

No. 1-15-3673

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOUTH CREEK 12, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 15 CH 14810
)	
CHICAGO NEIGHBORHOOD INITIATIVES, INC.)	Honorable
)	Mary Mikva
Defendant-Appellee.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly granted summary judgment in favor of defendant where the parties' contract automatically terminated according to its own terms and, consequently, plaintiff was not entitled to specific performance.

¶ 2 This appeal arises from an action filed by South Creek 12, LLC (South Creek 12), against Chicago Neighborhood Initiatives, Inc. (CNI), seeking specific performance of a Purchase Agreement the parties entered into for the sale of real property, located at 1000 East 111th Street in the Pullman neighborhood in Chicago (the Property). Pursuant to the Purchase Agreement, CNI was to sell the Property to South Creek 12 after, among other things, South Creek 12

provided a User Notice showing it had secured a tenant or occupant for the Property. CNI moved for summary judgment, arguing that the Purchase Agreement was not enforceable because South Creek 12 failed to file articles of organization before entering into that agreement. CNI also argued that the Purchase Agreement terminated when South Creek 12 failed to tender the requisite User Notice. In response, South Creek 12 argued that it was at all relevant times a legitimate entity under the *de facto* corporation doctrine. While South Creek 12's response to the summary judgment motion did not address CNI's contention regarding the User Notice, South Creek 12 argued at other times that the User Notice it provided was sufficient. The circuit court entered summary judgment in favor of CNI.

¶ 3 On appeal, South Creek 12 asserts that the circuit court improperly granted summary judgment in favor of CNI because (1) South Creek 12 was a legitimate entity under the *de facto* corporation doctrine; (2) CNI was estopped from denying South Creek 12's corporate existence; (3) South Creek 12's promoter, Wendy Berger Shapiro, could enforce the Purchase Agreement; and (4) South Creek 12 tendered the requisite User Notice. We affirm the circuit court's judgment. The record shows that while South Creek 12 tendered a document that it labeled as a User Notice, the document was not the User Notice defined in the Purchase Agreement.

¶ 4 I. BACKGROUND

¶ 5 The parties were seemingly drawn together by a mutual vision of revitalizing the Pullman neighborhood and developing the Property. In 2013, Shapiro, the principal of WBS Equities, LLC (WBS), and ultimately the principal of South Creek 12, apparently met with Bridget O'Keefe, a member of CNI's board of directors, to discuss how CNI could develop the Property. Later, Shapiro and CNI discussed the possibility of CNI selling the Property to one of WBS's

affiliates. According to Shapiro, WBS engaged O'Keefe and Matt Martin as counsel to represent WBS and whichever WBS affiliate would purchase the Property.

¶ 6 On April 3, 2014, WBS sent CNI a "Letter of Intent," proposing that CNI sell the Property to NEP 12, LLC, a WBS affiliate. Shapiro subsequently asked Martin to change the designated "Purchaser" from NEP 12, LLC, to South Creek 11, LLC. Martin, however, mistakenly wrote down "South Creek II," instead of South Creek 11. When Martin checked the entity's name with the Secretary of State's office, he discovered his mistake and sought confirmation from Shapiro. Shapiro subsequently instructed Martin to change the designated purchaser to South Creek 12.

¶ 7 CNI and South Creek 12, through Shapiro, entered into the Purchase Agreement on November 5, 2014. During the 180 day "Due Diligence Period," South Creek 12 was entitled to survey all aspects of the land and back out of the purchase if dissatisfied. If South Creek 12 was satisfied and wished to proceed, it was required to provide CNI with written notification, referred to as a "User Notice," within 10 days after the Due Diligence Period expired. Specifically, the User Notice was required to state that South Creek 12 had "a fully executed agreement with such agreement granting rights in and to the Property to a tenant or occupant for all or a portion of the Property, which notice shall be accompanied by a copy of such executed agreement reflecting the name of such tenant or occupant and the use to be made of the Property by such party." In addition, the Purchase Agreement specified that if South Creek 12 "fails to provide the Seller the User Notice within ten (10) business days after the expiration or waiver of the Due Diligence Period, then this Agreement shall terminate upon the expiration of such 10 business day period and Earnest Money shall be promptly returned to the Purchaser." The parties subsequently amended the Purchase Agreement to extend the Due Diligence Period to September 1, 2015.

¶ 8 On August 28, 2015, three days before the Due Diligence Period expired, South Creek 12 submitted a purported User Notice:

"South Creek 12, LLC has a fully executed agreement granting rights in and to the Property (as that term is defined in the Agreement) to a tenant or occupant for all or a part of the Property. Enclosed with this User Notice is a copy of such executed agreement reflecting the name of the tenant or occupant and the use to be made of the Property by such party."

