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FIFTH DIVISION
November 4, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

4536 NORTH SHERIDAN CONDO ASSOCIATION,)	Appeal from the
)	Circuit Court of
Plaintiff/Counter-Defendant-Appellant,)	Cook County.
)	
v.)	No. 11 M1 705007
)	
MICHAEL MADUFF,)	The Honorable
)	Rodolfo Garcia,
Defendant/Counter-Plaintiff-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶1 *HELD:* Counter-plaintiff failed to establish that counter-defendant Condominium Association had a duty to respond to his redevelopment plans in any formal or express manner. As a result, there were no genuine issues of material fact preventing summary judgment in favor of the Condominium Association on counter-plaintiff's claims for breach of fiduciary duty and breach of the duty of good faith and fair dealing. Counter-plaintiff cannot support his remaining contentions of error.

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¶2 Counter-plaintiff, Michael Maduff, appeals the order of the circuit court granting summary judgment in favor of counter-defendant, 4536 North Sheridan Condo Association (Condo Association), on his claims of breach of fiduciary duty and breach of the duty of good faith and fair dealing under the Illinois Condominium Act (Act) (765 ILCS 605/1 *et seq.* (West 1998)) and the condominium declarations. Maduff contends the circuit court erred where genuine issues of material fact existed barring the entry of summary judgment as to: (1) whether the Condo Association breached its fiduciary duty by failing to respond to or approve his plan for redevelopment of his condominium unit; (2) whether the Condo Association breached the duty of good faith and fair dealing by failing to act on his proposals; (3) whether the Condo Association improperly locked him out of his unit preventing him from maintaining it, thereby constructively evicting him; and (4) whether the doctrine of laches barred his claims. Based on the following, we affirm.

¶3 **FACTS**

¶4 In 1998, Maduff acquired a condominium unit in a building located at 4532 North Sheridan as part of a settlement in a lawsuit for fraud against the developers of the 4532 North Sheridan and 4536 North Sheridan buildings. Both buildings were part of the Condo Association. Maduff's unit was the only condominium in the 4532 building, while the 4536 building contained 14 condominium units. Maduff eventually sold the 4532 North Sheridan unit in 2014.

¶5 Beginning sometime before June 2004, Maduff attempted to subdivide his single unit into two units to be rented or resold. In order to do so, Maduff sought the Condo Association's permission to sever the property from the association. According to Maduff, he had "numerous discussions, meetings and correspondence with the [Condo] Association and Board of Managers" without success, positive feedback, or counter-proposal. Maduff additionally alleged

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the Condo Association locked him out of his condominium unit “on an ongoing basis commencing no later than June 2004.” Maduff suspended payment of his condominium assessments on June 10, 2004, “while awaiting a response from the [Condo] Association.” On May 15, 2005, Maduff presented a developmental plan before the Condo Association board and members, requesting input and approval therefrom. Maduff asserted that, during 2006 and 2007, he supplemented his original proposal with formalized plans for a subdivision, having hired an architect to present the plans to the Condo Association. The Condo Association raised objections, which Maduff used as a basis to rework his proposal. The Condo Association, however, “refused to take any action either to accept or reject any of his proposals, or to offer any counter-proposals.” Then, in a letter dated August 15, 2008, the Condo Association demanded payment of Maduff’s outstanding assessments. Maduff did not respond.

¶6 Meanwhile, due to his inability to access the condominium unit, Maduff’s unit, which was uninhabitable to begin with, deteriorated to the point that the City of Chicago filed an action for condemnation proceedings.

¶7 On March 3, 2011, the Condo Association filed a complaint for possession and judgment of the subject property. Maduff filed an answer and affirmative defenses, arguing (1) the Condo Association unlawfully locked him out of his unit; (2) the doctrine of laches applied; (3) the Condo Association improperly compounded interest; and (4) there were discrepancies in the amount the Condo Association claimed was due.

¶8 On January 31, 2012, the Condo Association filed a motion for summary judgment and a memorandum in support thereof, arguing that there were no genuine issues of material fact regarding its authority to prevail in a forcible entry and detainer action where Maduff had delinquent monthly assessments and that his affirmative defenses lacked merit. Maduff filed a

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response essentially restating his affirmative defenses. The Condo Association filed a reply stating that: (1) there was no constructive eviction because Maduff's occupation to the premises was not hindered; (2) Maduff never occupied the premises; (3) the Condo Association never intended to deprive Maduff of the beneficial enjoyment of his property; (4) the doctrine of laches did not apply because the lapse of time did not impact Maduff's duty and failure to pay the assessments; and (5) the compounding of late fees was not grounds to deny the motion.

