2019 IL App (1st) 181448-U

FIRST DIVISION
June 24, 2019

Nos. 1-18-1448 and 1-18-1901 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PINNACLE REAL ESTATE INVESTMENTS GROUP LLC, ANDREW HOLMES, and RAHUL VISAL, Plaintiffs-Appellants, v. EDWARD BOUTROS, CHARLES BOUTROS, ATLAS REAL ESTATE INVESTMENTS GROUP LLC, APEX REAL ESTATE INVESTMENTS GROUP LLC, XERXES REAL ESTATE INVESTMENTS GROUP LLC, WILLIAM BOUTROS, and NAHED BOUTROS, Defendants-Appellees.	) Appeal from the Circuit Court of) Cook County) No. 17 CH 16485) Honorable Sanjay T. Tailor) Judge Presiding

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it ordered the plaintiff-appellants to arbitration under the terms of a settlement agreement. While one subset of attorney fees should not have been awarded, the trial court did not abuse its discretion awarding the remainder of the attorney fees it awarded to defendants.

¶ 2 The parties are all engaged in the business of real estate investment. Several disputes

arose between the parties about properties in which both parties had an interest. The plaintiffs filed suit and sought preliminary injunctive relief. After the temporary injunctive relief was granted in plaintiffs' favor, the parties negotiated and entered into a settlement agreement. The settlement agreement left a few issues outstanding and provided a procedure by which the parties would attempt to resolve any disputes through negotiation and, if negotiation failed, through arbitration. Negotiation failed.

¶ 3 Defendants filed an arbitration demand. Plaintiffs refused to go to arbitration, arguing that the arbitration demand was untimely. Plaintiffs filed a declaratory judgment action seeking a declaration that it had no obligation to arbitrate. The trial court held that the arbitration demand was timely and, thus, ordered plaintiffs to participate in arbitration. Plaintiffs appeal, and we affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiffs Pinnacle Real Estate Investments Group LLC, Andrew Holmes, and Rahul Visal ("the Pinnacle parties") filed suit against defendants Edward Boutros, Charles Boutros, William Boutros, Nahed Boutros, and several business entities controlled by them ("the Boutros parties"). The parties are all engaged in the business of real estate investment and they had ongoing dealings together.

¶ 6 In the lawsuit, the plaintiffs, the Pinnacle Parties, sought injunctive relief alleging that they had an ownership interest in 18 properties to which the defendants, the Boutros parties, held title. The Pinnacle parties contended that they had an interest in the properties by way of certain joint venture agreements and that they are entitled to 50% of the income generated by those 18 properties. The Boutros parties denied that the Pinnacle parties had any interest in 13 of the 18 properties. The parties each alleged that the other was committing financial misdeeds, such as

misappropriating funds. The trial court granted a temporary restraining order in the Pinnacle parties' favor, vindicating their interests in the properties, at least temporarily.

¶ 7 After the temporary injunctive relief was granted, the parties negotiated a settlement that is memorialized in a written settlement agreement. In the settlement agreement, the parties agreed that the Boutros parties would deliver title to seven of the properties to the Pinnacle parties. The Boutros parties also agreed to pay the Pinnacle parties sums of $30,000, $118,339.91, and $289,190 and to pay attorney fees of $11,790. The parties agreed that they would wind down the joint ventures, and the settlement agreement provided a process by which the joint venture accounts would be reconciled.

¶ 8 Most relevant here is paragraph 2(h)(ii) of the settlement agreement in which the parties set forth their agreed process for reconciliation in winding down the joint ventures.

> "(ii) Reconcilation No. 2, is being prepared to: (1) wind-down all financial obligations of the Joint Ventures; and (2) reconcile the cash flows in the Joint Venture Accounts and any other accounts in which Joint Venture funds are, or have been, held, from May 1, 2016 to the date of execution of this settlement agreement."

The parties set forth a process for how they would proceed to negotiate the allocation of assets and liabilities.

> "The Parties shall work together in good faith to resolve any disputes relating to the amounts owed pursuant to Reconciliation No. 2. If they are able to agree regarding such amounts owed, such amounts shall be paid by the Parties from whom monies are owed, within twenty-one (21) days from the latter of the date of the execution of this Settlement Agreement or date the Parties reach an agreement

> regarding such amounts owed pursuant to Reconciliation No. 2."

The parties also set forth a process for how they would proceed if further negotiation was not fruitful in resolving any disputes regarding the allocation of assets and liabilities.

