiff argued that the use of the word receive (present tense) in the liquidated damages clause distinguished the case from *Newcastle* and established that the parties did not intend to limit the amount of the liquidated damages to amounts "theretofore paid" or under the control of the trustee. *In re Polo Builders*, 388 B.R. at 367. The court disagreed stating that the use of the word "receive" in the liquidated damages clause, when read in conjunction with the earnest money deposit clause, established that the plaintiff was not entitled to receive from the defendants the earnest money that had not been deposited in escrow. *In re Polo Builders*, 388 B.R. at 367. Therefore, because the buyers did not deposit the earnest money in escrow, the court held that the plaintiff was not entitled to liquidated damages because a deposit was never received by the Trustee. *In re Polo Builders*, 388 B.R. at 367-68.

¶ 58 *In re Ocean Blue* involved a set of facts analogous to those in this instant case. In *In re Ocean Blue,* the purchaser entered into a contract to purchase certain real estate from the seller (trustee). The contract provided for the "Earnest Money Deposit" to be paid in three separate installments and the contract also provided that upon default, the seller was entitled to recover the "Earnest Money Deposit" as liquidated damages. *In re Ocean Blue*, 393 B.R. at 795. The buyer paid the first two installments totaling $250,000, but the buyer did not pay the final installment of

$250,000 when due. The seller declared the buyer in default and terminated the contract. The seller argued, like the plaintiffs here, that the contract clearly stated that he was entitled to recover the entire $500,000 "Earnest Money Deposit" as the term was defined in the contract. *In re Ocean Blue*, 393 B.R. at 803. The *In re Ocean Blue* court held that the trustee was not entitled to the additional $250,000 balance of the deposit that was never paid because the contract did not specifically state that the Trustee's liquidated damages included the purchaser's earnest money deposit "to be paid" by the purchaser. *In re Ocean Blue*, 393 B.R. at 802-03.

¶ 59 In *Brecker*, cited by both *Newcastle* and *In re Ocean Blue,* the defendants (buyers) contracted to purchase real estate from the plaintiffs (sellers). The buyers were required to deposit the earnest money in two installments. The buyers paid the first $1,000 deposit, but they did not make the final deposit of $16,700. The sellers brought suit for breach of contract. Unlike the contract provisions in *Newcastle*, *In re Polo Builders* and *In re Ocean Blue*, the contract in this case provided that "[i]f Buyer fails to perform the Contract within the time specified, the deposit(s) made *or agreed to be made by Buyer* may be retained or recovered by or for the account of Seller as liquidated damages *** ." *Brecker*, 508 So.2d at 514. The *Brecker* court found that the sellers were entitled to the $16,700 unpaid deposit because the contract specifically stated that deposits made or "agreed to be made" by the purchaser may be retained or recovered by the sellers as liquidated damages. *Brecker*, 508 So.2d at 515. The *Brecker* court held that the buyers and sellers had bargained for the sellers liquidated damages to include both the earnest money deposit that was paid and the deposit that was to be paid by the buyer. See *Brecker*, 508 So.2d at 515.

¶ 60 In this case, paragraph 4 of the contract defined the "earnest money" as initial and final

earnest money, and section E provided that upon buyer's default, the earnest money "shall be paid" to the seller. We find that section E of the contract was a forfeiture provision. A contract provision for the forfeiture of earnest money will be construed as a liquidated damages clause, in the absence of an express provision to the contrary. *Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (2010). In this case, the contract did not include an express provision to the contrary; therefore, section E in this contract will be construed as a liquidated damages clause. We note that the law discourages interpreting a liquidated damages provision broadly and requires that the contract contain clear and explicit language for a seller to recover from a buyer, upon default, earnest money which was never deposited in escrow. See *Newcastle Properties*, 221 Ill. App. 3d at 727; *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 913 (2010). Here, the contract did not contain any language which explained what the escrowee was to pay the seller if the final earnest money was not deposited in escrow when the buyers defaulted by terminating the contract. Accordingly, because the contract does not contain clear and explicit language which provides that the sellers, upon buyers' default, were entitled to recover as liquidated damages, the final earnest money agreed to be deposited in escrow, we cannot award plaintiffs the final earnest money of $109,000, which was never deposited in escrow.

¶ 61 Therefore, because we interpret liquidated damages provisions strictly and narrowly, and because the liquidated damages provision in this contract does not clearly and explicitly state that sellers, upon buyers' default, were entitled to recover as liquidated damages, the final earnest money agreed to be deposited in escrow by the buyers, the plaintiffs are not entitled to $109,000 in liquidated damages from the defendants. Accordingly, we hold that the trial court erred when it

awarded the plaintiffs$109,000 in liquidated damages.

¶ 62 Prejudgment Interest

¶ 63 On the cross-appeal, plaintiffs argue that the trial court erred when it refused to award them prejudgment interest on the $109,000. We find that the plaintiffs' request for prejudgment interest is rendered moot by our holding that plaintiffs were not entitled to liquidated damages of $109,000.

¶ 64 Conclusion

¶ 65 We find that the affidavit, depositions and pleadings on file failed to create issues of material fact that would bar plaintiffs' right to a judgment on its breach of contract claim. We also find that the contract did not contain clear and explicit language which provided that sellers, upon buyers' default, were entitled to recover as liquidated damages, the final earnest money, if deposited or agreed to be deposited in escrow. Therefore, we hold (A) that the trial court did not err when it granted plaintiffs' motion for summary judgment on their breach of contract claim; (B) that the trial court erred when it awarded the plaintiffs $109,000 in liquidated damages where the contract did not contain clear and explicit language that the sellers, upon buyers' default, were entitled to recover as liquidated damages, the final earnest money agreed to be deposited in escrow by the buyers; and (C) the plaintiffs' request for prejudgment interest is rendered moot by our holding that plaintiffs were not entitled to the $109,000 in liquidated damages. Accordingly, we affirm the trial court's order which granted summary judgment in favor of plaintiffs on their breach of contract claim, but we reverse the trial court's order which awarded the plaintiffs $109,000 in liquidated damages, and we find that the plaintiffs' request for prejudgment interest is moot.

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