2015 IL App (2d) 141003-U
No. 2-14-1003
Order filed June 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT RAUSCHENBERG, Indiv. and d/b/a Jenapea's, LLC,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 13-LA-353
SNOOPY LIMITED PARTNERSHIP,	)	
Defendant-Appellant	)	
(Robert Thompson, d/b/a Thompson's Appliance & Repair Service, Defendant).	)	Honorable Thomas A. Meyer, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's complaint against a lessor for its allegedly negligent maintenance: although the lessor might have undertaken a duty to maintain, this undertaking did not cancel the lease's exculpatory clause or estop the lessor to invoke it.

¶ 2 Plaintiff, Robert Rauschenberg, suing "individually and doing business as JENAPEA'S, LLC,"[1] appeals following the dismissal, pursuant to section 2-619(a)(9) of the Code of Civil

[1] According to records of the Secretary of State, Jenapea's, LLC, was involuntarily

Procedure (735 ILCS 5/619(a)(9) (West 2012)), of the counts of his complaint against Snoopy Limited Partnership. The relevant counts alleged that negligence by Snoopy, the lessor of property on which plaintiff operated a restaurant, had resulted in a fire at the restaurant. Snoopy raised an exculpatory clause in the lease as a defense; plaintiff's response asserted that, because Snoopy had taken over maintenance and forbidden plaintiff to make repairs, Snoopy was estopped to assert the clause as a defense. The trial court ruled that the exculpatory clause remained effectual, thus dismissing the relevant counts. We agree with the trial court, and so we affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 4, 2013, plaintiff filed his complaint against Snoopy and Robert Thompson, d/b/a Thompson's Appliance & Repair Service. According to the complaint, plaintiff had leased the structure at 109 Van Buren in Woodstock and associated land for use as a restaurant, Jenapea's. Snoopy became the landlord and property manager in 2009 and it would control all repairs to building fixtures such as the furnace. Before June 10, 2012, there had been at least four service calls relating to problems with the furnace. On June 10, 2012, Thompson made a service call relating to the furnace. The same day, a fire originating in the furnace severely damaged the building, such that plaintiff was unable to reopen his restaurant. Plaintiff alleged that Snoopy's negligent maintenance caused the fire, in that, among other things, Thompson was not qualified to service the furnace. The complaint also contained counts alleging that Thompson had acted negligently to cause the fire.

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dissolved on September 13, 2013. Secretary of State, Business Services, Corporation/LLC Search, *available at* http://www.ilsos.gov/corporatellc/ (name search on "Jenapea's").

¶ 5 Snoopy moved to dismiss the counts against it, asserting that the lease between it and plaintiff exculpated it from any damage caused by its failure to keep the premises in proper repair. The lease stated that repairs and maintenance were the lessee's responsibility and required the lessee to use licensed contractors for all HVAC (heating, ventilation, and air conditioning) repairs. The exculpatory clause stated:

> "Except as provided by Illinois statute, Lessor shall not be liable to Lessee for any damage or injury to him or his property occasioned by the failure of Lessor to keep the Premises in repair, and shall not be liable for any injury done or occasioned by wind, rain, storm or by from [*sic*] any defect of plumbing, electric wiring or of insulation thereof, gas pipes, water pipes or steam pipes [or other building components and natural phenomena], nor for any such *damage or injury arising from any act, omission or negligence* of co-tenants [or other similar third parties], or *of Lessor's agents or Lessor himself*, all claims for any such damage or injury being hereby expressly waived by Lessee." (Emphases added.)

The lease further permitted the lessor to make repairs if the lessee failed to do so.

¶ 6 The motion was fully briefed. Plaintiff submitted his own affidavit in support of a theory that the parties had made an oral modification to the lease such that the exculpatory clause was no longer enforceable. According to that affidavit:

> "4. After Snoopy took over in October 2009, Snoopy advised me through its property manager Cary Cook that from that point forward Snoopy would be responsible for maintaining and repairing the premises, including the furnace. ***
>
> 5. In the same conversation[,] *** Cary Cook advised me that from that point forward I should not attempt to repair or maintain the premises, including the furnace.

> 6. After Snoopy took over in October 2009, Snoopy did in fact act to maintain and repair the premises, including the furnace. I have knowledge of this because on numerous occasions I contacted Cary Cook regarding problems with the premises, including with the plumbing, air conditioning, and a screen door, and Cary each time told me that Snoopy would send somebody over. Then, as Cary had promised, repairmen would arrive soon after to perform the necessary maintenance."

¶ 7 The court granted Snoopy's motion and dismissed with prejudice the counts against it. In the dismissal order, the court included a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that no just reason existed to delay appeal. Plaintiff timely appealed.

