

2018 IL App (1st) 171228-U

No. 1-17-1228

Order filed August 16, 2018

Fourth Division

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 DISTRICT

JEANETTE RENE, INC., an Illinois Corporation,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	
)	
ROGER NAJJAR, US BANK/CUST SASS/MUNI V,)	
CHANNEL ENTERPRISES LLC VLG)	No. 14 CH 1341
STREAMWOOD, CHANNEL ENTERPRISES LLC-)	
YORKSHIRE DR., and UNKNOWN OWNERS,)	
)	
Defendants,)	
)	Honorable
(Roger Najjar and Channel Enterprises LLC-Yorkshire)	Anna Helen Demacopoulos,
Dr., Defendants-Appellees).)	Judge presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's denial of plaintiff's motion for summary judgment but reverse the court's grant of defendants' motion for summary judgment where a genuine issue of material fact existed as to whether one of the defendant's

installation of an air conditioning unit materially interfered with plaintiff's use of an easement.

¶ 2 Plaintiff, Jeanette Rene, Inc., sued several parties, including defendants, Roger Najjar (Najjar) and Channel Enterprises LLC-Yorkshire Dr. (Channel Yorkshire) (collectively, defendants), based on Najjar's installation of an air conditioning unit in a shared parking lot that was allegedly subject to a right-of-way easement. Plaintiff asserted that the air conditioning unit interfered with its business operations by making truck deliveries difficult and sought to have defendants remove it. The parties filed cross-motions for summary judgment, contesting whether the shared parking lot was subject to the easement and notwithstanding the breadth of the easement, whether the air conditioning unit actually interfered with plaintiff's business.

¶ 3 The circuit court found that the shared parking lot was subject to a right-of-way easement between the parties, but that the air conditioning unit did not interfere with plaintiff's use of the easement. The court therefore granted plaintiff's motion for summary judgment in part on whether there was a valid easement covering the shared parking lot, but denied the motion in part, finding no breach of the easement. The court also granted defendants' motion for summary judgment, finding that the air conditioning unit did not breach the easement.

¶ 4 Plaintiff now appeals the circuit court's rulings only as they relate to the breach-of-easement issue, raising several arguments as to why the court's rulings were erroneous. Though we disagree with plaintiff that it was entitled to summary judgment on its motion, we agree that the court entered summary judgment on defendants' motion despite a genuine issue of material fact existing as to whether the air conditioning unit interfered with plaintiff's use of the easement. Accordingly, for the reasons that follow, although we affirm in part, we reverse and remand the matter for further proceedings.

¶ 5

I. BACKGROUND

¶ 6

A. The Easement

¶ 7 In February 1991, Harris Bank Roselle as Trustee under Trust No. 1120 Dated July 2, 1969 (Trust No. 1120) “for itself, it[s] heirs, grantees, and assigns, grant[ed] and convey[ed] unto” West Suburban Bank as Trustee under Trust No. 9330 Dated March 22, 1990 (Trust No. 9330) “its heirs, grantees and assigns, an easement in, upon and over all that paved portion of a certain driveway situation commonly between the two lots, both to the north and south of the building constructed on said lots, commonly known as 1400 and 1410 Yorkshire Drive in Streamwood, Illinois per Exhibit A, attached hereto and made a part hereof.” According to the easement, it was “given for the sole purpose of ingress and egress.” The parties agreed “to, at all times, maintain and make necessary repairs, at their own expense equally, should the driveway require same for its proper upkeep and maintenance.” The easement was recorded with the Cook County Recorder of Deeds as document number 91094187, but did not contain Exhibit A.

¶ 8 Since 1991, the ownership of 1400 and 1410 Yorkshire Drive has changed. Concerning 1400 Yorkshire Drive, Trust No. 9330 conveyed the property to Worldwide Discount Computers, Inc., who then conveyed the property to Lucky and Karen Shelton. In 2002, the Sheltons sold the property to plaintiff, who has operated its business out of the property ever since. Concerning 1410 Yorkshire Drive, there were multiple conveyances after Trust No. 1120 owned the property, including at one point to Najjar. More recently, in June 2007, US Bank/Cust Sass/Muni V (US Bank) purchased the property through a tax sale and eventually conveyed the property in June 2015 to Channel Enterprises LLC VLG Streamwood (Channel Streamwood), who then conveyed the property to Channel Yorkshire approximately a year later. Despite the

ownership changes of 1410 Yorkshire Drive, Najjar has operated a business out of the property since at least 2000.