> "In the event the Parties are unable to resolve any dispute relating to Reconciliation No. 2 within fourteen (14) days of complete execution of this Settlement Agreement, or upon such later date as agreed to in writing by the Parties, such dispute shall be fully, finally, and completely determined pursuant to the procedures set forth in paragraph 3 in this Settlement Agreement."

Paragraph 3 of the settlement agreement is an arbitration clause. The parties agreed to binding arbitration in order to settle any disagreements arising under their agreed reconciliation procedures.

> "In the event of the Parties' inability to reach agreement regarding issues relating to Reconciliation No. 2, their dispute relating to such issues shall be resolved by a speed arbitration award. Such arbitration shall be initiated no earlier than fourteen (14) days after the execution of this Settlement Agreement by one of the Parties delivering a demand for arbitration to the other Party and to the arbitrator ***."

¶ 9 After the settlement agreement was executed and the lawsuit was dismissed, the parties began negotiating the issues under Reconciliation No. 2. The Pinnacle parties' counsel emailed the Boutros parties' counsel on four separate occasions to request extensions related to arbitration. Each time, the Boutros parties' counsel agreed to the extension. The parties apparently continued to negotiate a possible resolution. The last date they discussed to be an arbitration extension ran to October 6, 2017. On November 20, 2017, the Boutros parties initiated arbitration in accordance with the procedure set out in the settlement agreement.

¶ 10 The Pinnacle parties refused to arbitrate under the Boutros parties' demand and filed a complaint for a declaratory judgment. In their declaratory action, the Pinnacle parties sought a declaration that the time within which to demand arbitration had passed and that "all disputes related to the Settlement Agreement and underlying lawsuit are fully and finally concluded." In response, the Boutros parties filed a motion to compel arbitration. They also sought attorney fees. Following full briefing and a hearing, the trial court granted the Boutros parties' motion to compel arbitration, and it subsequently awarded them their attorney fees. The Pinnacle parties appeal.

¶ 11 ANALYSIS

¶ 12 The Pinnacle parties argue that the trial court erred when it ordered them to participate in arbitration. They raise both substantive and procedural objections to the trial court's ruling. Substantively, the Pinnacle parties argue that the emails their attorney exchanged with the Boutros parties' attorneys modified the settlement agreement and unambiguously set a date by which any arbitration had to be filed. They contend that their agreement set the latest date to file for arbitration at October 6th and, thus, that the Boutros parties' November 20th arbitration demand was untimely. Procedurally, the Pinnacle parties argue that the trial court needed more than the motion papers to adjudicate the issue. They also argue that the trial court's ruling was, in effect, a summary judgment ruling and that there were genuine issues of material fact prohibiting the trial court from summarily disposing of the case.

¶ 13 A. Substantive Issues

¶ 14 The parties dispute what standard of review should apply. The Boutros parties argue that the abuse of discretion standard applies because we are reviewing the trial court's interlocutory order granting a motion to compel arbitration (citing *Bovay v. Sears, Roebuck & Co.*, 2013 IL

App (1st) 120789, ¶ 26). The Pinnacle parties argue that the *de novo* standard applies because we are reviewing the trial court's decision to compel arbitration which was based on a purely legal analysis (citing *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 115 (2003)). We agree with the Pinnacle parties that the standard of review is *de novo* because, as will be seen below, the issue is a pure question of law—one of contract interpretation.

¶ 15 The Pinnacle parties argue that the email exchange between the parties' attorneys modified the settlement agreement and set a deadline by which any arbitration had to be filed. Paragraph 2(h)(ii) of the settlement agreement stipulates that, in the event the parties are unable to resolve their disputes within fourteen days, the dispute shall be determined under the speed arbitration provision. The speed arbitration provision stipulates that "[s]uch arbitration shall be initiated no earlier than fourteen (14) days after the execution of this Settlement Agreement."

¶ 16 The settlement agreement was executed on June 29, 2017. In four separate email exchanges on July 12, 2017, July 18, 2017, August 11, 2017, and September 13, 2017, the parties agreed to extensions. In the July 12th email, the parties agreed to extend "the arbitrator selection." In the July 18th email, the parties agreed to extend "the date to initiate arbitration" and "the date to select the arbitrator." In the August 11, 2017 email, the parties agreed to extend "the arbitrator selection date" and the "arbitration filing date." In the September 13, 2017 email, the parties agreed to extend "the arbitrator selection date" and the "arbitration filing date." The September 13, 2017 email was the last agreement between the parties in which they agreed to an extension, and they agreed to extend the "arbitration filing date" from September 29 to October 6, 2017.

