2013 IL App (2d) 121177-U
No. 2-12-1177
Order filed June 11, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

IN RE ESTATE OF GORDON J. NESS, Deceased	)	Appeal from the Circuit Court of De Kalb County.
	)	
	)	No. 10-P-45
	)	
(Bonnie D. Petersen and Linda L. Merriman, Executors of the Estate of Gordon J. Ness, Plaintiffs-Appellants v. John G. Ness and Dawn Ness, Defendants-Appellees).	)	Honorable Kurt P. Klein, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Option contract was valid, supported by adequate consideration, and properly exercised by defendants; defendants did not breach agreement by failing to make payments required by lease; and trial court did not err in failing to make explicit findings and not deeming admitted unanswered allegations set forth by plaintiffs as affirmative defenses to counterclaim.

¶ 1 I. INTRODUCTION

¶ 2 Plaintiffs, Bonnie D. Petersen and Linda L. Merriman, filed a complaint seeking a declaration that an option contract signed by decedent, Gordon J. Ness, was invalid. The option contract purported to give defendants, John G. Ness and Dawn Ness, the right to purchase certain real

property that had been owned by decedent. Defendants filed a counterclaim alleging breach of contract and seeking specific performance. Defendants prevailed at trial, and this appeal followed. For the reasons that follow, we affirm.

¶ 3 II. BACKGROUND

¶ 4 The real property that is the center of this dispute consists of a small farmette and about 38.5 acres of land near Genoa. Decedent had owned it since the 1950s and resided there. An appraisal authorized by the estate placed that value of the property at $420,000 as of April 2010. Decedent prepared a will in 1998 with the assistance of an attorney he retained. In the 1998 will, decedent directed that the property be sold and the proceeds be split equally among his six children.

¶ 5 Defendant John Ness is the president of John Ness Construction, Inc., a concrete construction company. He is married to defendant Dawn Ness, who is the bookkeeper of the company. Decedent also worked for the company during the final 20 years of his life. However, the company never paid workers' compensation insurance for decedent, issued him a W-2 form, or recorded employment taxes or unemployment wages for him. Prior to working at John Ness Construction, decedent worked at a factory in Sycamore for 24 years. The factory closed. Decedent was over 60-years old at the time. John gave him a job at the construction company driving a truck. Vehicles were sometimes stored on decedent's property. Eventually, a shed was constructed on decedent's property to house the vehicles. The building cost $35,000, and John did the concrete work for free.

¶ 6 John and decedent discussed the cost of the shed. John suggested that decedent allow him to start buying the farm. Decedent would be allowed to stay on the property (including receiving income from leasing the farm land) as long as he could. John stated, "[N]othing would change." Prior to the construction of the shed, John Ness Construction paid decedent $1,000 per month for "rent" and "accounts payable" (there was testimony that suggested that this payment was made to

compensate decedent for the work he performed for the construction company). John discussed the value of the farmette with Robert Merriman, John's brother-in-law, with decedent present. The value of the property was estimated at $250,000. From this figure, John subtracted the cost of the shed and concluded that a fair purchase price for the property would be $215,000.

¶ 7 Defendants retained attorney Robert Becker to prepare documents that would allow them to lease storage space on decedent's land and give them an option to purchase the property, while receiving partial credit toward the purchase price from the payments on the lease. Becker produced a lease, an option contract, and a real estate-purchase contract. Pursuant to the lease, defendants agreed to pay decedent $1,000 per month on the first day of the month (in advance), and $600 of each payment would reduce the purchase price of the property ($215,000) if defendants exercised the option. The term of the lease was 20 years beginning on November 1, 2000. Decedent did not retain an attorney to represent him in this transaction. The option contract, contract to purchase, and a legal description of the property were recorded, but the lease was not.