¶ 8 II. ANALYSIS

¶ 9 In this appeal, the parties agree to, or do not dispute, several core substantive and procedural issues. Procedurally, the parties agree that the dismissal here was under section 2-619(a)(9) and that review is therefore *de novo*. As to this point, we note that nothing in the record suggests that the court decided any disputed issues of fact. *See Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004) (absent the existence of a genuine issue of material fact, a court should decide whether dismissal is proper as a matter of law, so that review of such a dismissal is *de novo*). Substantively, we note that plaintiff does not contend that the exculpatory clause was inherently unenforceable—that is, he does not claim that it is against public policy, unconscionable, or the like. Further, he does not dispute that the lease as written would exculpate Snoopy from liability for nonrepair or improper repair of the furnace. Finally, we note that plaintiff does not claim that Snoopy breached any part of the lease, either as written or as orally modified.

¶ 10 Given these areas of agreement, the issue here is limited to whether plaintiff succeeded in putting forward anything that would overcome the exculpatory clause. We hold that he has not. We note that, where a plaintiff asserts the existence of a contract modification to overcome the defense of an exculpatory clause, he or she has the burden to show that the modification in fact cancelled the exculpatory clause in the original contract. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 25. Plaintiff has not shown a modification that removed the exculpatory clause. Moreover, plaintiff has not shown that any basis existed on which the court should have refused to enforce the exculpatory clause.

¶ 11 On appeal, plaintiff makes what he labels as two separate arguments. First, he argues that an oral modification of the lease changed it such that "Snoopy [was] subject to liability for negligent performance of its obligation to maintain and repair the furnace." Second, he asserts that Snoopy was estopped to assert the exculpatory clause as a defense to his suit. In reply to Snoopy's argument that plaintiff showed at most that the parties modified the maintenance clause alone, plaintiff asserts that such an argument "fails because it ignores facts *** that show *** an estoppel based on plaintiff's reliance on Snoopy's representation that it would maintain and repair the furnace." In other words, although plaintiff divided his argument into two parts, he admits that he can succeed only if Snoopy is estopped to assert the exculpatory clause as a defense.

¶ 12 Because plaintiff admits that he cannot argue that the oral modification changed anything other than the maintenance clause, we do not decide whether such a modification occurred. Instead, we address only plaintiff's claim that Snoopy is estopped to raise the exculpatory clause as a defense. We hold that plaintiff has failed to show that such an estoppel should apply.

¶ 13 Plaintiff argues that he "did rely Snoopy's undertaking [to maintain the premises] to his detriment, because *** Snoopy negligently failed to maintain and repair the furnace." He asserts that "[u]nder these facts, Snoopy is estopped from invoking the exculpatory provision of the lease." He notes that, in the case's current posture, we must take as true both that Snoopy's agent directed plaintiff not to perform repairs on the furnace and that Snoopy in fact caused repairs to be made to the furnace.

¶ 14 Plaintiff's argument fails; nothing in what plaintiff has alleged is sufficient to show that Snoopy should be estopped to enforce the exculpatory clause.

> "The general rule is that where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct, that person will not be allowed to deny his or her words or acts to the damage of the other party. [Citations.] Equitable estoppel may be defined as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001).

"Fraud" is an essential element of an estoppel, but "it is sufficient that a fraudulent or unjust effect results from allowing another person to raise a claim inconsistent with his or her former declarations." *Geddes*, 196 Ill. 2d at 314. Plaintiff asserts that he relied to his detriment on Snoopy's promise to maintain the furnace, but he fails to explain how that should lead to estoppel to enforce the exculpatory clause. On plaintiff's claims, one can understand how plaintiff might argue that Snoopy should be estopped to deny that it was responsible for repairs, but that would have nothing to do with the exculpatory clause. Indeed, the record suggests no

representation of Snoopy's as to its willingness to be subject to suit for damages, and thus no representation relating to the exculpatory clause on which plaintiff might have relied.

¶ 15 In the end, plaintiff seems to have nothing but an implication that it is unfair and improper for defendant to promise to maintain the premises while denying having an enforceable duty to do so with due care. However, as Snoopy has noted, a promise in a lease to repair and maintain is consistent with an exculpatory clause; the tenant loses only the right to sue for money damages while retaining other possible modes of relief. *Book Production Industries, Inc. v. Blue Star Auto Stores, Inc.*, 33 Ill. App. 2d 22, 36-37 (1961). Nothing prevents a commercial tenant from choosing to accept such a term in a lease. Plaintiff asserts that the lease "was orally modified" to include Snoopy's duty to make repairs. If the lease "was orally modified," this was necessarily done by the parties' agreeing to the modification; no contract exists without an agreement (that is, an offer and an acceptance). See, *e.g.*, *Crackel v. State Farm Insurance Co.*, 2014 IL App (5th) 130366, ¶ 13. Plaintiff, by his own argument, must be taken to have agreed to a modification of the lease terms concerning repair without negotiating a modification of the exculpatory clause. Hindsight might have shown that choice to be a poor one, but plaintiff has not shown that he was not entitled to make that choice.

¶ 16 III. CONCLUSION

¶ 17 For the reasons stated, we affirm the dismissal of the counts against Snoopy.

¶ 18 Affirmed.