¶ 17 The Pinnacle parties maintain that October 6th was, thus, *the latest possible date* for initiating arbitration because the parties modified their settlement agreement to set that date as

the deadline. The Boutros parties maintain that October 6th was *the earliest possible date* for initiating arbitration because the parties modified their settlement agreement to set that date as the end of the negotiation window and the beginning of the adjudicatory dispute process.

¶ 18 The parties agree that their dispute turns on the terms of their settlement agreement and any modifications thereto. Any issue concerning the construction, interpretation, or legal effect of a contract is a question of law. *Daniel v. Ripoli*, 2015 IL App (1st) 122607, ¶ 65. The primary goal of contract interpretation is to give effect to the intent of the parties. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75. A contract must be interpreted as a whole and the plain and ordinary meaning must be ascribed to unambiguous terms. *Palm*, 2014 IL App (1st) 111290, ¶ 75. When multiple contracts exist or when amendments to a contract are made, all parts of the agreement are to be considered in conjunction in order to determine the parties' intent. *Downers Grove Associates v. Red Robin International, Inc.*, 151 Ill. App. 3d 310, 318 (1986).

¶ 19 The plain language of the settlement agreement clearly sets the earliest date that arbitration can be filed. The settlement agreement contains no deadline by which arbitration must be filed—it is completely silent regarding any deadline. While there is a deadline, a date certain, for selecting an arbitrator, there is no such deadline for filing an arbitration demand or initiating an arbitration proceeding. Therefore, the only way the Pinnacle parties can prevail in demonstrating that the arbitration demand was untimely is if the email communications between the parties' attorneys modified the settlement agreement such that it created a deadline that did not exist in the original settlement agreement. In that vein, according to the Pinnacle parties, "[t]he October 6, 2017 agreed extension was to be the last date for the filing of an arbitration."

¶ 20 We hold that the email correspondence did not modify the settlement agreement to create

a deadline for demanding arbitration. The purpose of the reconciliation process that the parties chose to use to wind down their joint ventures was first focused on the parties resolving their differences through negotiation. The settlement agreement provided for binding arbitration as a last resort, only to be used if negotiation failed. Thus, it makes perfect sense that the parties included a provision setting the *earliest* date for filing a demand for arbitration—it was a negotiation period. There is no equally reasonable rationale for setting a quick deadline at which the right to arbitration would be cut off and an aggrieved party would be left without a remedy.

¶ 21 In the email correspondence, the parties acknowledged that they were engaged in efforts to resolve the reconciliation issues through negotiation and, thus, were continuing to extend the date for any arbitration filing. The only reasonable interpretation of their correspondence is that they were putting off filing for arbitration while negotiations continued, not that they were creating a deadline to end their dispute entirely. There is nothing in the parties' communications evidencing their assent to converting the earliest date to file for arbitration into a deadline to file for arbitration—a deadline that never existed under the settlement agreement.

¶ 22 The interpretation proffered by the Pinnacle parties in their reply brief is instructive as to why their arguments must fail. The Pinnacle parties argue that "the parties had fourteen days to resolve any accounting issues related to Reconciliation No. 2 but necessarily had to file the arbitration on the fourteenth day, if any issues remained." Their position that there was only one appropriate day on which to demand arbitration finds no support in the record, in the parties' communications, or in reason. That interpretation is not a reasonable construction of the parties' agreement or their objective intentions. The settlement agreement does not state that arbitration must be initiated "on the 14th day" or "no later than the 14th day"—it says "no earlier than 14 days." The emails show that the parties continued to work towards a negotiated resolution. They

would not have set a deadline to file for arbitration while the negotiating window remained open. Arbitration was to be used after the end of negotiation—in the event that negotiating failed to achieve an appropriate result.

¶ 23 The Pinnacle parties argue that, in order to accept the interpretation contrary to their own, the trial court had to read additional language into the emails. For example, where the emails state that the parties agreed to extend "the arbitration filing date," according to the Pinnacle parties, the trial court's interpretation required it to read the emails as stating "the earliest date to initiate or file an arbitration." But the interpretation proffered by the Pinnacle parties would require the court to read the language as "the latest day to initiate or file an arbitration" and that language is not present either. The Pinnacle parties argue that the parties could have easily, but did not, include "earliest date" in their emails. They similarly could have easily included "latest date" in their emails if that was what was intended. The "earliest" qualifier is supplied by the settlement agreement itself and conforms to the intended course of performance by the parties. Nowhere in the emails do the parties use "deadline" or "latest date" or any other language indicating a mutual assent to set a cutoff date for demanding arbitration. The idea of a deadline by which to initiate arbitration is not present anywhere in the case except in the Pinnacle parties' supposed unilateral expectations.