¶ 8 Decedent died on April 7, 2010. His 1998 will was admitted to probate. Bonnie Petersen and Linda Merriman were named co-executors. On April 10, 2010, at a reception at Linda's house following decedent's funeral, a conversation ensued between defendants and Bonnie Petersen regarding who owned decedent's farm. Linda testified that the conversation "escalat[ed]" and she tried to "break it up." She said, "I have neighbors" and "I don't want the cops coming here." Defendants stated that they owned the property. The next day, John came to Linda's house with a copy of the option contract. Shortly thereafter, Linda told him it was not enforceable. He did not produce a real estate contract that was signed by everyone, and Linda did not give him title to the farmette. John never gave her a copy of the lease. In May 2010, via counsel, Linda reiterated that the option was not enforceable. Bonnie testified that she reviewed the option contract on the day

after decedent's funeral. No one in the family believed the option was valid. Bonnie and Linda spoke and agreed that the option should not be honored. Defendants stopped making the $1,000 monthly payment in May 2010 (the last payment was made in April 2010). On June 15, 2010, through counsel, defendants communicated their intention to exercise the option and tendered a signed copy of the real estate contract to plaintiffs. The contract was not dated; however, it was attached to a dated letter.

¶ 9 The trial court ruled in favor of defendants. It made few findings of fact, stating only that "[decedent] intended to do what he did" and "[h]e went to a lawyer [and] signed the agreement." Plaintiffs now appeal.

¶ 10 III. ANALYSIS

¶ 11 Plaintiffs raise a number of issues on appeal. They contend that the option contract is not valid as it does not set forth a time period in which the option is to be exercised. They argue that defendants never exercised the option in the manner specified in the contract. Plaintiffs further assert that the option contract lacked consideration. Plaintiffs also make a number of contentions that we will address preliminarily, as they do not present substantial questions. During oral argument, certain collateral issues between the parties were alluded to; however, as no sustained argument was made regarding such issues in the parties' briefs, we will not consider them here.

¶ 12 The first such issue is plaintiffs' claim that the trial court erred in finding that decedent "went to a lawyer" before he signed the option contract. Even if we were to agree with plaintiffs, this would provide no basis for us to disturb the trial court's judgment, as it is not relevant to any theory of relief advanced by plaintiffs. It might be relevant to a claim of undue influence. See *In re Estate of Berry*, 277 Ill. App. 3d 1088, 1091-92 (1996). Though plaintiffs make vague intimations

throughout their brief, they never attempt to set forth such a claim in this court. As such, we need not address this purportedly erroneous finding.

¶ 13 Second, plaintiffs complain that the trial court did not make detailed findings of fact or state its conclusions of law. Plaintiffs urge that we make independent findings. Regarding legal conclusions, we do so as a matter of course, as our review is *de novo* and we owe no deference to the trial court. *Travelers Insurance Co. v. First National Bank of Blue Island*, 250 Ill. App. 3d 641, 645 (1993). As for controverted questions of fact, such a course would be plainly improper. Where a trial court makes no express findings of fact, we presume that the trial court found all disputed issues of fact in favor of the prevailing party. *Larkin v. Sanelli*, 213 Ill. App. 3d 597, 604 (1991); *Century 21 Castles By King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 549 (1988). We must further presume that the trial court credited the testimony that supports its decision and rejected that which does not. *People v. Winters*, 97 Ill. 2d 151, 158 (1983). Moreover, "all reasonable presumptions will be extended in favor of the order under review." *Sheldon v. Colonial Carbon Co.*, 116 Ill. App. 3d 797, 800 (1983). Thus, while we will draw our own conclusion of law, we decline plaintiffs' invitation to independently review the facts. Instead, we will apply the manifest-weight standard to the findings of fact the trial court presumptively made and disturb them only if an opposite conclusion is clearly apparent. *Hargrove v. Neuner*, 138 Ill. App. 3d 811, 813 (1985). Moreover, it is well-established that we may affirm on any basis that appears in the record regardless of whether the trial court relied on that basis and irrespective of the trial court's reasoning. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62.

