2016 IL App (2d) 160452-U
No. 2-16-0452
Order filed January 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

APPLETON LODGING, LLC; SWIFT GROUP, INC.; and APPLETON HOTEL VENTURE, LLC, Plaintiffs and Counterdefendants-Appellees, v. SEF APPLETON, LLC and STEVEN E. FISHMAN, Defendants and Counterplaintiffs-Appellants. (SEF Appleton, LLC, and Steven E. Fishman, Third-Party Plaintiffs-Appellants; David L. Swift, Third-Party Defendant-Appellee).	)	Appeal from the Circuit Court of Stephenson County. No. 10-L-15 Honorable David L. Jeffrey, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of summary judgment in favor of plaintiffs and third-party defendant, David L. Swift, was affirmed where (1) Swift's allegedly fraudulent statements were not actionable because they were barred by a "settlement communication" in which defendants agreed not to use any statements made at a settlement meeting, and (2) defendants were not excused from performing under

the LLC agreement where plaintiffs properly made capital calls pursuant to that agreement.

¶ 2 The trial court granted summary judgment in favor of plaintiffs and counterdefendants, Appleton Lodging, LLC (Appleton), Swift Group, Inc. (Swift Group), and Appleton Hotel Venture, LLC (AHV) (collectively the Appleton plaintiffs), and third-party defendant, David L. Swift (Swift) in this action for damages resulting from the breach of agreements relating to the operation of a hotel in Appleton, Wisconsin. Defendants-counterplaintiffs and third-party plaintiffs, SEF Appleton, LLC (SEF), and Steven E. Fishman (Fishman), appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Parties

¶ 5 Appleton is an Illinois limited liability company with its principal place of business in Freeport, Illinois. AHV is a Delaware limited liability company with its principal place of business in Freeport. The Swift Group is an Illinois corporation with its principal place of business in Freeport. SEF is a Delaware limited liability company with its principal place of business in Pennsylvania. Fishman is a resident of Pennsylvania and was the chairman of Redwood Capital Advisors, LLC (Redwood). Redwood was in the business of obtaining investors and financing for hotel projects. Prior to the events in question, Redwood worked with Choice Hotels, Inc., the owner of the Cambria Suites hotel brand, to find potential developers and investors. One potential hotel developer with whom Redwood worked was the Swift Group. The Swift Group desired to develop a Cambria Suites hotel in Appleton, Wisconsin.

¶ 6 B. The Underlying Dispute and Settlement Agreements

¶ 7 Redwood and the Swift Group entered into an agreement in 2006 under which Redwood was to find financing for the development of the hotel. The hotel was built. However, Redwood failed to obtain the necessary capital, and AHV was obliged to procure a bridge loan to finance

the project. Additionally, the principals of the Swift Group were required to provide personal guarantees for that loan. The Swift Group then threatened a lawsuit against Redwood and others.

¶ 8 Fishman, as chairman of Redwood, requested a settlement meeting that took place on June 16, 2008. Fishman and Swift, among others, attended the meeting. Prior to the meeting, Redwood's attorney, Alexander Graham, prepared a written "settlement communication." In pertinent part, the settlement communication provided:

> "First, this meeting is for settlement purposes. As such, nothing discussed during the meeting may be used in evidence in any proceeding(s) between the parties. Moreover, and notwithstanding the generality of the foregoing, no admissions or statements of independent facts made during the course of our meeting may be used in evidence in any proceeding(s) between the parties."

The settlement communication was signed by counsel for Redwood and by counsel for the Swift Group. Three agreements resulted from the meeting: (1) the settlement agreement; (2) the LLC agreement; and (3) the letter agreement.

¶ 9 1. The Settlement Agreement

¶ 10 The parties to the settlement agreement were Redwood, Appleton, the Swift Group, and Fishman. The agreement recited that it was reached to "compromise and settle" the parties' disputes, including those alleged by the Swift Group in a draft complaint (the complaint) styled *Swift Hospitality Group, Inc. v. Redwood Capital Advisors, LLC. et al*." The parties were to execute mutual releases. The agreement further provided that Fishman, or an entity he controlled, would invest up to $2,291,428 in AHV in three installments of $500,000 each, with a final installment of $791,428. In exchange, Fishman (or his "controlled entity") would obtain

increased ownership percentages in AHV with each payment. In consideration of the above, the Swift Group and Appleton agreed to forbear filing the complaint.