The attached "Property Lease Rights Agreement" (PRLA) stated, however, that it was "not intended to create a binding commitment, but evidence [the parties'] mutual willingness to work together in good faith to negotiate and enter into a Lease contemplated hereby on the terms set forth herein provided [South Creek 12] purchases the Property." The only exception to this non-commitment provision was a confidentiality clause. More explicitly, the PLRA stated that South Creek 12 or PIG Investments, LLC (PIG), the purported tenant, could "terminate these discussions or any negotiations at any time or for any reason, with no obligation on any party hereto to continue discussion or negotiations" and that the parties to that agreement were not bound "to consummate any transaction or enter into a Lease, either on the terms outlined herein or on any other terms."¹

¶ 9 On September 17, 2015, CNI's counsel sent South Creek 12 an email stating that it had failed to submit a User Notice, as defined by the Purchase Agreement, within ten days of the Due Diligence Period's expiration. Accordingly, the Purchase Agreement terminated on its own terms. Although CNI directed the escrow agent to return South Creek 12's earnest money, the latter entity instructed the agent not to do so.

¹ While not essential to our disposition, we note that earlier the same day, South Creek 12, despite its apparent belief that it possessed a valid User Notice, asked CNI to extend the deadline for filing the User Notice. Such extension never came to fruition.

¶ 10 South Creek 12 then filed a verified complaint seeking specific performance of the Purchase Agreement. In response, CNI filed a counterclaim seeking a judgment declaring that the User Notice and PLRA did not satisfy the Purchase Agreement's requirements and, thus, CNI properly informed South Creek 12 that the Purchase Agreement had terminated according to its own terms. In its answer to the counterclaim, South Creek 12 denied that the notice tendered did not constitute the User Notice required by the Purchase Agreement.

¶ 11 CNI also moved for a preliminary injunction to enjoin South Creek 12 from interfering with CNI's ownership of the Property, again arguing that the User Notice was defective and, thus, the Purchase Agreement terminated. According to CNI, it subsequently discovered that South Creek 12 did not file articles of organization until September 24, 2015, well after the parties entered into the Purchase Agreement, and only a week after CNI sent South Creek 12 the termination letter. In a supplement to its preliminary injunction motion, CNI essentially argued that South Creek 12 could not enforce the Purchase Agreement because that entity did not exist until after CNI withdrew from the Purchase Agreement.

¶ 12 In November 2015, the circuit court determined that a motion for summary judgment would be a more appropriate mechanism for CNI to raise its new argument. CNI filed its motion for summary judgment the same day, presenting its new argument as well as incorporating by reference the reasoning raised in its original motion for a preliminary injunction. In response, South Creek 12 argued that it was at all times a legal entity under the *de facto* corporation doctrine. South Creek 12 did not respond, however, to CNI's contention that South Creek 12 failed to tender the requisite User Notice. Pursuant to the circuit court's order, South Creek 12 filed a supplemental response arguing that it made good faith efforts to organize under the law

and that, alternatively, Shapiro could legally enforce the Purchase Agreement and then assign her rights to South Creek 12.

¶ 13 Following arguments, the circuit court entered summary judgment in favor of CNI, essentially reasoning that South Creek 12 did not make a good faith effort to organize and was not a valid entity under the *de facto* corporation doctrine.

¶ 14 II. ANALYSIS

¶ 15 On appeal, South Creek 12 asserts that the circuit court erred in granting summary judgment in favor of CNI because South Creek 12 was at all times a valid entity under the *de facto* corporation doctrine. Even assuming South Creek 12 was a valid entity, however, CNI was nonetheless entitled to summary judgment because South Creek 12 failed to tender the User Notice required by the Purchase Agreement. Specifically, the record shows that the Purchase Agreement automatically terminated when South Creek 12 failed to submit notification that a fully executed agreement granted a tenant or occupant the right to occupy the Property.

¶ 16 Summary judgment is warranted where admissions, depositions, pleadings, exhibits, and affidavits, when considered in the light most favorable to the non-moving party, show no genuine issue of material fact exists so that the moving party is entitled to judgment as a matter of law. *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 13. We review the circuit court's order granting summary judgment *de novo*. *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2016 IL App (2d) 150303, ¶ 9. Accordingly, this court can affirm "on any basis appearing in the record whether or not the [circuit] court relied on that basis or its reasoning was correct." *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 17 As a threshold matter, we reject South Creek 12's contention that the validity of the tendered "User Notice" is not properly before us. As stated, CNI challenged the validity of the

notice before the circuit court. *Cf. Village of Posen v. Illinois Fraternal Order of Police Labor Council*, 2014 IL App (1st) 133329, ¶ 51 (observing that the appellant's failure to raise an argument in a complaint to vacate an arbitration award resulted in forfeiture, but addressing the argument's merits regardless of forfeiture). Although the circuit court did not expressly address that contention while granting summary judgment in CNI's favor, that has no bearing on our independent, *de novo* review.