¶ 24 The Pinnacle parties argue that the email exchanges created a deadline on their own, irrespective of the settlement agreement. They point out that the emails do not reference Reconciliation No. 2 or the speed arbitration clause. But it is clear that the emails were discussing Reconciliation No. 2 and the speed arbitration clause. The parties were working to resolve the subject matter of Reconciliation No. 2 and to allocate assets and liabilities in conjunction with winding down the joint ventures. The only reason the parties were discussing

arbitration at all was because it was the resolution mechanism in their settlement agreement for any issues arising from the winding down of the joint ventures. The words of a contract derive their meaning from the context in which they are used. *Northwest Podiatry Center, Ltd. v. Ochwat*, 2013 IL App (1st) 120458, ¶ 40. There is nothing in the email exchanges on their own that would have created the obligation to arbitrate and a deadline independent of the settlement agreement. And those communications were not sufficient on their own to alter the parties' legal rights under the settlement agreement. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 35.

¶ 25 It was the Pinnacle parties that kept requesting extensions and drafted the extension emails. The Boutros parties generally just replied with "confirmed" or a short response of that nature. The idea that the parties contemplated and then agreed to create an arbitration deadline that did not exist under the settlement agreement in those short correspondences belies sensibility and does not correspond to the manner in which the parties conducted themselves throughout.

¶ 26 After the motion to compel arbitration was granted, the Pinnacle parties submitted affidavits from one of the principals of Pinnacle Real Estate Group and from one of its attorneys. They averred that they intended and understood the email exchanges to be discussing deadlines. The Pinnacle parties' subjective expectations and their self-serving affidavits are, of course, irrelevant. *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 22. The trial court's interpretation of the parties' agreement—finding the arbitration demand to be timely and valid—was correct.

¶ 27 B. Procedural Issues

¶ 28 Procedurally, the Pinnacle parties argue that the trial court erred when it granted the motion to compel on the motion papers only. They argue that the Boutros parties only filed an

unverified motion to compel arbitration and provided no evidence, such as an affidavit, "to support [the] contention that the parties' settlement agreement was not modified such that the deadline to file an arbitration had passed."

¶ 29 The Pinnacle parties' whole declaratory judgment action sought a ruling from the court that the time to file for arbitration had passed. The Pinnacle parties framed that issue and they attached the settlement agreement and the parties' email communications to their complaint. There was nothing more that the trial court needed to reach the substantive issues in the case. All that the trial court was required to decide was whether the time to file for arbitration had passed. Even at the oral argument in this case, the Pinnacle parties continued to insist that the settlement agreement and the email communications are not ambiguous and that all that the trial court needed to adjudicate the matter was the settlement agreement and the email communications. The trial court had all the information that it needed to adjudicate that issue, and the Pinnacle parties cannot identify any specific information that it could have obtained through discovery or otherwise that would have justified the trial court waiting to make a ruling on whether the arbitration demand was timely.

¶ 30 A motion to compel arbitration and dismiss a lawsuit is similar to a motion to dismiss pursuant to section 2–619(a)(9) of the Illinois Code of Civil Procedure (Code), which provides for the dismissal of a claim where the claim is barred by affirmative matter that avoids the legal effect of or defeats the claim. *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 179-80 (2007). The issue of whether a dispute is subject to arbitration should be determined at the earliest possible moment. *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 285 Ill. App. 3d 796, 801 (1996). At a hearing on a motion to compel arbitration, the only issue before the court is whether an agreement exists to arbitrate the dispute in question. *Griffith*, 378 Ill. App. 3d at 180. In this

case, the only issue raised *at all* was whether the dispute was subject to arbitration.

¶ 31 The dispute itself and the motion to compel raised the same pure question of law—for the trial court to determine whether the time to file an arbitration demand had passed. The trial court was required to interpret the parties' agreement and decide a question of law. The trial court had all that it needed to make such a ruling, so the Pinnacle parties' argument to the contrary fails.