¶ 9 At the time the litigation commenced in January 2014, the two properties shared a building and between them was a common wall. To the east and west of the building were two long driveways leading from Yorkshire Drive at the front of the building to the back of the building where there was a large paved parking lot.

¶ 10 **B. The Complaint**

¶ 11 In January 2014, plaintiff filed its initial complaint against Najjar, US Bank and any Unknown Owners. It later amended the complaint, but still named Najjar, US Bank and any Unknown Owners as defendants. Thereafter, Najjar and US Bank filed a motion for summary judgment, plaintiff filed a motion for summary judgment, and Najjar and US Bank filed a second motion for summary judgment. In September 2016, before the circuit court ruled on those motions, plaintiff filed a second amended complaint and named Najjar, US Bank, Channel Streamwood, Channel Yorkshire and any Unknown Owners as defendants.

¶ 12 According to plaintiff's second amended complaint, given the language of the 1991 agreement between Trust No. 1120 and Trust No. 9330, the right-of-way easement ran with the land, benefitting all subsequent owners of 1400 Yorkshire Drive, including plaintiff, and binding all subsequent owners of 1410 Yorkshire Drive, including the most recent owner, Channel Yorkshire. The complaint alleged that, at some point in 2004, Najjar installed an air conditioning unit on the northwest side of his property on a portion of the shared parking lot, which allegedly infringed on the easement "by making ingress and egress a problem for motor vehicles" and resulting in plaintiff's clients having difficulty using the shared parking lot. Plaintiff also claimed

that the breach of the easement adversely affected the value of its property and its ability to convey title of the property.

¶ 13 In Count I, plaintiff asserted that Najjar had breached the easement by installing the air conditioning unit and Channel Yorkshire was responsible for the violation due to its ownership of the property. Plaintiff requested that defendants be required to remove the air conditioning unit and bear the costs. In Count II, plaintiff sought a declaratory judgment, seeking a declaration that: (1) it and defendants were subject to the easement; (2) the installation of the air conditioning unit by Najjar breached the easement; and (3) defendants be required to remove the air conditioning unit and bear the costs.

¶ 14 In defendants Najjar and Channel Yorkshire's answer, they admitted that Najjar had installed the air conditioning unit, but denied that the easement pertained to the shared parking lot, instead asserting that it pertained "solely to the driveways on each end of the property." They also denied that the air conditioning unit obstructed any motor vehicle traffic in the parking lot.

¶ 15 Defendants Najjar and Channel Yorkshire also raised four affirmative defenses. First, they asserted that plaintiff's complaint was filed in bad faith because US Bank and Channel Streamwood had no ownership interest in the property. Second, Najjar and Channel Yorkshire asserted that plaintiff's complaint failed to state a claim upon which relief could be granted because the easement referred to driveways, not the shared parking lot. Third, they raised a laches defense, asserting that plaintiff only informed Najjar of the issue shortly before it filed its initial complaint in 2014, meaning at least 10 years had passed before plaintiff had complained. Lastly, Najjar and Channel Yorkshire raised an equity defense, asserting that, if the circuit court were to determine that the easement pertained to the shared parking lot, plaintiff itself should be found in violation of the easement for numerous infractions.

¶ 16 On the same day defendants filed their answer and affirmative defenses, the circuit court dismissed US Bank and Channel Streamwood as defendants without prejudice based on the agreement of plaintiff, Najjar and Channel Yorkshire. The court subsequently set a briefing schedule for the parties' cross-motions for summary judgment.

¶ 17 C. Defendants' Motion for Summary Judgment

¶ 18 On December 20, 2016, defendants filed a "supplemental" motion for summary judgment, where they noted that the parties had previously filed motions for summary judgment. They therefore "incorporated by reference and adopted herein as if set forth at length" all of the "issues and arguments set forth" in their prior two motions for summary judgment. Defendants further noted that plaintiff had not responded to their affirmative defenses by the date set by the circuit court and thus, their affirmative defenses were "deemed admitted." Defendants asserted that their first affirmative defense of bad faith was moot because US Bank and Channel Streamwood had been dismissed, but posited that their remaining three affirmative defenses entitled them to summary judgment.

