

No. 1-14-2442

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

TODD BRYANT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County,
)	
v.)	No. 12 L 3343
)	
MARK IUPPENLATZ,)	
)	Honorable
Defendant-Appellant.)	John C. Griffin
)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly entered summary judgment in favor of plaintiff and ordered defendant to pay monies owed under a promissory note.

¶ 2 Plaintiff Todd Bryant, as assignee of Frank Talbert, brought an action against defendant, Mark Iuppenlatz, alleging defendant defaulted on a promissory note held by plaintiff. Ultimately, the circuit court entered summary judgment in plaintiff's favor, finding defendant Mark Iuppenlatz liable for the unpaid amounts. Defendant appeals, arguing the Note's payment deadlines were extended by an oral agreement between defendant and the initial holder of the

note, which creates a question of fact precluding the entry of summary judgment. For the following reasons, we affirm the circuit court's judgment.

¶ 3

BACKGROUND

¶ 4 On April 29, 2009, defendant Mark Iuppenlatz executed a promissory note (Note) in the principal amount of \$208,333, payable to Frank Talbert by April 29, 2012. Under the Note, an annual interest payment was due on the last day of every calendar year until the Note's maturity date, when the principal balance was due. In the event of a default, the entire principal and interest could be declared immediately due and payable. A separate agreement secured the Note (Pledge Agreement), pledging a lien on defendant's shares in two companies partly owned by Talbert (Farmington Companies). The Note provides "[t]he terms and conditions of the Pledge Agreement are incorporated herein by reference." Paragraph 4 of the Pledge Agreement states "this Agreement may be amended, modified or supplemented only by a written agreement signed by all parties hereto."

¶ 5 According to defendant, in May of 2010, Talbert and defendant entered into an oral agreement (Extension Agreement) to extend the Note's payment deadlines, including the maturity date (April 29, 2012), to an unspecified date, determined by the resolution of a separate lawsuit involving Talbert, Iuppenlatz and Bryant (Chancery Litigation). At defendant's request, Talbert sent defendant an undated written confirmation letter (Written Confirmation) to memorialize the Extension Agreement. It states, "[p]er our conversation I agree that the amount owing to me by you for purchase of shares in [the] Farmington project can be delayed." On June 28, 2010, Talbert assigned the Note and Pledge Agreement (collectively Loan Documents) to plaintiff.

¶ 6 On March 28, 2012, plaintiff filed a complaint for breach of the Note and Pledge Agreement. Plaintiff alleged defendant defaulted on the Note by failing to remit the required 2009, 2010 and 2011 year-end annual accrued interest payments. At the time the complaint was filed, the total amount of accrued interest and principal totaled \$292,591.66.

¶ 7 Defendant filed a motion to dismiss the complaint, arguing that although the Note has a maturity date of April 29, 2012, plaintiff has no standing to bring this suit because the assignment is void.

¶ 8 In response, plaintiff filed a motion for summary judgment. He argued defendant failed to make any payments under the Note and Pledge Agreement from 2009 to 2012. Therefore, defendant defaulted on the loan and the Note's full principal and accrued interest was immediately due and payable. Plaintiff also submitted an affidavit averring he has personal knowledge of the facts argued in his summary judgment motion.

¶ 9 Thereafter, defendant requested and was granted leave to withdraw his motion to dismiss with prejudice. Defendant subsequently answered the complaint admitting he executed the Note and Pledge Agreement but had no knowledge of the assignment to plaintiff. Defendant denied that he failed to timely pay the accrued interest because prior to Talbert's assignment of the Note to Bryant, "the deadline within which to pay accrued interest and all other amounts due and owing under the Promissory Note was extended by an agreement entered into by and between Iuppenlatz and Frank Talbert." Thus, defendant argued, there has been no default or breach of the Note and Pledge Agreement.

¶ 10 In response to the summary judgment motion, defendant argued that the Loan Documents were validly modified by an oral agreement with Talbert prior to the loan's assignment to

plaintiff. That agreement extended the maturity date and all payment deadlines under the Note to an event which had not yet occurred. Therefore, plaintiff cannot establish defendant's default of the loan. Defendant also argued that the existence of the oral modification to the Note creates a question of fact, making summary judgment inappropriate.

¶ 11 Attached to the response was a declaration by defendant stating that the Note was entered into as part of a transaction whereby defendant purchased shares of two companies from Talbert. In May 2010, he and Talbert orally agreed to extend the deadline for all payments under the Note, including all principal and interest payments. The payments were extended until a resolution was reached in the Chancery Litigation involving plaintiff, Talbert and defendant, among others. He requested that Talbert memorialize the extension agreement in writing, which resulted in Talbert sending defendant the Written Confirmation. Defendant asserted that the oral agreement extended both the maturity date as well as the deadline for all outstanding indebtedness due under the Note. At that time, no resolution had been reached in the Chancery Litigation, and so, no payment was due.