¶ 18 Courts may interpret and decide the meaning of a contract on a motion for summary judgment, as contract interpretation presents a question of law. *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 205 (2005). The underlying purpose of contract construction is to discover and effectuate the drafters' intent, as shown by the contract's language. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009). To that end, courts must objectively interpret parties' contracts in a manner consistent with a rational person's ordinary expectations. *Suburban Auto Rebuilders, Inc. v. Associated Title Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009). If the contract's language is unambiguous, courts must go no further than the contract itself in determining the parties' intent. *Reda v. Estate of Reda*, 408 Ill. App. 3d 379, 384 (2009).

¶ 19 We find that South Creek 12's notice and attached PLRA did not constitute an effective User Notice because those documents did not adhere to the requirements set forth in the Purchase Agreement. Section 4(a) of the Purchase Agreement required South Creek 12 to:

“provide [CNI] written notification *** that [South Creek 12] has a fully executed agreement with such agreement *granting rights in and to the Property to a tenant or occupant for all or a portion of the Property*, which notice shall be accompanied by a

copy of such executed agreement reflecting the name of such tenant or occupant and the use to be made of the Property by such party.” (Emphasis added).

In addition, section 4(a) provided that, if South Creek 12 failed to provide CNI with the User Notice within 10 days after the Due Diligence Period, “this Agreement shall terminate *** and the Earnest Money shall be promptly returned to [South Creek 12].” Although South Creek 12 sent the purported User Notice to CNI on August 28, 2015, before the deadline, the attached PLRA granted PIG no rights to the Property whatsoever. Accordingly, the notice tendered by South Creek 12 was not the requisite User Notice.

¶ 20 The PLRA expressly stated that, with the exception of the confidentiality clause, no part of the PLRA was binding. Specifically, the PLRA stated that “this Agreement is not intended to create a binding commitment, but evidence our mutual willingness to work together in good faith to negotiate and enter into a Lease.” It further stated, “[t]his agreement does not bind any party hereto to consummate any transaction or enter into a Lease, either on the terms outlined herein or on any other terms.” The PLRA could not more clearly state its non-binding nature.

¶ 21 We reject South Creek 12’s contention that the PLRA transferred the “ ‘rights’ [that] were intended to be sufficient for the User Notice” because the Purchase Agreement required South Creek 12 to procure certain authorizations and permits for the development of the Property before CNI would consummate the sale. According to South Creek 12, it “could not be bound under the PLRA to deliver something it had not acquired.” The PLRA did more, however, than allow South Creek 12 to escape liability under the PLRA in the event that the Purchase Agreement with CNI fell through. Instead, the PLRA generally allowed either South Creek 12 or PIG, in their “sole discretion,” to terminate discussions or negotiations “at any time or for any reason, with no obligation on any party hereto to continue discussions or negotiations.” Such

broad language is not congruent with a mere desire to protect South Creek 12 from being bound to the PLRA should CNI renege on the sale of the Property. Accordingly, the notice tendered by South Creek 12 did not constitute a User Notice as defined by the Purchase Agreement.

¶ 22 We further reject South Creek 12's assertion that the Purchase Agreement contemplated that only the complete failure to tender a User Notice, rather than the tender of an inadequate one, would automatically terminate the Purchase Agreement. South Creek 12 relies on section 4(a), which states that the Purchase Agreement will terminate "[i]f Purchaser *fails* to provide Seller the User Notice." (Emphasis Added.) Section 4(a), however, also defines the User Notice required. By submitting a document that did not meet that definition, South Creek 12 *failed* to provide a User Notice. Pursuant to South Creek 12's unreasonable suggestion that only the label matters, South Creek 12 could have avoided the termination of the Purchase Agreement by submitting anything, which would not have satisfied the parties' interest in seeing that the Property be put to beneficial use to revitalize the neighborhood.

¶ 23 III. CONCLUSION

¶ 24 Regardless of the circuit court's reasoning, we affirm the order granting summary judgment in favor of CNI. No genuine issue of material fact exists because the record clearly shows that South Creek 12 did not tender the requisite User Notice, that the Purchase Agreement automatically terminated, and that South Creek 12 is not entitled to specific performance.

¶ 25 Affirmed.