¶ 19 Three days later, plaintiff responded to defendants' affirmative defenses, denying all of the allegations presented.

¶ 20 Plaintiff also filed a response to defendants' supplemental motion for summary judgment, agreeing that their first affirmative defense of bad faith was moot because US Bank and Channel Streamwood had been dismissed. However, plaintiff argued that defendants' second affirmative defense that its complaint failed to state a claim upon which relief could be granted was not a proper affirmative defense but rather a matter that should be raised in a motion to dismiss. Plaintiff further argued that it did not need to respond to defendants' third affirmative defense of laches because they failed to state how they were damaged by its delay in bringing the cause of

action and thus had not raised a new allegation. Lastly, plaintiff asserted that defendants' fourth affirmative defense of equity did not demand a response because it was simply a claim that the easement should be enforced equally and failed to state a matter that affirmatively defeated its claim. Plaintiff concluded that the circuit court should not deem admitted any of the affirmative defenses and summary judgment was improper based on its failure to respond.

¶ 21 In defendants' reply, they essentially stood on arguments they made in their response to plaintiff's cross-motion for summary judgment, which will be discussed later.

¶ 22 D. Plaintiff's Motion for Summary Judgment

¶ 23 On December 23, 2016, plaintiff filed a "revised" motion for summary judgment. Plaintiff stated that, when the easement was agreed to in 1991, the two properties were considered one undivided lot with one property index number. Plaintiff asserted that, in 1992, the properties were divided into two distinct "part of lot" sections with two separate property index numbers. Plaintiff highlighted that, according to records from the Cook County Recorder of Deeds, the easement was recorded against the entire undivided lot in 1991 and today is recorded against both divided lots. To support these assertions, plaintiff attached documents from the Cook County Recorder of Deeds, a plat of survey from what appears to be March 1990 and a land title survey from July 2002. The land title survey contained a note stating that the "property [is] subject to a right-of-way and cross easement agreement per document 91094187" and the "easement agreement is not platable."

¶ 24 Plaintiff further attached documents it obtained through Freedom of Information Act requests from the Village of Streamwood, which showed that, in August 2013, Najjar submitted multiple applications for a permit to install a fence at 1410 Yorkshire Drive. However, the Village of Streamwood denied his first application, asserting that "[a] fence will not be permitted

through the existing parking lot based on the cross access agreement without your neighbor's approval." The village also denied Najjar's second application, asserting the same reason and adding "[y]ou still show the fence blocking the paved cross access between you and your neighbor. Provide a letter from your neighbor approving the location." The village also stated that "[a]ll unused or inoperable cooling equipment in the parking lot shall be removed."

¶ 25 Based on the supporting documents, plaintiff posited that the easement was "clearly" made with respect to both 1400 and 1410 Yorkshire Drive and covered the shared parking lot, facts Najjar obviously knew based on his rejected permit applications. Plaintiff argued that the air conditioning unit installed by Najjar in the shared parking lot made movement difficult for vehicles, especially trucks which came frequently to plaintiff's business, and therefore, it infringed on the easement. Plaintiff supported the infringement allegations with several photographs of the air conditioning unit and an affidavit from Kenneth Strass, its secretary and treasurer, who averred to the problems caused to the business by virtue of the air conditioning unit. Lastly, plaintiff argued that the air conditioning unit "potentially affect[ed]" the value of its property.

¶ 26 In response, defendants noted that the easement agreement referred to only the "driveway" yet the air conditioning unit was located on the shared parking lot and further that the agreement referred to an Exhibit A, which was not recorded and neither party had been able to locate. Based on these two facts, defendants argued that plaintiff's summary judgment motion should be denied because there were genuine issues of material facts, namely to what exact areas of the properties the easement pertained. Defendants additionally argued that, beyond the photographs attached to plaintiff's motion and its conclusory affidavit, there were no facts establishing exactly how the air conditioning unit hindered ingress or egress for vehicles. Lastly,

defendants posited that plaintiff's claim that its property value may be affected by the air conditioning unit was highly speculative. Supporting their response, defendants attached an aerial image from Google Maps which showed the two properties, the shared parking lot and the air conditioning unit.