¶9 Then, on July 11, 2012, Maduff filed a three-count counter-claim, claiming: (1) a breach of fiduciary duty against the Condo Association under the Act and the condominium declarations; (2) a breach of the duty of good faith and fair dealing under the Act and declarations; and (3) that he was entitled to a declaratory judgment to abate the assessments. The Condo Association filed an answer and affirmative defenses, asserting laches as an affirmative defense.

¶10 On August 29, 2012, the circuit court entered an order granting the Condo Association's motion for summary judgment of its claim for possession and judgment, finding Maduff's defenses did not preclude entry of judgment. The circuit court awarded the Condo Association \$17,089.25 in assessments and granted an order of possession in its favor. The parties agree that the court's August 29, 2012, order disposed of Maduff's counter-claim requesting a declaratory judgment abating his assessments.

¶11 On September 15, 2014, the Condo Association filed a motion for summary judgment of Maduff's counter-claims and a memorandum in support thereof. In its summary judgment motion and supporting memorandum, the Condo Association acknowledged that it had a fiduciary duty to its unit owners. The Condo Association, however, argued that there was no duty to assist one unit owner in redeveloping its property when such redevelopment would be

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detrimental to the remainder of the units in the association. In addition, the Condo Association admitted that “a duty of good faith and fair dealing exist[ed] generally.” The Condo Association, however, maintained that its refusal of Maduff’s plans was not an abuse of discretion “because those plans diminished the Association’s use of the common elements.” The Condo Association further argued that laches is a valid affirmative defense to a claim for breach of fiduciary duty.¹

¶12 On January 15, 2015, Maduff filed a response, along with a counter-affidavit. In the response, Maduff argued that there were questions of material fact because the Condo Association admitted that it had a fiduciary duty under the Act; therefore, its reasons for refusing to accept his requests to improve his condominium unit, which he disputed, did not support the entry of summary judgment. Maduff further argued that there was a genuine issue of material fact regarding the Condo Association’s unlawful lockout of his condominium unit. On February 17, 2015, the Condo Association filed a reply, stating that it properly exercised its business judgment by consulting independent legal counsel and did not breach its fiduciary duty or the duty of good faith and fair dealing under the Act, and that laches is a valid affirmative defense.

¶13 On June 16, 2015, the circuit court entered the following order:

“As a matter of law under the Condominium Act and the Association’s Declaration, there is no duty of the Condo Association to formally or expressly deny an association member’s plans to redevelop the member’s unit or otherwise formally consider Michael Maduff’s plans. Accordingly, Plaintiff/Counter-Defendant’s motion for summary judgment is granted.”

¶14 This appeal followed.

¹ Attached to the motion and memorandum were affidavits of Regina Rathnau, the former treasurer and current legal counsel for the Condo Association, and Dennis Weisgram, the former secretary for the Condo Association.

¶15

ANALYSIS

¶16 Maduff contends that, since the Condo Association admitted it had a fiduciary duty under the Act, there were genuine issues of material fact that prevented entry of summary judgment. Maduff additionally contends there were genuine issues of material fact regarding the Condo Association's reasons for failing to approve his plans in breach of the duty of good faith and fair dealing. Next, Maduff contends there were genuine issues of material fact preventing summary judgment as to his claim for illegal lockout and constructive eviction. Finally, Maduff contends the circuit court erred in relying on the doctrine of laches to grant summary judgment.

¶17 Summary judgment is appropriate only "if 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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The circuit court must view the documents and exhibits in a light most favorable to the nonmoving party. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 36. Summary judgment is a drastic measure and may be granted only if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The purpose of summary judgment is not to try an issue of fact, but rather to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review the granting of summary judgment *de novo*, meaning we perform the same analysis that the circuit court performed. *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 45.

¶18

I. Breach of Fiduciary Duty

¶19 Maduff first argues that questions of material fact remain regarding: (1) whether the Condo Association breached its fiduciary duty under the Act and its declarations by not taking

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any action on his proposals for redevelopment; (2) whether his proposals were detrimental to the remainder of the association; and (3) whether Maduff offered the Condo Association and other unit holders adequate compensation for his proposed redevelopment plans.

¶20 The Condo Association responds that Maduff's arguments are defeated where he failed to challenge the circuit court's legal finding that there was no duty for the Condo Association to consider or expressly deny his redevelopment plans. More specifically, the Condo Association argues that (1) there was no question of fact as to whether the business judgment rule excused it from liability because there was no duty to begin with that would be shielded by the business judgment rule; (2) there was no question of fact regarding whether the proposed development was detrimental to the remainder of the association because there was no duty to begin with; and (3) there was no question of fact as to whether Maduff offered adequate compensation for the proposed development because there was no duty to begin with. In fact, the Condo Association maintains that Maduff forfeited review of whether summary judgment was proper by failing to argue first in his opening brief that the circuit court erred in finding the Condo Association had no duty to consider or deny his redevelopment plans. See *Finks v. Banks*, 2013 IL App (1st) 122177, ¶ 14 (points not argued in an opening brief are waived and shall not be raised in the reply brief).