¶ 11 2. The LLC Agreement

¶ 12 The LLC agreement was actually an amended and restated operating agreement of AHV. The purpose of AHV was the ownership, operation, and maintenance of the hotel. In accordance with the settlement agreement, Fishman created SEF as the entity through which he funneled the installment payments to AHV. The parties to the LLC agreement were SEF and Appleton.

¶ 13 Article 4, § 4.1 recited that SEF would make an initial capital contribution of $2,291,428 and acknowledged that $500,000 had already been paid. The balance was to be paid in two installments of $500,000, with a final installment of $791,428. That section also provided that, if additional capital became due (pursuant to a "capital call" by the LLC manager) prior to the due date of any installments, a certain formula for computing the amount of the new installment payment would apply.

¶ 14 Making a capital call, as defined in § 4.3.2, constituted a "major decision" under § 8.1.9 that could not be undertaken without the express prior written consent of the members holding at least 90% of the membership interests. In turn, § 4.3.2 defined a "capital call" as one made "after the investor has made its entire initial [c]apital [c]ontribution."

¶ 15 3. The Letter Agreement

¶ 16 The parties to the settlement agreement (Redwood, Appleton, and the Swift Group) agreed that AHV was responsible to pay the interest on the bridge loan. However, they recognized that AHV might not have the capital to pay the interest. In that event, pursuant to the letter agreement, entered into between the Swift Group, Appleton, and Fishman, Fishman personally agreed to reimburse the party advancing the bridge loan interest. Fishman's

obligation was limited to the interest due on the date that his next capital contribution to AHV was due.

¶ 17 C. The Litigation

¶ 18 Following is a thumbnail of this complex litigation. Additional facts will be noted as necessary to understand our analysis. SEF made one complete payment and one partial payment under the LLC agreement. Fishman did not perform under the letter agreement. On May 6, 2010, the Appleton plaintiffs filed a four-count complaint against SEF and Fishman for breach of contract and breach of fiduciary duty. On April 26, 2013, SEF and Fishman filed an answer admitting that they had not performed the agreements. However, they asserted in affirmative defenses, *inter alia*, that Appleton and/or the Swift Group misrepresented material facts and circumstances pertaining to the hotel's operation which excused their performance. Also on April 26, 2013, SEF and Fishman filed a second amended counterclaim and a third party complaint (against Swift) alleging that Swift made the following false statements at the settlement meeting for the purpose of inducing defendants to invest in AHV: (1) the hotel had "turned the corner"; (2) the hotel would soon be operating "in the black"; (3) the hotel would be competitive in the market; and (4) there should be no need for further capital calls. Fishman and SEF also alleged that AHV breached the LLC agreement by issuing a series of capital calls without seeking SEF's prior consent.

¶ 19 On August 13, 2013, the Appleton plaintiffs and Swift[1] filed a motion for summary judgment on the complaint, counterclaim, and third-party complaint. The basis for summary judgment was, among other things, that statements allegedly made by Swift at the settlement

[1] For consistency, we will also refer to the summary judgment movants collectively as "the Appleton plaintiffs."

meeting were not actionable and that Fishman and SEF breached the agreement to contribute additional capital in response to AHV's "capital calls" (demand for money in addition to the initial capital contribution). The trial court granted the motion. Fishman and SEF moved for reconsideration, and the trial court denied the motion to reconsider on May 12, 2016. This timely appeal followed.

¶ 20 II. ANALYSIS

¶ 21 SEF and Fishman argue that the trial court erred in granting summary judgment where (1) Swift fraudulently induced them to enter into the settlement agreement; and (2) the court made an inappropriate factual assumption regarding SEF's lack of consent for capital calls.

¶ 22 Summary judgment is proper where the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 32. The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of fact exists. *Colburn*, 2012 IL App (2d) 110624, ¶ 32. To determine this, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant. *Colburn*, 2012 IL App (2d) 110624, ¶ 32. Summary judgment should be granted only when the right of the moving party is clear and free from doubt. *Colburn*, 2012 IL App (2d) 110624, ¶ 32. We review *de novo* an order granting summary judgment. *Colburn*, 2012 IL App (2d) 110624, ¶ 32.