¶ 27 In its reply, plaintiff asserted that whether the shared parking lot was subject to the easement was a question of construction of the easement agreement, a matter of law, summary judgment was proper to resolve that question. And plaintiff argued that the only plausible interpretation of the agreement was that it covered the east and west driveways as well as the shared parking lot. Plaintiff further contended that, because it submitted an affidavit describing the problems caused to its business by virtue of the air conditioning unit and defendants failed to submit a counter-affidavit, the facts of its affidavit were deemed admitted.

¶ 28 E. The Circuit Court's Ruling

¶ 29 The circuit court held a hearing on the parties' cross-motions for summary judgment, where it first found that the easement pertained to not only the driveways on the east and west side of the common building, but also to the shared parking lot. However, the court determined that, because the air conditioning unit was located so close to the building away from the drivable part of the parking lot, it did not inhibit vehicular traffic in the parking lot, and therefore, Najjar's installation of the air conditioning unit did not breach the easement. The court also found plaintiff's claim about the air conditioning unit affecting the value of its property entirely too speculative.

¶ 30 In a written order, with respect to Count I, the circuit court granted defendants' motion for summary judgment because there had been no breach of the easement. With respect to Count II, the court granted plaintiff's motion for summary judgment in part as the easement existed and

covered the shared parking lot, but denied its motion in part as the air conditioning unit did “not infringe on the easement” nor did it present “a cloud on title” for the property.

¶ 31 Plaintiff unsuccessfully moved the circuit court to reconsider its rulings. In the court’s written order denying plaintiff’s motion to reconsider, it stated that the orders was “final and appealable” under Supreme Court Rule 304(a) (eff. Mar. 8, 2016).¹ Thereafter, plaintiff timely appealed the court’s order on the parties’ cross-motions for summary judgment, but only with respect to the court’s finding that there was no breach of the easement.

¶ 32

II. ANALYSIS

¶ 33 In this appeal, plaintiff raises several arguments as to how the circuit court erred in granting defendants’ motion for summary judgment as to Count I and denying its motion for summary judgment in part on Count II, all based on the court’s finding that the air conditioning unit did not breach the easement that covered the shared parking lot.

¶ 34

A. Preliminary Considerations

¶ 35 Before addressing the merits of plaintiff’s appeal, we begin by addressing two preliminary matters, the first being our jurisdiction in this appeal, which we have a duty to consider *sua sponte*. *In re Marriage of Mardjetko*, 369 Ill. App. 3d 934, 935 (2007). Generally, the circuit court’s denial of a motion for summary judgment is not appealable because such a ruling is interlocutory in nature. *Clark v. Children’s Memorial Hospital*, 2011 IL 108656, ¶ 119. This is true even if “the court has made a finding pursuant to Illinois Supreme Court Rule 304(a).” *Fogt v. 1-800-Pack-Rat, LLC*, 2017 IL App (1st) 150383, ¶ 95. However, there is an exception to this rule when the parties have filed cross-motions for summary judgment, and the

¹ It is unclear why the circuit court added the Rule 304(a) language where there were no pending issues left after it granted defendants’ motion for summary judgment.

court grants one party's motion and denies the other party's motion, but the grant of summary judgment "disposes of all issues in the case." *Clark*, 2011 IL 108656, ¶ 119. This was the case here, and consequently, we may review plaintiff's arguments concerning the denial of its motion for summary judgment.

¶ 36 Second, we note that defendants have failed to file an appellees' brief in this appeal. However, in light of the record being simple and plaintiff's claimed errors being straightforward, we can resolve this appeal without the aid of an appellees' brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Consequently, the absence of an appellees' brief presents no impediment to our review of this appeal.

¶ 37 **B. Summary Judgment**

¶ 38 Moving on to the issue in this case, the circuit court's resolution of cross-motions for summary judgment. Disposing of litigation on a motion for "[s]ummary judgment is a drastic means," and such a motion "should be granted only when the movant's right to judgment is clear and free from doubt." *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 45. Specifically, the circuit court should only grant summary judgment where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. A genuine issue of material fact exists where the material facts are disputed or reasonable people could draw different inferences from the undisputed facts. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review the circuit court's ruling on a motion for summary judgment *de novo*. *Friends of Parks v. Chicago Park District*, 203 Ill. 2d 312, 319-20 (2003).

