FIRST DIVISION
FILED: November 19, 2012

No. 1-11-2426

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEVIN J. BURKE and MARIE K. BURKE,	)	Appeal from the
	)	Circuit Court of
Plaintiffs/Counter-Defendants/Appellees,	)	Cook County.
	)	
v.	)	
	)	
GARY QUATEMAN and EVA QUATEMAN,	)	No. 04 CH 19347
	)	
Defendants/Counter-Plaintiffs/Appellants,	)	
	)	
and	)	
	)	
BAIRD & WARNER,	)	Honorable
	)	Carolyn Quinn,
Defendant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The entry of summary judgment against the defendants on their counterclaim for anticipatory repudiation is affirmed, where they could not establish their ability to perform their obligations under a contract.

¶ 2 The plaintiffs, Kevin and Marie Burke (the Burkes), brought this action against the defendants, Gary and Eva Quateman (the Quatemans), asserting claims for breach of contract and declaratory relief, based on a contract to purchase the Quatemans' interest in a cooperative apartment. The Quatemans filed a counterclaim, alleging that the Burkes had anticipatorily repudiated the contract. The circuit court entered summary judgment against the Quatemans on the counterclaim, and they have appealed. For the reasons that follow, we affirm.

¶ 3 The record reflects that on March 12, 2004, the Quatemans accepted the Burkes' offer to purchase the Quatemans' interest in a cooperative apartment on Fullerton Avenue in Chicago. The original contract signed by the Quatemans and the Burkes contained an attorney review provision, which provided, in relevant part, as follows:

> "14. It is agreed by and between the parties hereto that their respective attorneys may make modifications to the contract other than sales price, broker's compensation and dates, mutually acceptable to the parties. If within 5 business days after acceptance of the Contract, it becomes evident agreement cannot be reached by the parties hereto regarding the proposed modifications of their attorneys and written notice thereof is given to either party within the period specified herein, then this Contract shall become null and void and all monies paid by the Purchaser shall be refunded upon joint written direction of both parties to Escrowee."

¶ 4 On March 17, 2004, counsel for the Burkes sent a letter to the Quatemans' attorney proposing a number of modifications to the contract. In addition to four enumerated modifications relating to matters that are not relevant to this appeal, the letter included the following statements:

> "I have enclosed a disclosure statement with this letter, which we would like the co-op association to complete and return to us. In addition, please provide copies of the board meeting minutes for the past year. We request an extension of the Attorney Review contingency of the contract as it relates to the above requested documents and completed disclosures until 5 days after the receipt of all materials.
>
> *** These items are only requests and should not serve as a counter-offer. In the event these requests are acceptable to your clients, please confirm the same by signing the enclosed copy of this letter on their behalf and faxing it to me. If your clients choose not to consent to these requests, please call me to discuss these issues so we may resolve them in an amicable manner."

At his deposition, the Quatemans' attorney testified that his clients agreed to all of the requests set forth in the first paragraph quoted above.

¶ 5 On March 24, 2004, the Quatemans' attorney sent a letter to counsel for the Burkes, in which he affirmatively agreed to several of the suggested modifications. That letter also stated that some of the requested financial information "would presumably be part of the cooperative's disclosure on the form you provided." He also stated that, "[u]pon confirmation that all issues are resolved[,] we'll promptly forward the cooperative's disclosure form for completion."

¶ 6 Thereafter, the parties' attorneys continued to exchange correspondence relating to various repair issues and other contract modifications not pertinent to this appeal. On April 8, 2004, counsel for the Quatemans sent a letter to the Burkes' attorney stating that "all remaining issues and contingencies" had been resolved. Four days later, the Burkes' attorney acknowledged that the

"inspection issues" had been resolved, but stated that the Burkes had still not received the disclosure statement that was sent on March 17, 2004. The Burkes' attorney further stated that "we have 5 days upon receipt of the documents and information to review for approval or disapproval of the contract."

¶ 7 On April 28, 2004, counsel for the Burkes sent a letter to the Quatemans' attorney, advising that, if the Burkes did not receive the requested documents by April 30, 2004, they would cancel the contract. That same day, Mr. Quateman sent a fax message to Mickey Light, the co-op manager, requesting that the board fill out the disclosure form.

