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2012 IL App (3d) 110322-U

Order filed March 20, 2012

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

EKS LAND DEVELOPMENT	)	Appeal from the Circuit Court
OF OSWEGO, LLC,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal No. 3-11-0322
	)	Circuit No. 10-L-291
PLAINFIELD ECONOMIC PARTNERSHIP,	)	
A. JOSEPH JUDD, Individually, and	)	
CARL R. BUCK, Individually,	)	Honorable
	)	Barbara Petrungaro,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* In a breach of contract case, the circuit court held a bench trial and found in favor of the plaintiff for \$18,771.26 plus costs. On appeal, the appellate court held that the evidence presented at the bench trial did not support the circuit court's finding that the parties modified the contract when they negotiated a final settlement agreement. Accordingly, the appellate court reversed and remanded with directions for the circuit court to recalculate the amount owed to the plaintiff under the contract.

¶ 2 The plaintiff, Eks Land Development of Oswego, LLC (Eks), sued the defendants, Plainfield Economic Partnership (the Partnership), A. Joseph Judd, and Carl R. Buck, for breach

of contract. Eks alleged that the Partnership failed to compensate Eks' manager, Michael Mills, pursuant to a contract for professional services, which required the Partnership to compensate Mills for 180 days past the date of notice of termination. After a bench trial, the circuit court found that the parties had modified the contract by negotiating a 90-day compensation period as a part of a final settlement agreement. The court entered judgment in favor of Eks for \$18,771.26, and Eks appealed. On appeal, Eks argues, *inter alia*, that the evidence did not support the court's finding that the parties modified the contract. We reverse and remand with directions.

¶ 3

### FACTS

¶ 4 On April 13, 2010, Eks sued the defendants for, *inter alia*, breach of contract. In relevant part, the complaint alleged that on September 29, 2009, Eks' manager, Michael Mills, signed a contract for professional services with the Partnership. Defendant A. Joseph Judd was the chairman of the Partnership and signed the contract on behalf of the Partnership. Defendant Carl R. Buck was an attorney and a board member of the Partnership; Buck reviewed and approved the contract that was signed by Mills and Judd.

¶ 5 The complaint also alleged that on January 29, 2010, the Partnership notified Mills that it was terminating the contract—not for cause under the contract, but due to a lack of funding. Further, despite the existence of a provision in the contract that called for Mills to receive 180 days of compensation from the date of notification of termination, the complaint alleged that the Partnership informed Mills that it was going to pay Mills 90 days of compensation. The complaint alleged that the Partnership had the funds available to pay him but breached the contract by failing to pay him according to the 180-day compensation provision.

¶ 6 On March 15, 2011, the circuit court held a bench trial. Judd testified that he was the

president of a bank in Plainfield and that he also served as the chairman of the Partnership. The Partnership's purpose was to "stimulate economic development in the Village of Plainfield." The village had committed to funding the Partnership with \$75,000 per year for a three-year period, and other funding came from donations. The Partnership was effectively dormant for a period of time during that three-year period, but Judd revived the corporation with the election of a new mayor. As such, Judd sought to hire a director for the Partnership.

¶ 7 Judd testified that Mills was referred to him by a client for the Partnership's open director position. Judd interviewed Mills and shared his résumé with the Partnership's board and the village board. Judd offered the position to Mills, who insisted on a written contract. Mills provided the original version of the contract, which was edited three times to include changes negotiated by Judd and Mills. All four drafts of the contract were entered into evidence. The final draft of the contract, which was signed by the parties, contained the following termination provision:

"If Consultant fails to fulfill his obligations under this Agreement in a proper manner, or if Consultant violates any of the covenants, conditions or terms of this Agreement, the PEP shall have the right to terminate this Agreement by giving not less than ninety (90) business days prior written notice to Consultant of such termination. In that event, Consultant shall not be relieved of any liability to the PEP for damages sustained by the PEP by virtue of any breach of this Agreement by Consultant, nor shall the PEP be liable for any costs other than those costs set forth in Sections 4, 6 & 7 in this Agreement which were incurred prior to the termination of this Agreement.

The PEP or Consultant may at any time terminate this Agreement for any reason by giving not less than one hundred eighty (180) business days prior written notice of termination. Upon such termination, Consultant will be paid based upon terms set forth in Sections 4, 6 & 7 in this Agreement for that period of time to the end of the notice period."