¶ 12 Plaintiff's reply brief argued that neither defendant nor the Written Confirmation addressed whether there was consideration for the purported extension, any specifics regarding the delayed payments, or the Loan Documents. Although the terms of the Note are clear, the terms of the Written Confirmation Letter and defendant's declaration are not. Plaintiff also moved to strike defendant's declaration arguing it does not comply with Supreme Court Rule 191(a) (eff. Jan. 4, 2013) because it improperly presents parol evidence to establish the Written Confirmation's timing, meaning and effect, is inconsistent, is based on information and belief, and consists of legal conclusions.

¶ 13 In a surresponse defendant argued that parties to a promissory note can orally extend payment deadlines set forth in written loan documents. Here, defendant and Talbert orally agreed to extend all payment deadlines and the oral Extension Agreement was legally sufficient to do so. In addition, because the Loan Documents are for the benefit of defendant, he may properly waive the requirement that modifications be in writing and signed by both parties. In a supplemental declaration attached to the surresponse, defendant averred "I waived the requirement that I sign any written document agreeing to the extension of the payment deadlines under the Loan Documents." He also stated that, as consideration for the payment extension, defendant "agreed to set-off any judgment I obtained against Talbert in the [Chancery] Lawsuit against the amounts due and owing under the Loan Documents."

¶ 14 Also attached to the surresponse was Talbert's deposition transcript. Talbert testified that he was "pretty confus[ed]" about the circumstances of the payment extension. When asked if he recalled defendant requesting an extension of the April 2012 maturity date, Talbert responded: "[h]e did not ask me that." According to Talbert, when defendant requested the extension, defendant did not specify whether the request related to the annual interest payment due at that time or whether it related to the maturity date. He and Iuppenlitz did not specify a date for the new payment deadline and, although Talbert had an idea of what he was "thinking, *** [he] didn't put it in writing."

¶ 15 Plaintiff subsequently filed a surrepley, arguing defendant could not unilaterally waive his obligations under the Loan Documents. Plaintiff further argued the supplemental declaration was improper because it was self-serving and presented only inadmissible conclusions, not material facts.

¶ 16 On March 13, 2013, the circuit court granted plaintiff's motion for summary judgment and entered judgment against defendant in the amount of \$322,661.46. The circuit court found the Note integrated the Pledge Agreement, which required all modifications be in writing signed by both parties. The Extension Agreement and Written Confirmation did not meet these requirements. In addition, the undated Written Confirmation does not set forth the terms and conditions of the purported oral extension agreement. Therefore, the Extension Agreement could not extend the Note's maturity date from April 29, 2012, to the unspecified date of the resolution of the Chancery Litigation. The circuit court also found that the Extension Agreement had no legal effect because both the Illinois Credit Agreements Act (815 ILCS 160/1 *et seq.*) and the parol evidence rule require the oral Extension Agreement to be in writing. Defendant filed a motion to reconsider, which the circuit court denied. Thereafter, defendant timely filed this appeal.

¶ 17 ANALYSIS

¶ 18 On appeal defendant argues the trial court erred in granting summary judgment in favor of plaintiff. He contends that, although the maturity date of the Note was April 29, 2012, he made an oral agreement with Talbert to extend all payments under the Note until after the Chancery Litigation had been resolved. Because that action has not been resolved, no payments are due and owing, and plaintiff cannot recover for breach of the Note.

¶ 19 Summary judgment is proper where the record reveals that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 127-28 (2005). The court must view the pleadings, depositions, admissions, and affidavits on file in the

light most favorable to the nonmoving party. *Id.* The entry of summary judgment is reviewed *de novo*. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002).

¶ 20 To prevail on a breach of contract claim, a plaintiff must plead and prove the existence of a contract, performance by plaintiff, breach of the contract by defendant, and the resultant damages or injury. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007). In the instant case, plaintiff alleged and defendant admits: the existence of the Note and Pledge Agreement, signed by defendant; the holder of the Note fulfilled his obligations; and defendant has not paid any sums under the Note since 2009. However, defendant disputes whether he is in default under the Note. He argues the April 29, 2012 maturity date was validly extended and therefore, no sums were due when plaintiff filed this action.

¶ 21 Defendant argues that Illinois law permits parties to make oral modifications to written agreements and, therefore, he and Talbert properly entered into an oral modification to extend all payments under the Note until resolution of the Chancery Litigation.

¶ 22 Plaintiff argues that because the Note prohibits oral modification of its terms, the purported oral agreement is unenforceable.