¶ 39 We also note that, generally when parties file cross-motions for summary judgment, they are mutually conceding that there are no genuine issues of material fact and that only a question of law is involved. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. “However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment.” *Id.*

¶ 40 C. Consideration of Previously Filed Motions

¶ 41 Plaintiff first argues that the circuit court misapplied Illinois law when it considered the parties’ motions for summary judgment that were filed in connection with plaintiff’s first amended complaint. As previously mentioned, plaintiff filed its initial complaint and then subsequently amended it. Following the filing of its amended complaint, defendants Najjar and US Bank filed a motion for summary judgment followed by plaintiff filing a motion for summary judgment followed by Najjar and US Bank filing a second motion for summary judgment. Before the circuit court ruled on the three motions, plaintiff filed a second amended complaint and added defendants Channel Streamwood and Channel Yorkshire.

¶ 42 During the hearing on the parties’ cross-motions for summary judgment, plaintiff highlights that the circuit court stated:

“So we are here today on Plaintiff’s motion for summary judgment, Defendants’ motion for summary judgment, I also have Plaintiff’s revised motion for summary judgment and then responses replied to each one of those, the second amended complaint, affirmative defenses, and I’m ready to hear any additional arguments.”

According to plaintiff, this statement by the court indicates that it considered the parties’ previously filed motions for summary judgment.

¶ 43 Beyond the highlighted statement from the circuit court, our review of the hearing does not reveal any further explicit reference by the court to any of the previous motions for summary judgment, and plaintiff likewise fails to point to any other evidence in the record. However, regardless of whether this one statement demonstrates that the circuit court considered the prior motions for summary judgment, assuming *arguendo* that it did, we find no error with respect to any consideration of defendants' two previously filed motions for summary judgment.

¶ 44 Plaintiff ignores that, in defendants' "supplemental" motion for summary judgment filed on December 20, 2016, they noted that the parties had "previously submitted several motions for summary judgment." Based on this, defendants stated explicitly that they were "incorporat[ing] by reference" and "adopt[ing] herein as if set forth at length" their previously filed motions. Plaintiff has cited no decision stating that a party may not incorporate by reference previously filed motions. While we do not recommend litigants use a strategy of incorporation by reference in motions such as ones for summary judgment because it places the burden on the court to rummage through the record when key arguments and evidence should be readily available, we likewise are unaware of any rule prohibiting such a practice. See *Taylor v. Bi-County Health Department*, 2011 IL App (5th) 090475, ¶ 27 (stating that a party had "incorporated by reference its previous summary judgment motion" in a "motion to dismiss," but not declaring any impropriety in the practice); *Yakupcin v. Baker*, 83 Ill. App. 3d 624, 627 (1980) (stating that the plaintiff in his response to the defendant's motion for summary judgment "incorporated by reference the arguments, depositions and statements he relied on in his prior responses to the motions for summary judgment filed by the other defendants," but not declaring any impropriety in the practice). Therefore, to the extent that the circuit court considered defendants' previously filed motions for summary judgment, such consideration was proper.

¶ 45 Concerning plaintiff's previously filed motion for summary judgment, unlike defendants, it did not incorporate by reference the previously filed motion in its "revised" motion for summary judgment filed on December 23, 2016. However, its initial motion was nearly identical to its revised motion. Therefore, to the extent that the circuit court considered plaintiff's previously filed motion for summary judgment, any error was harmless.

¶ 46 D. The Affidavits

¶ 47 Plaintiff next argues that it was entitled to summary judgment because the affidavit of Kenneth Strass, its secretary and treasurer, was the only affidavit properly before the circuit court and therefore, his affidavit, which established that Najjar's air conditioning unit infringed on the easement, must be accepted as true.