¶ 23 Here, Fishman and SEF admitted that they did not make the required payments under the agreements. With respect to the affirmative defenses, counterclaim, and third-party complaint, the summary judgment motion was a *Celotex*-type motion that essentially placed the burden of

proof on the nonmovants. See *Koziol v. Hayden*, 309 Ill. App. 3d 472, 477 (1999). The gist of the motion was that SEF and Fishman lacked sufficient evidence to prove their affirmative defenses, counterclaim, and third party complaint. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates that the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate that he or she could do so. *Colburn*, 2012 IL App (2d) 110624, ¶ 33

¶ 24 With respect to Swift's statements at the settlement meeting, the court found that Fishman and SEF were bound not to use those statements as the basis for any litigation. The court further found that Swift's statements were nonactionable opinions. The court also found that Fishman's reliance on the statements was not reasonable, because the evidence showed that Fishman knew the truth about the hotel's economic past and prospects.

¶ 25 With respect to the capital calls, the court interpreted the LLC agreement to mean that SEF could not block the capital calls. The court noted that such an arrangement made sense where an investor had not made its entire capital contribution.

¶ 26 A. Swift's Statements at the Settlement Meeting

¶ 27 Fishman and SEF contend that (1) the settlement communication did not bind them; (2) Delaware public policy does not allow one to insulate himself against his fraudulent statements; and (3) genuine issues of fact exist as to whether Swift knew that the representations were false and whether Fishman justifiably relied on them.

¶ 28 A threshold issue is whether Delaware or Illinois law applies to the settlement communication. Fishman and SEF assert that the court should have applied Delaware law to the fraudulent-inducement claims, including the settlement communication, because the LLC agreement, which was the basis for the fraudulent-inducement claims, provided that it was

governed by Delaware law. The Appleton plaintiffs dispute that Delaware law applies to the settlement communication but, nevertheless, employ it. Because both sides apply Delaware law, we apply it also.

¶ 29 In interpreting a contract, the court gives priority to the parties' intentions as reflected in the four corners of the agreement. *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The contract terms are controlling when they establish the parties' common meaning so that a reasonable person in either party's position would have no expectations that are inconsistent with the contract language. *GMG*, 36 A.3d at 780. A contract is not rendered ambiguous simply because the parties do not agree on its proper construction. *GMG*, 36 A.3d at 780. Rather, an ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings. *GMG*, 36 A.3d at 780. If a contract is ambiguous, the court must look beyond the language of the contract to ascertain the parties' intentions. *GMG*, 36 A.3d at 780.

¶ 30 Fishman and SEF first argue that only the parties to the settlement communication were bound by it. The signatories were Redwood and the Swift Group. Fishman and SEF stress that the settlement meeting was for the purpose of settling a potential lawsuit between Redwood and the Swift Group. They point out that Fishman, although a principal of Redwood, was not individually a target of the proposed lawsuit and that SEF was not yet in existence. Therefore, they argue, the settlement communication could not have been intended to include Fishman and SEF.

¶ 31 Second, Fishman and SEF argue that the scope of the settlement communication was restricted to statements that were made in furtherance of settling the then-existing dispute between Redwood and the Swift Group. They maintain, without a record citation, that those

discussions concluded before talks ensued on the entirely different subject of Fishman personally investing in the hotel. It was in the context of the new subject, they argue, that Swift made the allegedly fraudulent statements.

¶ 32 Third, SEF and Fishman contend that public policy precludes construing a contract in such a way that allows a party to escape liability for future fraudulent-inducement claims. Fourth and fifth, Fishman and SEF argue that the court made an erroneous factual finding as to the parties' intent in entering into the settlement communication and that the integration clauses of the settlement agreement and the LLC agreement prohibit consideration of the settlement communication.

¶ 33 In contrast, the Appleton plaintiffs contend that the settlement meeting was instigated by Fishman and that the plain language of the settlement communication covered all statements that were made at the meeting. According to the Appleton plaintiffs, to interpret the settlement communication to exclude Fishman and SEF would render the document meaningless. The Appleton plaintiffs argue that the settlement communication was designed "to protect everyone [at the meeting] from claims relating to statements allegedly made while the parties were trying to resolve their differences." The only way to accomplish that goal, the Appleton plaintiffs argue, was to bind everyone who attended the meeting. Thus, the Appleton plaintiffs argue, to interpret the settlement communication as Fishman and SEF suggest would lead to an absurd result. Further, the Appleton plaintiffs maintain that the public-policy argument is misplaced.

¶ 34 1. The Settlement Communication

¶ 35 The Appleton plaintiffs maintain that the meeting was convened to discuss both the financing of the hotel and the settlement of the Swift Group's claims; therefore, the Appleton

plaintiffs conclude, all statements made at the meeting were subject to the agreement and bound all of the participants, including Fishman.