¶ 23 The Note provides "[t]he terms and conditions of the Pledge Agreement are incorporated herein by reference." Thus, the Note expressly incorporates the Pledge Agreement's provisions. See *Wilson v. Wilson*, 217 Ill. App. 3d 844, 853 (1991); see also *Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill. App. 3d 417, 421 (1989) (the additional provisions found in an incorporated document are interpreted as expressly written into the original contract itself). The Pledge Agreement provides "this Agreement may be amended, modified or supplemented

only by a written agreement signed by all of the parties hereto." Therefore, we find, as did the circuit court, that the Note provides its terms can only be modified by a written agreement signed by both parties.

¶ 24 However, under Illinois law, a written agreement may be modified by a subsequent oral agreement even where written agreement's terms prohibit oral modifications. *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 105 (1993).

¶ 25 Defendant, as the proponent of the claim that the oral agreement modified the payment deadline, is required to show the existence and validity of the oral modification. See *South Shore Amusements, Inc. v. Supersport Auto Racing Ass'n*, 136 Ill. App. 3d 284, 287 (1985) (proponent of a contract must prove its existence and validity). In this stage of the proceedings, defendant is not required to prove his defense but must present some evidence to raise a factual dispute regarding an element of the plaintiff's claim. *Kinzer v. Fidelity & Deposit Co.*, 273 Ill. App. 3d 211, 215 (1995). To support his contention that the oral agreement extended the Note's payment deadlines and was effective, defendant supplied the trial court with two sworn declarations. Defendant argues that because his declarations established a genuine issue of material fact as to the oral modification's existence, summary judgment was improper, and the matter should have gone before the trier of fact.

¶ 26 Plaintiff contends that defendant's declarations are inadmissible because they are self-serving and consist of mere conclusory statements. Furthermore, the declarations fail to show evidence of sufficient consideration to support the purported oral modification and do not show the oral modification's terms were definite and enforceable.

¶ 27 Defendant's sworn declarations are summarized as follows: the Note was entered into as

part of a transaction to purchase shares of two companies from Talbert; he and Talbert orally agreed to extend the deadline "for all payments owing under the Loan Documents, including all principal payments and interest payments" until resolution was reached in the Chancery Litigation; as consideration for the payment extension, defendant "agreed to set-off any judgment [he] obtained against Talbert in the [Chancery] Lawsuit against the amounts due and owing under the Loan Documents"; he requested that Talbert memorialize the oral agreement in writing, and Talbert accordingly prepared a document stating "[p]er our conversation, I [Frank Talbert] agree that the amount owing to me by you [Mark Iuppenlatz] for your purchase of shares in [the] Farmington project can be delayed"; a month later, Talbert assigned the Loan Documents to plaintiff; no resolution has been reached in the Chancery Litigation; and, as a result, there is no obligation yet to make payments under the Note.

¶ 28 Upon review of defendant's declarations, we find, as a matter of law, the declarations do not show the existence of a valid oral modification and, therefore, no question of material fact exists to preclude summary judgment.

¶ 29 An oral agreement is binding where there is an offer, acceptance and a meeting of the minds as to the terms of the agreement. *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307, 313 (2009). Oral modifications must be proven to be definite and certain, and the party claiming the modification bears the burden of proof. *Estate of Kern v. Handelsman*, 142 Ill. App. 3d 506, 514 (1986). For an agreement to extend a note's payment deadlines to be binding, the extension must be for a definite time period and be supported by consideration. *Theodosakis v. Austin Bank of Chicago*, 93 Ill. App. 3d 634, 639 (1981); see *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320 (1977).

¶ 30 According to the defendant, he has a claim against Talbert for money damages in the separate Chancery Litigation, referred to by the parties as the "Proteus lawsuit." In defendant's supplemental declaration, he avers that as consideration for the oral modification he pledged to "set-off any judgment I obtained against Talbert in the Proteus lawsuit" from the amounts owed under the Loan Documents. We find, as a matter of law, that the agreement to delay payments under the Note, as averred, lacks consideration. See *Lesnik v. Estate of Lesnik*, 82 Ill. App. 3d 1102, 1107 (1980) (whether an agreement is supported by consideration is a question of law).

¶ 31 To be binding, a promise to extend loan payment deadlines must be supported by consideration. *Theodosakis*, 93 Ill. App. 3d at 640. Consideration is a bargained-for exchange (*In re Marriage of Hluska*, 2011 IL App (1st) 92636, ¶ 78) and "consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Doyle v. Holy Cross Hospital*, 289 Ill. App. 3d 75, 79 (1997). Where a "modification [is] solely for the benefit of one of the parties [it] is unenforceable." *Id.*

¶ 32 In this instance, defendant (debtor) claims he asked Talbert (original note holder) to extend the payment deadlines. Talbert agreed and promised to extend the deadlines until resolution of the Chancery Litigation. Thus, the averred consideration for Talbert's promise to extend the payment date was in exchange for defendant reducing any judgment he obtains against Talbert in the Chancery Litigation by the amount he owed Talbert under the Note.