¶ 14 Third, plaintiffs contend that the trial court ignored the fact that it pleaded various affirmative defenses to defendants' counterclaim, and defendants did not answer them. Plaintiffs point out that the failure to answer an affirmative defense constitutes an admission of the allegations

contained in it. *Filliung v. Adams*, 387 Ill. App. 3d 40, 56 (2008). An exception to this rule is that "if the added allegations are not new and the existing complaint already negates them, then a reply is not necessary." *Id*. at 57. The rule also does not apply to legal conclusions. *People ex rel. Lacanski v. Backes*, 19 Ill. 2d 541, 543 (1960); *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill. App. 3d 298, 309 (1979). With these principles in mind, we will examine the propositions plaintiffs claim should be deemed admitted.

¶ 15 The first two propositions are that defendants never exercised the option either before decedent's death or before the commencement of the instant case. These are propositions of law, namely, whether whatever actions defendants engaged in (facts plaintiffs do not identify) meet the legal standard constituting the exercise of the option. *Cf. Lojek v. Department of Employment Security*, 2013 IL App (1st) 120679, ¶ 32 (holding whether facts meet legal standard involves a legal issue). Plaintiffs also pleaded that defendants drafted the contract and that any ambiguity should be resolved against them (a proposition they also advance elsewhere in their brief). The latter portion of this allegation is clearly a legal matter. Moreover, the principle set forth only applies in the failure of other rules of construction, and plaintiffs attempts to invoke it are premature. *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 165-66 (2002) (citing *Bunge Corp. v. Northern Trust Co.*, 252 Ill. App. 3d 485, 493 (1993)) ("The rule has been described as 'at best a secondary rule of interpretation, a last resort which may be invoked after all the ordinary interpretive guides have been exhausted.' "). The next three purported affirmative defenses involve the meaning of the terms of the contract, which clearly are legal issues. *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 189 (2011) ("A contract's meaning and whether it is ambiguous are questions of law, subject to *de novo* review."). The next proposition asserts a violation of the Statute of Frauds (740 ILCS 80/2 (West 2010)), another legal issue. See *Michigan Avenue National Bank v. County of*

Cook, 191 Ill. 2d 493, 503 (2000). Next, plaintiffs alleged that "[n]o installment contract or articles of agreements exist, indicating that any payment made by counter-plaintiffs if at all, could not have been pursuant to any contract to purchase." It is unclear to us, and plaintiffs do not explain, how this constitutes a defense. Finally, plaintiffs assert that "[s]ome or all of the improvements that counter-plaintiffs claim were made prior to the execution of the option contract and could not have been in furtherance thereof." How this allegation would be dispositive in this case is similarly not apparent to us. In sum we do not find persuasive plaintiffs' arguments concerning their so-called affirmative defenses. We now turn to the two overarching questions regarding whether the option contract was valid and whether the option was properly exercised.

¶ 16 1. VALIDITY

¶ 17 Plaintiffs argue that the option contract was not valid for two reasons. They claim it did not specify a period in which the option is to be exercised, and they argue it lacked consideration. The construction of a contract presents a question of law subject to *de novo* review. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). Whether a contract is supported by consideration is reviewed using the same standard. *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 770 (2007). Under the *de novo* standard, our review is independent (*Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 10) and we may freely substitute our judgment for that of the trial court (*People v. Davis*, 403 Ill. App. 3d 461, 464 (2010)).

¶ 18 Under Illinois law, an option consists of "a unilateral offer to sell; and a contract to leave the offer open for a specified time." *Soderholm v. Chicago National League Ball Club, Inc.*, 225 Ill. App. 3d 119, 122 (1992). Plaintiffs point out that, while the option contract refers to an "option period," it does not state what that period is. Defendants counter that the term of the option is specified in the lease. Plaintiffs contend that the lease and the option contract are separate

instruments and that the lease cannot cure the purported deficiency in the contract. They point out that the lease was not recorded at the time the option contract was. We agree with defendants.