¶ 36 The Appleton plaintiffs rely on *All Energy Corp. v. Energetix, LLC*, 985 F. Supp. 2d 974 (S.D. Iowa, 2012), for the proposition that a nonparty to a contract can nonetheless be bound by it. In *All Energy*, All Energy Corporation and "Energetix" entered into a nondisclosure agreement. *All Energy*, 985 F. Supp. 2d at 987. One Miller, who was an agent for two different Energetix entities, signed the agreement but failed to specify which entity was intended to be bound. *All Energy*, 985 F. Supp. 2d at 987. Under those circumstances, the court found an ambiguity and held that both Energetix entities were bound. *All Energy*, 985 F. Supp. 2d at 987. Here, there was no ambiguity, nor do the Appleton plaintiffs suggest one. Consequently, *All Energy* is inapposite.

¶ 37 Nevertheless, we agree with the Appleton plaintiffs that the settlement communication covered Swift's statements. The record shows the following. The complaint had been drafted. The opening paragraph of the settlement communication recited that the participants would generally discuss the financing of the hotel and, more specifically, "the various issues and possible claims." Fishman, as chairman, attended the meeting on behalf of Redwood, and Swift attended on behalf of the Swift Group. Fishman testified at his deposition that the objective of the meeting "was to negotiate a settlement of a claim that Swift was threatening to bring against Redwood." The LLC agreement specifically recited that it was entered into, in part, in exchange for the Swift Group's forbearance in filing the complaint. Thus, Fishman's role in funding SEF's obligations under the LLC agreement was the direct result of the discussions pertaining to the settlement of the Swift Group's claims against Redwood and was not the product of a separate negotiation.

¶ 38 From the above, we conclude that Swift's statements were not made to Fishman personally, but to Fishman in his capacity as Redwood's chairman. To protect the settlement discussions, Graham, Redwood's attorney, provided in the settlement communication that all statements made at the settlement meeting would be privileged. According to Graham, Fishman attended the settlement meeting in his capacity as Redwood's chairman. Also according to Graham, Fishman was "the principal" of Redwood. The court concluded from these undisputed facts that Fishman could not disavow the settlement communication while also taking advantage of it.

¶ 39 Indeed, the record shows that Fishman benefitted from the settlement. The settlement meeting resulted in the Swift Group's forbearance in filing the complaint against Redwood. Also, Fishman obtained a 66% ownership of the hotel, which, at the time, he thought was valuable.

¶ 40 Forbearance in filing the complaint further benefitted Fishman in that it removed the threat of a lawsuit against another entity in which he was a principal. Formation Capital, LLC (Formation), Fishman's "main business," was named, along with Redwood, as a defendant in the complaint. The complaint alleged that Formation was Redwood's "alter ego," and that Redwood was a "mere shell, instrumentality, and conduit" through which Formation operated a private equity investment business. At his deposition, Fishman became quite agitated at Formation's inclusion in the complaint. Fishman testified that Formation was in the health care business and had "absolutely nothing to do" with the Appleton plaintiffs' dispute with Redwood. Fishman testified that he "absolutely" did not want his Formation partners "involved in any litigation that had anything to do with Redwood in any way, shape, or form." Fishman stated: "[A]nd this was a pure reach to go threaten to sue Formation." Asked if it was important to him to have

Formation removed from the litigation, Fishman testified that "[i]t's my main business." He reiterated that he "did not want [Formation] involved in any way, shape, or form. In anybody's sense of anybody's imagination did [Formation] have anything to do with this [*sic*]." Thus, the settlement protected Fishman's main business, and the settlement communication was instrumental in gaining Fishman that protection. Therefore, we agree with the trial court that Fishman could not repudiate the settlement communication while taking advantage of it.

¶ 41 Courts will not read a contract to render a provision meaningless or illusory. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). If Fishman is allowed to sue Swift for claims arising out of Swift's statements at the settlement meeting, then the confidentiality provision of the settlement communication is rendered illusory. Furthermore, Fishman created SEF to carry out the settlement through the LLC agreement, and Redwood and the Swift Group contemplated SEF's creation in the settlement agreement. Thus, both Fishman and SEF were bound by the settlement communication.