This provision, including the emphasis on the 180-day compensation provision, appeared in all four drafts of the contract; only the section numbers were changed.

¶ 8 Judd testified that he did not read the contract carefully. When asked about the termination provision, Judd stated variously that "I have no recollection of that being part of the contract and it was clearly an oversight on my part," and "I did not read the contract word for word carefully. I don't ever remember that being part of the contract. That is my fault and my oversight." The final draft of the contract was signed by Judd and Mills on September 29, 2009.

¶ 9 On January 26, 2010, Judd met with Mills and notified him that the contract was being terminated. Judd explained that the village had decided to take the stimulation of its economic development in-house and that the village would no longer fund the Partnership. Judd sent a letter to Mills the next day that referenced their January 26 discussion, including the statement; "[y]our final day of work will be April 30, 2010, when the fiscal year ends for the Village of Plainfield." Judd testified that Mills was not expected to work through April 30, 2010, only that he was to be paid through that date.<sup>1</sup>

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<sup>1</sup> Judd also testified that the Partnership stopped paying Mills in March once he learned that Mills was disputing the amount owed under the contract. Other documents entered into evidence established that the Partnership had more than enough money in its bank account to pay

¶ 10 On February 24, 2010, Judd met with Mills to discuss numerous questions that Mills had, including, *inter alia*, whether Judd would write a letter of recommendation for Mills, what date Mills would last be required to come in to the office, what date Mills would no longer be allowed into the office, whether Mills would receive compensation for vacation time, and what would be done with office equipment. A written document memorializing these questions and their respective answers was completed by the parties and was admitted into evidence.

¶ 11 When asked whether there was anything in the February document related to salary, Judd replied in the negative and explained that his understanding was that Mills was owed for 90 days, which would pay him through April 30, 2010. Then, the following exchange took place:

"[PLAINTIFF'S COUNSEL:] Why did you assume that?

[JUDD:] The only conversation we ever had.

[PLAINTIFF'S COUNSEL:] What do you mean conversation?

[JUDD:] When we were doing the contract originally we put in there that if we dissolved PEP or he left there would be 90 days. And it's an oversight on my part that I don't remember the clause you keep referencing, but I don't.

[PLAINTIFF'S COUNSEL:] Okay. None of the draft contracts actually called for a 90-day notice, did it?

[JUDD:] No, but I think it's the part -- in their clause it says 90 days for cause. Our agreement was 90 days. And that's what we had talked about during

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Mills pursuant to the 180-day compensation provision, which served to defeat the defendants' claimed defense of impossibility of performance.

the interview process."

¶ 12 On March 19, 2010, Mills sent a "Final Invoice" letter to Judd, in which Mills calculated the amount he believed he was owed to be \$71,784.76. This figure included compensation under the contract's 180-day notice period beginning February 1, 2010, and ending October 14, 2010. When asked about Mills' letter, the following exchange took place:

"[PLAINTIFF'S COUNSEL:] Okay. What issues did you have with Mr. Mills' final invoice?

[JUDD:] That our agreement was I was going to pay him for 90 days and this is --

[PLAINTIFF'S COUNSEL:] When did you strike this agreement?

[JUDD:] When he joined PEP initially.

[PLAINTIFF'S COUNSEL:] So when he joined PEP initially, no matter what, you were going to pay him 90 days if you terminated him or if he terminated?

[JUDD:] Yes.

[PLAINTIFF'S COUNSEL:] That was your understanding of the deal?

[JUDD:] Yeah, I think so."

¶ 13 On cross-examination, Judd was asked whether the first time Mills told him that he was entitled to 180 days of compensation was after the February document was signed. Judd responded, "I don't remember the exact date and time but we talked about the six months' pay and I said our agreement was 90 and that's what I was intending to pay, our verbal agreement." When Judd was asked on redirect to clarify that response, Judd stated, "I remember him saying the

contract says I'm actually entitled to 180. I said our agreement was 90 and that's what I'm paying you. And then I got the [March 2010] letter and that was the last of our conversations."

¶ 14 Mills testified that on January 26, 2010, he met with Judd but they only discussed the status of the Partnership, not termination. Mills was surprised by Judd's January 27 letter informing him of the termination. He had numerous questions about the details of the termination. On February 24, 2010, he met with Judd and another individual regarding those questions. Mills testified that at no point during that meeting did they discuss a modification of the contract with regard to salary.