¶ 48 Generally, where an affidavit supporting a motion for summary judgment is unchallenged by a counter-affidavit or other admissible evidence, the supporting affidavit must be accepted as true. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 384 (2008). Where other evidence is supporting or opposing a summary judgment motion, that evidence must be the type admissible at trial. *Id.*

¶ 49 Although it is accurate that, in defendants' response to plaintiff's revised motion for summary judgment, they did not submit a counter-affidavit, they did submit an affidavit from Najjar with their second motion for summary judgment which was filed in connection with plaintiff's first amended complaint. As mentioned, defendants incorporated that motion by reference into their supplemental motion for summary judgment, resulting in Najjar's affidavit, in effect, being included in their supplemental motion for summary judgment. In Najjar's affidavit, he made representations that, when he purchased 1410 Yorkshire Drive, he was

unaware of any easement on the property and furthermore, the air conditioning unit had not interfered with the parking lot and had not caused any disruptions to anyone's property.

¶ 50 Because Najjar's affidavit was, in effect, included in defendants' supplemental motion for summary judgment and the substance of his affidavit attacked the basis of plaintiff's revised motion for summary judgment, in particular Strass' affidavit, Najjar's affidavit could be construed as a counter-affidavit. See *Krilich v. Millikin Mortgage Co.*, 196 Ill. App. 3d 554, 560 (1990) (finding that, although the plaintiffs had attached affidavits in support of their motion for summary judgment, they could be "construed as counteraffidavits because their substance also attacks the basis of [the defendant's] motion for summary judgment"). Consequently, the circuit court could construe Najjar's affidavit as a counter-affidavit and thus, it was not required to accept plaintiff's affidavit as true.

¶ 51 Moreover, regardless of whether Najjar's affidavit could be construed as a counter-affidavit, plaintiff's affidavit was not required to be accepted as true for another reason. In defendants' response to plaintiff's revised motion for summary judgment, they attached an aerial image from Google Maps which showed the two properties, the shared parking lot and the air conditioning unit. This image was "other admissible evidence" (see *Cordeck Sales*, 382 Ill. App. 3d at 384 (2008)) that could challenge plaintiff's affidavit. See *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, ¶¶ 8, 36-37 (stating that an image from Google Maps had been attached to a motion for summary judgment and using the image in its analysis that ultimately reversed the circuit court's grant of summary judgment). Notably, when the circuit court found that the air conditioning unit did not breach the easement, it mentioned that the parties had "submitted various photographs and an aerial photograph of where the [air conditioning unit] is located." Therefore, the circuit court was not required to accept plaintiff's affidavit as true. Because the

circuit court was not required to accept plaintiff's affidavit as true for multiple reasons, plaintiff was not entitled to summary judgment on this basis.

¶ 52 E. Genuine Issue of Material Fact

¶ 53 Plaintiff next argues that, if the circuit court properly considered the previously filed motions for summary judgment and his affidavit was not required to be accepted as true, the court improperly entered summary judgment in favor of defendants because there was a genuine issue of material fact as to whether Najjar's installation of the air conditioning unit breached the easement.

¶ 54 An easement provides a right to use someone else's property. *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 842 (2006). The land that benefits from the easement is called the dominant estate while the land that is burdened by the easement is called the servient estate. *Chicago Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 32. In this case, Trust No. 1120, who owned 1410 Yorkshire Drive, granted the easement for the benefit of Trust No. 9330, who owned 1400 Yorkshire Drive. After multiple conveyances, Channel Yorkshire became the owner of the property at 1410 Yorkshire Drive and plaintiff became the owner of the property at 1400 Yorkshire Drive. Thus, plaintiff's land is the dominant estate, and Channel Yorkshire's land, where Najjar operates a business, is the servient estate.

¶ 55 Under an easement, the owner of the dominant estate has the right, for a limited purpose, to pass over or use the land of the servient estate. *Id.* Unless the parties have agreed otherwise, the owner of the servient estate may use its land for any purpose consistent with the owner of the dominant estate's enjoyment of its easement. *Coomer v. Chicago & North Western Transportation Co.*, 91 Ill. App. 3d 17, 25 (1980). However, the owner of the servient estate may not use or alter its land in a manner that would "materially interfere with or obstruct its use as a

right of way.” *McMahon v. Hines*, 298 Ill. App. 3d 231, 239 (1998). Whether or not a use or alteration of the servient estate’s land materially interferes with or obstructs its use as a right of way “is a question of fact to be determined from the facts and conditions prevailing.” *Id.* at 239-40; see also *Ogilby v. Donaldson’s Floors, Inc.*, 13 Ill. 2d 305, 310 (1958) (stating “[n]o hard-and-fast rule can be stated as to when the use made by the owner of the servient estate is a reasonable use as distinguished from an unreasonable use” and as such, “[i]t is a question of fact to be determined from the facts and conditions prevailing”).