¶21 In his reply brief, Maduff argues that he did not forfeit review of the existence of a duty. Instead, Maduff maintains that he demonstrated the Condo Association owed him a fiduciary duty and failed to uphold that duty by highlighting the general fiduciary duty promised by the Condo Association in the condominium declarations.

¶22 We acknowledge that Maduff's opening brief failed to directly challenge the circuit court's order that the generalized fiduciary duty within the declarations did not create an express

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duty to respond to Maduff's redevelopment plans under the facts of the case. Forfeiture aside, we, however, will address the underlying issues on appeal. *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748, ¶ 21 (if an appellant's brief violates supreme court rules, we may dismiss the appeal; however, the rules are an admonishment to the parties and not a limitation on the jurisdiction of this court).

¶23 The question before us is whether there was a genuine issue of material fact that the Condo Association had a duty to formally consider or expressly deny Maduff's redevelopment plans in some established manner.

¶24 Section 18.4 of the Act provides that "[i]n performance of their duties, the officers and members of the board, whether appointed by the developer or elected by the unit owners, shall exercise the care required of a fiduciary of the unit owners." 765 ILCS 605/18.4 (West 1998). The "duties" of the board, as provided by statute, include: (1) providing for the operation, upkeep, maintenance, replacement, and improvement of the common elements; (2) preparing, adopting, and distributing the annual budget; (3) levying and collecting assessments from the unit owners; (4) paying state property taxes; (5) obtaining adequate and appropriate insurance; (6) keeping records and receipts for expenditures affecting the use and operation of the property; (7) adopting and amending rules and regulations covering the details of the operation and use of the property, "after a meeting of the unit owners called for the specific purpose of discussing the proposed rules and regulations;" and (8) having "access for each unit from time to time as may be necessary for the maintenance, repair or replacement of any common elements or for making emergency repairs necessary to prevent damage to the common elements or to other units." As demonstrated, although the Act recognizes a generalized duty for a condominium board to

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exercise fiduciary care to the unit owners, the Act does not provide any expressed duties to respond to a proposal by a unit owner for redevelopment of his or her individual unit.

¶25 Maduff cites to the condominium declarations as support for his argument that the Condo Association breached its fiduciary duty by not taking any action on his proposals for redevelopment. Our review of the declarations, however, does not provide any such duty. Section 4.08 of the declarations entitled “Additions, Alterations or Improvements” provided, in relevant part, that:

“Except as otherwise provided in Section 7.01(a) hereof, no additions, alterations or improvements shall be made by a Unit Owner to any part of the Common Elements and no additions, alterations or improvements shall be made by a Unit Owner to his Unit (where such work alters the structure of the Unit or increases the cost of insurance required to be carried by the Board hereunder) without the prior written consent of the Board. The Board may (but shall not be required to) condition its consent to the making of an addition, alterations or improvement by a Unit Owner upon the Unit Owner’s agreement either (i) to be solely responsible for the maintenance of such addition, alteration or improvement, subject to such standards as the Board may from time to time set, or (ii) to pay to the Association from time to time the additional cost of maintenance and/or insurance as a result of the addition, alteration or improvement. If an addition, alteration or improvement is made by a Unit Owner without the prior written consent of the Board, then the Board may, in its discretion, take any of the following actions:

(1) Require the Unit Owner to remove the additions, alterations or improvement and restore the Property to its original condition, all at the Unit Owner’s expense; or

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(2) If the Unit Owner refuses or fails to properly perform the work required under (1), the Board may cause such work to be done and may charge the Unit Owner for the cost thereof as determined by the Board; or

(3) Ratify the action taken by the Unit Owner, and the Board may (but shall not be required to) condition such ratification upon the same conditions which it may impose upon the giving of its prior consent under this Section.”

¶26 Simply stated, the declarations do not support Maduff’s argument. Instead, the declarations establish the obligations of a *unit owner* prior to making any additions, alterations, or improvements, such as in this case. The declarations are silent as to any protocol for the *Condo Association* once a unit owner has sought permission to make those additions, alterations, or improvements. The declarations merely provide the Condo Association with recourse in the event a unit owner proceeds with additions, alterations, or improvement without prior written consent. As a result, the declarations do not provide a duty on the part of the Condo Association to take action following a unit owner’s proposal, such as here. Accordingly, although the Condo Association did admit that it owed its unit owners a generalized fiduciary duty of care, there was nothing to support Maduff’s claim that the Condo Association had a duty to respond in any manner to his redevelopment proposals.