¶ 42 2. Public Policy

¶ 43 Next, we consider whether public policy precludes enforcing the settlement communication against Fishman and SEF. Fishman and SEF assert that "a perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it," quoting *Webster v. Palm Beach Ocean Realty Co.*, 139 A. 457, 460 (Del. Ch. 1927). However, neither *Webster* nor the other cases cited by Fishman and SEF purported to articulate Delaware public policy or involved the interpretation of a pre-settlement confidentiality agreement. *Webster* was an action for rescission and cancellation of a contract for the sale of land. *Webster*, 139 A. at 458. *Slessinger v. Topkis*, 40 A. 717 (Del. Super. Ct. 1893), was not an opinion but the transcription of a jury instruction in a confession-of-judgment

case. *BPI Energy, Inc. v. IEC (Montgomery), LLC*, 2007 WL 3355363, *2 (S.D. Ill. 2007), involved pleading requirements. *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1034 (2006), was an action to rescind a stock purchase agreement. Accordingly, we reject the public policy argument.

¶ 44 3. The Court Did Not Make Any Factual Findings

¶ 45 In ruling that the settlement communication barred the use of Swift's statements in the present litigation, the court commented that to hold otherwise would eviscerate the settlement communication of any meaning. Fishman and SEF argue that this conclusion embodies factual assumptions that should be left to the trier of fact. We disagree. As we demonstrated above, Fishman acted in his capacity as Redwood's chairman, and he also benefitted from the settlement communication. The court's observation noted the obvious.

¶ 46 4. The Integration Clauses in the Settlement Agreement and the LLC Agreement

¶ 47 Lastly, SEF and Fishman argue that the integration clauses in the settlement agreement and the LLC agreement superseded all prior agreements and representations. A contract is integrated when it represents a final and complete expression of the parties' agreement. *Carlson v. Hallinan*, 925 A.2d 506, 522 (Del. Ch. 2006). Both the settlement agreement and the LLC agreement recite in their integration clauses that the agreements supersede all prior or contemporaneous agreements, representations or negotiations between the parties. However, we agree with the Appleton plaintiffs that the integration clauses are of no consequence. The integration clauses in both agreements provide that the agreements supersede all prior agreements concerning the same subject matter. The settlement communication related to communication, while the settlement agreement and the LLC agreement related to the substantive terms of the settlement. Therefore, the integration clauses do not affect the

settlement communication. Accordingly, for all of the above reasons, we hold that the settlement communication barred the fraudulent-inducement claims. Having so determined, we need not address Fishman and SEF's contentions regarding those claims.

¶ 48 B. The Capital Calls

¶ 49 SEF admitted that it did not pay the additional capital in response to AHV's capital calls, but it asserted in an affirmative defense that its performance was excused by AHV's failure to fully perform under the contract. Specifically, SEF alleged that AHV failed to make capital calls in accordance with the LLC agreement by not obtaining SEF's prior consent. The trial court found that SEF could not "block" capital calls, because SEF had not made its entire capital contribution. In so finding, the court remarked that it would make no sense to allow an entity that had not made its capital investment to block capital calls. SEF interprets that statement as a finding of fact that was inappropriate at the summary judgment stage.

¶ 50 Initially, we note the Appleton plaintiffs' argument that SEF forfeited this issue by failing to raise it in the trial court. Our reading of the record does not support a finding of forfeiture.

¶ 51 Turning to the merits, SEF argues that § 8.1.9 of the LLC agreement prohibited capital calls unless SEF consented. However, that section says nothing about capital calls. It is titled "Major Decisions," and it provides that AHV cannot make a "major decision" without the express prior written consent of members holding at least 90% of the membership interests. "Major decision" is defined in § 2.26.11 as "making a call for any [a]dditional [c]apital (as defined in Section 4.3.2)." Section 4.3.2, in turn, provides that "at any point in time after the Investor has made its entire [c]apital [c]ontribution," the managing member "may" send notice of a capital call. When the plain, common, and ordinary meaning of words used in a contract lends itself to only one reasonable interpretation, such interpretation controls. *Sassano v. CIBC World*

Markets Corp., 948 A.2d 453, 462 (Del. Ch. 2008). The court reads a contract as a whole and gives each provision and term effect, so as not to render any part of the contract mere surplusage. *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

¶ 52 Clearly, SEF was not required to give its prior written consent, because it had not made its entire capital contribution. Because § 8.1.9, read together with § § 2.26.11 and 4.3.2, are unambiguous, we do not construe the court's observation that the contractual scheme made sense to be a factual finding. Rather, the court was merely editorializing on the common-sense underpinning of the contractual language. Accordingly, we hold that the court properly granted summary judgment on this issue.

¶ 53 III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

¶ 55 Affirmed.