¶ 32 The Pinnacle parties argue that the trial court's ruling on the motion to compel amounted to it granting summary judgment in the Boutros parties' favor. The Pinnacle parties argue that there were outstanding questions of fact that made the trial court's summary disposition improper. The Pinnacle parties raised this argument for the first time in their motion to reconsider, so it is waived. *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008) (arguments raised for the first time in a motion for reconsideration in the circuit court are waived on appeal). A party is not allowed to remain silent on an issue until losing a motion and then turn around and formulate an argument to contend that it was the trial court that erred. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991).

¶ 33 All along, the Pinnacle parties have maintained that the issue before the court is to interpret the parties' agreement and determine whether they were obligated to arbitrate. That was the issue framed in their declaratory judgment complaint and that was the issue framed in the Boutros parties' motion to compel arbitration. Even here, in arguing for their preferred standard of review, the Pinnacle parties submit that the issue presented to the trial court was a question of law. The trial court made a specific ruling on the question of law presented—"Plaintiffs are compelled to arbitrate Reconciliation No. 2 pursuant to paragraph 3 of the Settlement Agreement, the Court ruling that Paragraph 3 of the Settlement Agreement did not include a deadline to initiate arbitration and that the parties' subsequent communications did not modify

paragraph 3 of the Settlement Agreement." There were no questions of fact prohibiting the trial court from ruling as a matter of law in a summary disposition, and the Pinnacle parties have failed to raise any procedural issue that would countenance reversing the trial court's order.

¶ 34 C. Attorney Fees

¶ 35 The parties' settlement agreement provides that in the event any legal proceeding is initiated "to enforce this Settlement agreement, the party against whom this Settlement Agreement is enforced *** will be required to pay the other party all of its reasonable attorney's fees and costs." The Boutros parties petitioned for $15,681 in attorney fees and $237 in costs. The Pinnacle parties argue that some of the work for which the Boutros parties sought fees was work that occurred prior to this case being initiated and work not associated with enforcing the settlement agreement. The Pinnacle parties also argue that some of the fees submitted for reimbursement are excessive.

¶ 36 Among the factors to be considered in determining the reasonable value of an attorney's services are: the skill and standing of the attorney employed; the nature of the cause and the novelty and difficulty of the questions at issue; the amount and importance of the subject matter; the degree of responsibility involved in the management of the cause; the time and labor required; the usual and customary charge in the community; and the benefits resulting to the client. *Laff v. Chapman Performance Products, Inc.*, 63 Ill. App. 3d 297, 307 (1st Dist. 1978). A trial court has broad discretion to award attorney fees and its decision will not be disturbed on appeal absent an abuse of that discretion. *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 61.

¶ 37 We agree with the Pinnacle Parties that the work billed before December 14, 2017, the date the complaint in this case was filed, is not subject to reimbursement under the settlement

agreement. The description in the Boutros parties' attorneys' billing records demonstrates that the work done before December 14th was work done in anticipation of reconciliation and arbitration, not work done to *enforce* arbitration, *i.e.*, to enforce the settlement agreement. The December 15, 2017 billing that the Pinnacle parties dispute does, however, qualify for reimbursement as it was work done in connection with this case: reviewing the complaint, discussing litigation strategy, and demanding a voluntary dismissal of the case.

¶ 38 The Pinnacle parties argue that other fees for which the Boutros parties sought reimbursement are excessive. In particular, the Pinnacle parties argue that the .7 hours billed to threaten sanctions, the 20.6 hours billed to prepare the reply brief in support of the motion to compel arbitration, the time spent on research for an appeal, and the time allotted for preparing the fee petition are excessive or otherwise should not be allowed. We find none of these arguments persuasive, and the trial court did not abuse its discretion in awarding the Boutros parties fees for these services.

¶ 39 Based on the foregoing, we order that the fees billed for November 28, 2017, December 1, 2017, and December 5, 2017 be stricken and vacated as the Boutros parties are not entitled to such fees. The remainder of the fee order stands.

¶ 40 The Boutros parties ask us to remand the matter so that they may petition the trial court for the attorney fees incurred in defending this appeal. Defending this appeal is part of the Boutros parties' effort to enforce the settlement agreement. See *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 265 (1992). Therefore, under the parties' agreement, the Boutros parties are entitled to attorney fees incurred on appeal. We remand the case to the circuit court for consideration of that issue.

¶ 41 CONCLUSION

¶ 42 Accordingly, we affirm.

¶ 43 Affirmed as modified (see ¶ 39 *supra*). Remanded for defendants to seek attorney fees incurred on appeal.