¶ 15 Mills testified that in March 2010, he received a request from Judd, through Judd's assistant, to prepare a final invoice. Mills compiled the final invoice and presented it to Judd on March 19, 2010. Mills did not receive any response from Judd, but received a letter on March 23, 2010, from defendant-attorney Buck. In the letter, which was admitted into evidence, Buck referenced the contract's termination provision and stated:

"As you are well aware, the Village has withdrawn funding for this project. As such, there is no ability of PEP to continue on with this agreement. As that issue is not addressed by the contract, PEP has done its best to honor the intent of the agreement and provide you with a 90 days notice and payment therein. While not obligated to do so, the action, at best, is all that is warranted by the facts."

Mills stated that the Partnership stopped paying him after he sent the March 19, 2010, letter, and he filed suit in April.

¶ 16 At the close of the bench trial, the circuit court took the matter under advisement. On April 1, 2011, the court issued its written order. The court found that the defendants failed to

establish that impossibility was a valid defense. The court also found:

"Mr. Judd could not recall the date, but testified to a specific conversation between he and Mr. Mills wherein Mr. Mills stated that he wanted 6 months salary and Mr. Judd stated that he agreed to pay 90 days and that was all he was going to pay. Mr. Judd testified that this conversation occurred prior to the final invoice in March 2010. No testimony was provided from Mr. Mills disputing this conversation.

Although there was a dispute as to when and whether the parties discussed the 90 days of salary, the Court finds, after reviewing all of the evidence and testimony in the record, that there is competent evidence to support that the parties discussed and negotiated the 90 days of salary as part of the final settlement agreement. As such, this subsequently negotiated contract is a valid agreement with valid new consideration and will be upheld."

Accordingly, the court found in favor of Eks for \$18,771.26, plus costs. Eks appealed.

¶ 17

#### ANALYSIS

¶ 18 On appeal, Eks argues, *inter alia*, that the evidence did not support the circuit court's finding that the parties had modified the contract. The defendants argue that the court's finding was correct, as "everything points to ninety days of severance pay."

¶ 19 A modification to a contract's terms must satisfy all of the elements necessary to establish that a contract exists, including an offer, an acceptance, and valid consideration. *Richard W. McCarthy Trust Dated September 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 534 (2011). Whether the parties to a written contract modified the contract's terms via acts or

conduct presents a question of fact, and we will not disturb the trier of fact's determination on the issue unless it was against the manifest weight of the evidence. *Sosin v. Hayes*, 258 Ill. App. 3d 949, 952 (1994). "A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancura v. Katris*, 238 Ill. 2d 352, 385-86 (2010).

¶ 20 Our review of the record reveals that the evidence does not support the circuit court's finding that "there is competent evidence to support that the parties discussed and negotiated the 90 days of salary as part of the final settlement agreement." There is no question that the document executed by the parties on February 24, 2010, did not address a salary modification or any other issue related to the 180-day compensation provision contained in the original contract. When Judd was asked about the 180-day compensation provision, Judd stated that he did not read the original contract carefully. Judd stated that his understanding of the agreement was that Mills would be paid for 90 days after notice of termination and stated twice that the negotiation of this 90-day compensation period occurred at the time the original contract was being negotiated. Moreover, Judd's statements on cross-examination and redirect (respectively, "I don't remember the exact date and time but we talked about the six months' pay and I said our agreement was 90 and that's what I was intending to pay, our verbal agreement," and "I remember him saying the contract says I'm actually entitled to 180. I said our agreement was 90 and that's what I'm paying you. And then I got the [March 2010] letter and that was the last of our conversations"), especially when taken in context of his other testimony, do not establish that the parties reached an agreement to modify the original contract's 180-day compensation provision. See *Richard W. McCarthy Trust*, 408 Ill. App. 3d at 534 (modification requires all elements of a

contract, including mutual assent, offer, acceptance, and valid consideration).

¶ 21 Reformation of the contract was not at issue in this case; modification was at issue.

Judd's statements on this issue simply do not support the court's aforementioned finding.

Accordingly, we hold that the circuit court's ruling was against the manifest weight of the evidence. On remand, the circuit court should calculate the amount owed to Mills using the original contract's 180-day compensation provision.

¶ 22 **CONCLUSION**

¶ 23 The judgment of the circuit court of Will County is reversed and the cause is remanded with directions.

¶ 24 Reversed and remanded with directions.