¶ 8 The following day, the Quatemans informed the Burkes that they did not have the disclosures and did not know when they would be available. Counsel for the Quatemans also advised the Burkes' attorney that the disclosure statement had twice been forwarded to the cooperative board with a request that it be completed and that "[Mr. Quateman] called the board directly to follow up *** [and] was informed that the board needs to meet to review the form and complete it. *** [T]he completion of the form is not something which is directly within the sellers' control. We have submitted it for completion and execution and we are [a]waiting the board's action in this respect." On April 30, 2004, counsel for the Quatemans sent another letter to the Burkes' attorney, explaining that the board had not completed the disclosure form and that he "[could] not guaranty or make definite representations *** as to when the board will provide the [requested] information ***."

¶ 9 The cooperative association's rules and regulations specifically provided that it had a policy of not making any statements or responding to questions from non-shareholders, and the shareholders were responsible for providing information to prospective purchasers. Following the

parties' exchange of correspondence in April 2004, the board's next scheduled meeting was set for May 26, 2004, two days before the closing date set forth in the parties' contract. The board met on May 26, but apparently did not address the issue of the disclosure statement requested by the Burkes. Mr. Quateman testified at his deposition that he did not know whether the board members would have been available to conduct a special meeting to complete the disclosure statement before the closing date designated in the contract.

¶ 10 In early May 2004, Jean Perkins, the president of the co-op board, sought legal advice regarding the board's obligation to complete the disclosure statement. The board's attorney advised that the Burkes were not entitled to the information sought in the disclosure statement and that "[t]he disclosure requests should have been voided from the contract." He also suggested that the board provide copies of the corporation's 2003 financial statement and income tax return, as well as a certificate of insurance showing coverage for the building. With regard to the additional information sought by the disclosure statement, the board's attorney stated that "the parties will have to resolve other issues between themselves." Thereafter, Perkins sent a fax message to Mickey Light, the co-op manager, which referenced the lawyer's advice and indicated that the board should provide the Burkes with the corporation's 2004 budget, 2003 tax return, certificate of insurance, and the 2002 financial statement, which was the most recent statement that was available.

¶ 11 Mr. Quateman testified at his deposition that he had obtained copies of the board meeting minutes for the prior 12 months, but he did not know why he had not provided them to the Burkes. He also stated that he thought he had sent them to his attorney, but counsel for the Quatemans testified that he never received the board's meeting minutes. The meeting minutes and disclosure

statement were never provided or tendered by the Quatemans.

¶ 12 In a letter dated May 4, 2004, the Burkes' attorney notified the Quatemans that, because they had failed to furnish the requested materials in a timely manner, the contract was canceled pursuant to the attorney review clause. The letter also requested the return of $68,750 in earnest money paid by the Burkes.

¶ 13 The earnest money was not returned, and the Burkes filed a two-count complaint against the Quatemans and the escrowee, Baird & Warner.[1] Count I alleged that the Quatemans breached the contract, and Count II sought a declaratory judgment. The Quatemans filed a two-count counterclaim, also alleging breach of contract (Count I) and seeking a declaratory judgment (Count II). On April 14, 2005, the circuit court *sua sponte* dismissed both the Burkes' and the Quatemans' claims for declaratory judgment.

¶ 14 The Quatemans subsequently filed a motion for partial summary judgment on their counterclaim, arguing that the Burkes had anticipatorily breached the contract. The Burkes then filed a motion for summary judgment on their breach of contract claim, asserting that their attorney properly cancelled the contract pursuant to the attorney review clause. On March 8, 2007, the circuit court granted summary judgment in favor of the Burkes, denied the Quatemans' motion for summary judgment on the counterclaim, and held that the Burkes were entitled to the return of their earnest money. The Quatemans appealed.

---

[1] Baird & Warner subsequently transferred the earnest money it held in escrow to the Clerk of the Circuit Court and was dismissed from the lawsuit. Consequently, it is not a party to this appeal.