¶ 19 It is well established that documents that are executed at the same time, concerning the same subject matter, by the same parties, during the same transaction are "regarded as one contract and will be construed together." *Gallagher v. Lenart*, 226 Ill. App. 3d 208, 233 (2007); see also *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 448 (2009); *In re Estate of Mayfield*, 288 Ill. App. 3d 534, 541 (1997). Here, both the option contract and the lease were executed on November 1, 2000, were signed by defendants and decedent, and concerned decedent's farmette. Moreover, the lease expressly references the option. Clearly, they should be regarded as a single contract. The lease specifically states that the option may be exercised at "any time during the term of this lease." The term of the lease is set at 20 years beginning on November 1, 2000. Accordingly, the contract specifies the time for which the option shall remain open.

¶ 20 We now turn to the question of consideration. A contract must, of course, be supported by valid consideration. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 979 (1997). Consideration consists of an exchange of promises or performances, which may be a promise, act, or forbearance. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 23. Any act or promise that is some benefit to one party or a detriment to the other constitutes sufficient consideration. *Id*.

¶ 21 Plaintiffs point out that prior to the execution of the option contract, defendants were paying decedent $1,000 a month to compensate him for either work he performed for the construction company or for leasing space to store equipment on the farmette. After the option contract and lease were executed, plaintiffs continue, defendants simply kept paying decedent $1,000 per month. Thus, plaintiffs conclude, the monthly payment does not constitute consideration as defendants were making it anyway. Initially, we note that the option contract states that "[t]his Option is granted in

consideration of Optionee's payment to Optionor of $1,000, payable by certified or cashier's check drawn to the order of Optionor (receipt whereof is hereby acknowledged) and Optionee's and Optionor agreeing to maintain the leasehold improvements at his sole cost and expense." Hence, the ongoing monthly $1,000 payment was not the consideration for the option. Moreover, even if it were, it would be sufficient. It is true that a promise to do something one is already required to do is not adequate consideration. *Moehling v. W.E. O'Neil Construction Co.*, 20 Ill. 2d 255, 265-66 (1960). However, defendants were not obligated to continue the $1,000 monthly payment for 20 years or until they purchased the property prior to entering into the lease. If the $1,000 payment previously was for wages, we observe that employment is at will. *Johnson v. George J. Ball, Inc.*, 248 Ill. App. 3d 859, 864 (1993). If they represented payment for storage space on decedent's property, plaintiffs have identified no document that would require them to continue for a similar duration as the lease. As such, committing to make the monthly payment for the duration specified in the lease constitutes sufficient consideration.

¶ 22 In sum, the agreement between defendants and decedent specified a period during which the option had to be exercised and was supported by adequate consideration. Accordingly, we find neither of plaintiffs' contentions well founded.

¶ 23 2. EXERCISE OF THE OPTION

¶ 24 Plaintiffs' final contention is that defendants never actually exercised the option. Generally speaking, an optionee must exercise an option in the manner specified in the option contract. *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 217 (2001). Regarding exercise of the option, the option contract states as follows:

> "Optionee may exercise this option by executing and tendering to Optionor duplicate originals of the Real Estate Sales Contract hereto attached as Exhibit B. Within 3 days

thereof Optionor shall then execute and deliver to Optionee an executed duplicate of original said contract."

Plaintiffs spend considerable effort arguing that the option had not been exercised prior to decedent's death. We agree with plaintiffs on this point. For example, we do not find the fact that decedent referenced a sale in his federal tax returns in the years preceding his death as compelling evidence that the option had been exercised. Furthermore, though there was an exchange of letters in May 2010 in which defendants' desire to exercise the option is discussed, there is no indication that defendants tendered an executed copy of the original real estate sales contract during this period. However, they did tender such a contract attached to a letter dated June 15, 2010. Plaintiffs point out that the contract is not dated; however, they identify no legal authority or language in the option contract that would make this omission fatal to defendants' position. We also note defendants' observation that the above-cited passage begins with the word "may," indicating that what follows is permissive rather than required. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 611 (2011).