¶ 33 To constitute valuable consideration, it is essential that "the party in whose favor the contract is made parts with a right which he might otherwise exert." *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill. App. 3d 907, 913 (1985). In other words, for an agreement to be supported by

consideration, the promisee must relinquish something, for the benefit of the promisor, in exchange for the promise made. See *Goodwine State Bank v. Mullins*, 253 Ill. App. 3d 980, 1011 (1993). Such relinquishment occurs when the promisee performs any act which "occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform." *F.H. Prince & Co. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 798 (1995). Where a debtor merely requests an extension to pay a loan, without the exchange of valuable consideration, the extension agreement is unenforceable. *Theodosakis*, 93 Ill. App. 3d at 640 (the court suggested that adequate consideration for a promise to extend payment deadlines would be the payment of interest in advance by the debtor).

¶ 34 Here, defendant, as promisee, did not provide Talbert any additional consideration for Talbert's promise to delay defendant's payments under the Note. Instead, defendant only offered to offset Talbert's potential liability in the Chancery Litigation by the amount defendant owes Talbert under the Note. Offsetting that potential judgment would in no way reduce Talbert's liability to defendant if defendant was successful in the Chancery Litigation. Stated differently, if defendant prevails in the Chancery Litigation, Talbert would still owe defendant the judgment amount, whether it is satisfied in full or by offsetting defendant's debt under the Note. For example, assume defendant owed Talbert \$100,000 and defendant obtains a \$25,000 judgment against Talbert in the Chancery Litigation. Under defendant's theory, defendant would offset the \$25,000 judgment owed by Talbert against what defendant owes Talbert under the Note, leaving defendant with a balance of \$75,000 owed to Talbert. In this hypothetical, Talbert would have received no benefit by delaying payment under the Note: he has been paid \$100,000 now and pays \$25,000 later for a net \$75,000, or under defendant's theory, now, he later pays the \$25,000

Chancery judgment for a net of \$75,000.

¶ 35 Thus, under defendant's theory, defendant suffered no detriment in exchange for Talbert's promise to defer the note payments, and Talbert received no benefit. Defendant only changed the uncertain method of Talbert paying his potential liability in the Chancery Litigation. As a result, the averred oral agreement only benefits defendant, and therefore, the agreement lacks consideration and is unenforceable. See *Theodosakis*, 93 Ill. App. 3d at 640; see also *Doyle*, 289 Ill. App. 3d at 79; see also Restatement (Second) of Contracts § 71, Comment b (1981) (there is no consideration for a promise where there is a "mere pretense of a bargain" or "where the purported consideration is merely nominal.") Accordingly, we find defendant has failed to show evidence of a genuine issue of material fact to prevent the entry of summary judgment in plaintiff's favor.

¶ 36 Because we find the trial court was correct in finding there was no consideration for the oral agreement, we find it is not necessary to address defendant's contention that the trial court erred in applying the Illinois Credit Agreements Act (815 ILCS 160/1 *et seq.*) and parol evidence rule as additional support of its decision to grant plaintiff summary judgment. Because we have *de novo* review, we may affirm the circuit court for any reason supported by the record, regardless of the particular rationale relied upon by the circuit court. *In re Marriage of Benson*, 2015 IL App (4th) 140684, ¶ 22. Based on our above ruling, we find sufficient basis to uphold the circuit court's judgment for granting plaintiff's summary judgment motion, without considering this alternative basis.

¶ 37 Lastly, in plaintiff's response to this appeal he argues that under the Pledge Agreement, he is entitled to the reasonable attorney fees incurred in defending this appeal. The Pledge

Agreement, incorporated into the Note, provides that "[i]n the event any dispute hereunder is submitted to any proceeding for resolution, the non-prevailing party in any such action shall pay its and the prevailing party's fees and expenses, including reasonable attorneys' fees *** and all other costs and expenses (including without limitation, court costs and expenses) connected with the case." An appeal is a continuation of the trial court action. *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004). Because "the amount of attorney fees *** on appeal are more properly determined upon a petition and evidentiary hearing in the trial court" we remand the cause for further proceedings including a determination of whether plaintiff is entitled to reasonable attorney fees under the Pledge Agreement. *Id.*

¶ 38

CONCLUSION

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court and remand this cause for the circuit court to determine the reasonable attorney fees plaintiff incurred in defending this appeal.

¶ 40 Affirmed and remanded with directions.