¶ 15 On appeal, this court held that the March 17, 2004, letter proposed several contract modifications, including an extension of the attorney-review clause until five days after receipt of the materials requested by the Burkes, and that, because the Quatemans' attorney had agreed to the modifications suggested in the March 17 letter, the attorney-review period was extended until five days after the Burkes received the disclosure statement and the meeting minutes. *Burke v. Quateman*, No. 1-07-0920, slip op. at 9 (unpublished order under Supreme Court Rule 23) (*Burke I*). We also held that the attorney-review provision in the contract did not give the parties' attorneys a right to disapprove the contract for any reason. *Id.* at 11. Rather, the contract could be canceled only if an agreement regarding the proposed modifications could not be reached. *Id.* Because there was no evidence that the parties had failed to agree on the proposed modifications, we rejected that Burkes' argument that their counsel had authority to cancel the contract pursuant to the attorney-review clause. *Id.* Accordingly, we reversed the entry of summary judgment in favor of the Burkes on that basis. *Id.* In addition, we affirmed the denial of the Quatemans' motion for summary judgment on their counterclaim because they had not challenged that ruling, and we remanded the matter for further proceedings. *Id.* at 12.

¶ 16 On remand, the Burkes moved to dismiss the counterclaim based on the law-of-the-case doctrine. They contended that the Quatemans' failure to either appeal the circuit court's entry of judgment against them on the counterclaim or seek judgment in their favor on the counterclaim in the prior appeal rendered the circuit court's judgment in favor of the Burkes on the counterclaim final and precluded the Quatemans from pursuing their counterclaim on remand. The circuit court denied that motion.

¶ 17 The Burkes later voluntarily dismissed their amended complaint and filed an amended answer and affirmative defenses to the counterclaim for anticipatory repudiation, including the allegation that the Quatemans had failed to deliver the disclosure statement and the board meeting minutes, which was a condition precedent to the sale, and that, by failing to deliver the requested documents, the Quatemans materially breached the contract and relieved the Burkes of any duty to perform. The circuit court denied the Quatemans' motion to strike this affirmative defense.

¶ 18 After conducting additional discovery, the parties filed cross-motions for summary judgment on the counterclaim. The circuit court entered summary judgment against the Quatemans because they could not prove their ability to fulfill their duties under the contract if it had not been repudiated, which was an essential element of their claim. The court found that the Burkes had anticipatorily repudiated the contract and that the Quatemans could have provided the meeting minutes for the previous year, but it determined that the Quatemans had not presented sufficient evidence to establish that they could have made timely delivery of the disclosure statement. In particular, the court found that

> "the evidence shows that the disclosure statement, if ever produced, would not be produced in time to allow a five-day attorney review period before the May 28, 2004 closing ***. The evidence shows that the Quatemans could not fulfill the contractual obligations regarding the disclosure statement and the attorney review period by the closing date. Therefore, the Quatemans cannot establish their claim for anticipatory repudiation."

This appeal followed.

¶ 19 On appeal, the Quatemans argue that the circuit court erred in granting summary judgment for the Burkes on the counterclaim for breach of contract based on anticipatory repudiation. Because the propriety of an order granting summary judgment is a question of law, our review is *de novo*. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228, 864 N.E.2d 176 (2007).

¶ 20 The Quatemans initially contend that they were not contractually bound to provide the disclosure statement and the meeting minutes to the Burkes. They claim that the references to those documents in the March 17, 2004, letter were merely an expression of the Burkes' attorney's desire that the co-op association provide the meeting minutes and complete and return the disclosure form. According to the Quatemans, because they were not obligated to provide the disclosure statement and meeting minutes, their failure to provide those documents could not serve as the basis for the entry of summary judgment against them on their counterclaim. We cannot agree.

¶ 21 A contract should be construed as a whole, and such construction should be a natural and reasonable one. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92, 902 N.E.2d 1178 (2009). In addition, contracts are interpreted objectively and must be construed in accordance with the ordinary expectations of reasonable people. *Id.* Courts will construe a contract reasonably to avoid absurd results. *Id.* Also, contract terms will not be construed in a way that would nullify other provisions or render them meaningless. *Thompson v. Gordon*, 241 Ill. 2d 428, 442, 948 N.E.2d 39 (2011).