¶27 Because Maduff cannot establish the existence of a duty, we need not consider his remaining arguments regarding the breach of that duty. We, therefore, conclude that summary judgment was properly granted in favor of the Condo Association on Maduff’s claim that the Condo Association breached its fiduciary duty to him by failing to respond to his redevelopment proposals.

¶28 II. Breach of the Duty of Good Faith and Fair Dealing

¶29 Next, Maduff contends the Condo Association breached its duty of good faith and fair dealing by failing to act on his proposals for redevelopment of his condominium unit.

¶30 It is well established that a duty of good faith and fair dealing is implied in every contract. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007). The duty of good faith and fair dealing is a limitation on the exercise of one party's broad discretion in performing its obligations under the contract. *Id.* It requires that party to exercise the discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the parties' reasonable expectations under the contract. *Id.* The duty of good faith and fair dealing, however, is not an independent source of duties for contracting parties. *Id.* Rather, it is a derivative principle of contract law used as a construction aid in determining the intent of the parties where an instrument is susceptible to conflicting interpretations. *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 807 (1998).

¶31 Because we have concluded that the Condo Association did not have a duty to formally or expressly respond to or deny Maduff's redevelopment proposals under either the Act or the declarations, we need not consider the duty of good faith and fair dealing. To the extent Maduff argues that the Condo Association breached its duty of good faith and fair dealing outside the Act and the declarations, Maduff fails to cite to any contract upon which that duty was based. We, therefore, find that the circuit court properly granted summary judgment in favor of the Condo Association on Maduff's claim of breach of the duty of good faith and fair dealing.

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¶132

III. Improper Constructive Eviction

¶133 Maduff additionally contends the circuit court erred in granting summary judgment where there were genuine issues of material fact regarding whether the Condo Association constructively evicted him from his condominium unit.

¶134 We initially note that Maduff did not include a claim for illegal lockout or constructive eviction in his counter-claim. Maduff did assert basic facts that he was prevented entry into his condominium unit, but those facts were presented to support his request for a declaratory judgment that he was entitled to abatement of his delinquent assessments. Moreover, on August 29, 2012, the circuit court entered an order granting the Condo Association's motion for summary judgment on its claim for possession of Maduff's condominium unit and for repayment of the outstanding assessments. In so doing, the circuit court found Maduff's defenses, which included constructive eviction and illegal lockout of his unit, did not preclude entry of judgment. The circuit court awarded the Condo Association \$17,089.25 in assessments and granted an order of possession in its favor. The court's August 29, 2012, order disposed of Maduff's counter-claim requesting a declaratory judgment abating his assessments. Maduff did not challenge that order before the circuit court and has not appealed that order before this court. Illinois Supreme Court Rule 303(b)(2) (eff. Jan . 1 2015) requires that a notice of appeal "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2). Maduff's notice of appeal provides that he appealed the circuit court's June 16, 2015, order only. Maduff has made no argument on appeal that this court has jurisdiction to review the unspecified August 29, 2012, judgment as a step in the procedural progression leading to the June 16, 2015, judgment. See *In re F.S.*, 347 Ill. App. 3d 55, 69,

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(2004). We, therefore, find Maduff's contention regarding illegal lockout and constructive eviction is not properly before this court.

¶35

IV. Doctrine of Laches

¶36 Maduff finally contends the circuit court erred in granting summary judgment in favor of the Condo Association based on the doctrine of laches.

¶37 There is nothing in the record to support Maduff's contention. The record contains the circuit court's June 16, 2015, written order granting summary judgment in favor of the Condo Association, finding "[a]s a matter of law under the Condominium Act and the Association's Declaration, there is no duty of the Condo Association to redevelop formally or expressly deny an association member's plans to redevelop the member's unit or otherwise formally consider Michael Maduff's plans." No mention of the doctrine of laches appears in the court's June 16, 2015, order. Maduff argues that the circuit court's oral ruling did address the doctrine of laches; however, no transcript or acceptable substitute appear in the record from that proceeding.

¶38 It was Maduff's burden, as the appellant, to present a sufficiently complete record of the circuit court proceedings to support his claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984). In absence of such a record on appeal, we must presume that the circuit court's order was in conformity with law and had sufficient factual basis. *Id.* "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* Because we have no transcript from the summary judgment hearing, we must presume the circuit court's order granting summary judgment was in conformity with the law and supported by the facts. We, therefore, conclude that the circuit court properly entered summary judgment in favor of the Condo Association.

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¶39

CONCLUSION

¶40 We affirm the judgment of the circuit court granting the Condo Association's motion for summary judgment of Maduff's counter-claims.

¶41 Affirmed.