¶ 25 The question becomes, then, whether defendants were still entitled to exercise the option in June 2010. We conclude that they were. The following issues turn largely on the construction of the agreement between decedent and defendants, a legal issue subject to *de novo* review. *Gallagher*, 226 Ill. 2d at 219. Factual findings consistent with the trial court's verdict will be accepted unless they are contrary to the manifest weight of the evidence, *i.e.*, an opposite conclusion is clearly evident. *Adams v. Board of Trustees of Teachers' Retirement System*, 407 Ill. App. 3d 592, 595 (2011) .

¶ 26 Plaintiffs advance two reasons why defendants' exercise of the option was ineffective. First, they assert that duplicate originals of the real estate sales contract were never tendered to decedents

or the executors "prior to the suit being filed." However, there is no requirement in the agreement between decedent and defendants that any such tender occur prior to the initiation of any legal action. Moreover, as we hold that defendants were still entitled to exercise the option in June 2010, that they did not exercise it earlier is beside the point. We note that the agreement between defendants and decedent stated the option would remain open throughout the length of the lease. We reject plaintiffs' reliance on the testimony of attorney Becker (who drafted the option) to establish otherwise. Inexplicably, after asserting that the meaning of the relevant portion of the contract is not ambiguous and invoking the four-corners rule (see *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 24), plaintiffs attempt to rely on Becker's testimony to explain what the contract means. They point out that Becker testified that defendants needed to keep making lease payments in order to retain the right to exercise the option. However, plaintiffs never identify any basis for such a condition in the language of the agreement itself (they do point to paragraph five of the option contract; however, that paragraph says nothing about lease payments). Furthermore, as we explain below, under the facts of this case, defendants' failure to make lease payments after April 2010 did not amount to a breach of the agreement.

¶ 27 Plaintiffs argue that defendants breached the lease when they stopped making monthly payments in May 2010 and that this breach terminated their ability to exercise the option. It is uncontroverted that defendants last payment occurred in April 2010. Defendants argue that they only stopped making lease payments after plaintiffs indicated they would not honor the agreement defendants made with decedent. Indeed, in April 2010, Linda informed John that it was her position that the option was invalid. Linda was a co-executor of decedent's will.

¶ 28 It is well-established that "unless justified, a statement to a promisee by a promisor that the promisor will not perform his contractual duties constitutes an anticipatory repudiation of the

contract." *Schilling v. Book*, 84 Ill. App. 3d 972, 978 (1980); see also *Farwell Construction Co. v. Ticktin*, 59 Ill. App. 3d 954, 961 (1978). Under such circumstances, "the nonbreaching party is not required to tender performance or to comply with conditions precedent." *Builder's Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 106 (1978). Rather, "the non-breaching party generally has three options: (1) to rescind the contract altogether and pursue the remedies based on the rescission; (2) to elect to treat the repudiation as an immediate breach by bringing suit or by making some change in position; or (3) to await the time for performance of the contract and bring suit after that time has arrived." *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1031 (2007). This rule is founded on the basic legal tenent [*sic*] that the law never requires a useless act. *Builder's Concrete Co. of Morton*, 58 Ill. App. 3d at 106.

¶ 29 Continuing to make payments pursuant to an agreement that an executor for the estate indicated was invalid would have been such a useless act. Quite simply, once Linda communicated to John that she regarded the agreement between defendants and decedent to be invalid, defendants were free to stop performing and pursue other remedies. Further, that they attempted to secure the estate's performance before litigating is of no moment, for one path they were free to follow was to await performance for a time. See *Tower Investors, LLC*, 371 Ill. App. 3d at 1031. More importantly, since their performance was excused, the failure to make payments under the lease did not constitute a breach and did not terminate their ability to exercise the option, which they did in June 2010.

¶ 30 In short, we find plaintiffs' arguments that defendants did not exercise their option unpersuasive. Moreover, plaintiffs' contentions that defendants did not exercise the option prior to decedent's death or the commencement of the instant action are not relevant given that defendants were entitled to invoke the option in June 2010.

¶ 31 IV. CONCLUSION

¶ 32 In light of the foregoing, the judgment of the circuit court of De Kalb County is affirmed.

¶ 33 Affirmed.