¶ 56 In this case, the circuit court granted summary judgment for defendants, concluding they had not breached the easement. In making this finding, the court determined:

“[T]he [air conditioning unit] is very close to the original building itself and that there’s no way that any car would be able to make a sharp enough turn on the east driveway coming around the bend that it would inhibit the traffic or block the traffic pathway. As a matter of fact, the driveway and the entire parking lot goes all the way to the back of the lot.

Secondly, the plaintiff alleges that the plaintiff’s business requires frequent truck deliveries and that the [air conditioning unit] makes it difficult for the trucks to make an easy delivery. I do not believe that there is a genuine issue of material fact, and even if that were true that is not an infringement on the easement.”

By making this finding, the court determined from the circumstances that Najjar’s alteration of the servient estate from installing the air conditioning unit did not materially interfere with or obstruct plaintiff’s use and enjoyment of the easement because vehicular traffic was not impeded by the air conditioning unit given its location relative to the shared parking lot.

¶ 57 However, the circuit court's finding was improper. Although it was undisputed where the air conditioning unit was located in the shared parking and its size relative to the parking lot, based on the conflicting evidence attached to the parties' cross-motions for summary judgment, there was a genuine issue of material fact as to whether the air conditioning unit materially interfered with plaintiff's use of the easement, namely whether the location of the air conditioning unit made movement in the parking lot difficult for vehicles, especially trucks which frequented plaintiff's business. See *Progressive Insurance Co. v. Universal Casualty Co.*, 347 Ill. App. 3d 10, 23 (2004) ("Where affidavits submitted in support of motions for summary judgment contradict one another, a question of fact is raised and summary judgment is not appropriate."). Moreover, whether or not an alteration of the servient estate's land materially interferes with or obstructs its use as a right of way is a question of fact to be determined from the circumstances. *Ogilby*, 13 Ill. 2d at 310; *McMahon*, 298 Ill. App. 3d 239-40. Notably, during the hearing on the parties' cross-motions, the circuit court asked plaintiff's counsel if a "big rig" could make a "sharp enough turn" in the parking lot whereby the air conditioning unit would hinder the truck's movement, further illustrating that there was a question of fact present.

¶ 58 In light of this, when the circuit court determined that Najjar's installation of the air conditioning unit did not materially interfere with or obstruct the shared parking lot's use as a right of way, it improperly resolved a genuine issue of material fact. See *Cutuk v. Hayes/Gallardo, Inc.*, 151 Ill. 2d 314, 322 (1992) (stating that, on "a summary judgment motion, the court's task is not to resolve a disputed factual question" but rather "determine whether a factual question exists at all"). Although the parties filed cross-motions for summary judgment, which generally means they agree that there are no genuine issues of material fact, the mere filing of cross-motions does not establish this. See *Pielet*, 2012 IL 112064, ¶ 28. Consequently,

the circuit court erred when it granted defendants' motion for summary judgment based on them not breaching the easement.

¶ 59 Given our finding that the circuit court improperly granted defendants' motion for summary judgment, we need not address the remaining arguments raised by plaintiff. Additionally, plaintiff has not raised any contentions concerning his claim that the violation of the easement adversely affected the value of its property and its ability to convey title of the property. Thus, it has forfeited any arguments on this issue on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 60 In sum, we find that the circuit court properly denied plaintiff's motion for summary judgment as it related to an alleged breach of easement. However, we find that a genuine issue of material fact existed as to whether the air conditioning unit materially interfered with plaintiff's use of the easement that precluded the court granting defendants' motion for summary judgment.

¶ 61

III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the order of the circuit court of Cook County, which denied plaintiff's motion for summary judgment in part, but reverse the order of the circuit court, which granted defendants' motion for summary judgment. We remand the matter for further proceedings.

¶ 63 Affirmed in part; reversed in part; and remanded.