¶ 22 Here, the March 17 letter from the Burkes' attorney proposed three distinct contract modifications: (1) that the co-op association complete the enclosed disclosure statement and return it to the Burkes; (2) that the Quatemans provide copies of the board meeting minutes for the previous

year; and (3) that the Quatemans agree to extend the attorney-review provision of the contract until five days after receipt of the requested documents and completed disclosure. It is undisputed that the Quatemans agreed to all of the proposed modifications. Contrary to the Quatemans' assertion that the only action contemplated by these requests would be taken by the co-op association, the second and third modifications clearly were directed to the Quatemans and, upon their agreement, imposed contractual duties to comply with those provisions. Indeed, Mr. Quateman admitted that he had obtained copies of the board meeting minutes for the prior year, but had not delivered them to the Burkes.

¶ 23 With regard to the first modification, requesting the completion and return of the disclosure statement, we agree that this proposal contemplated action by the co-op association to the extent that the association was the entity with access to the desired information. However, the cop-op association was not a party to the contract and could not be bound by any of the terms contained therein. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (holding that "[i]t goes without saying that a contract cannot bind a nonparty). Although the requisite information was within the control of the association, the Quatemans bore the contractual burden of providing that information to the Burkes. Also, the evidence in the record demonstrates that the Quatemans recognized their obligation to supply the disclosure statement and undertook to ensure that it would be provided to the Burkes by repeatedly contacting the cooperative board regarding its completion.

¶ 24 Moreover, our prior decision expressly held that the parties had agreed to extend the attorney-review period until five days after the Burkes received the meeting minutes and completed disclosure statement. *Burke I*, slip op. at 9. Implicit in that ruling was the determination that the Burkes were

entitled to receive the meeting minutes and completed disclosure statement at least five days before the closing. Acceptance of the Quatemans' argument that they satisfied their duty by merely forwarding the disclosure statement to the board would lead to an absurd result. The board could ignore the request that it complete and return the disclosure statement, or it could provide incomplete information at any time, without regard to the provision allowing a five-day review period prior to the closing. Under either circumstance, the modification of the attorney-review clause would be illusory, because the extension of the review period was dependent upon the delivery of the documents, and the Burkes' ability to exercise their rights under that clause would be effectively nullified. We decline to hold that the parties intended to allow for such an unreasonable result. See *Jewelers Mutual Insurance Co. v. Firstar Bank Illinois*, 213 Ill. 2d 58, 65, 820 N.E.2d 411 (2004) (holding that a contract would not be interpreted in a manner that renders a party's obligation illusory); *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 93, 902 N.E.2d 1178 (2009) (same). Accordingly, the Quatemans were contractually bound to provide the disclosure statement.

¶ 25 In reaching this conclusion, we reject the Quatemans' assertion that they were not bound to provide the disclosure statement because they could not control the actions of the board. The mere fact that their ability to perform under the contract depended, in part, on the conduct of a third party does not negate their duty to provide the disclosure statement. See *Yale Development Co. v. Aurora Pizza Hut, Inc.*, 95 Ill. App. 3d 523, 526-27, 420 N.E.2d 823 (1981); *Pope v. Economy Fire & Casualty Co.*, 335 Ill. App. 3d 41, 47-48, 779 N.E.2d 461 (2002).

¶ 26 The Quatemans next argue that the circuit court erred in entering summary judgment against

them, based on its determination that they could not prove their ability to provide the completed disclosure statement in sufficient time to allow for the five-day attorney-review period prior to the scheduled closing date. This contention is without merit.

¶ 27 Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Murray*, 224 Ill. 2d at 228. Although a plaintiff need not prove his case during a summary judgment proceeding, he must present some evidentiary facts to support each element of his cause of action. *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1069, 793 N.E.2d 68 (2003). Where the parties have filed cross motions for summary judgment, they agree that there is no material question of fact and that the court can decide the case as a matter of law. See *Harwood v. McDonough,* 344 Ill. App. 3d 242, 245, 799 N.E.2d 859 (2003).

¶ 28 In Illinois, anticipatory breach, also referred to as anticipatory repudiation, consists of a manifestation by one party to a contract of an intent not to perform its contractual duty when the time comes for it to do so even if the other party has rendered full and complete performance. *In re Marriage of Olsen*, 124 Ill. 2d 19, 24, 528 N.E.2d 684 (1988); *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1031-32, 864 N.E.2d 927 (2007). Where a party has anticipatorily breached a contract, the non-breaching party generally can proceed in one of three ways: rescind the contract altogether and pursue the remedies based on the rescission; elect to treat the repudiation as an immediate breach by bringing suit or by making some change in position; or await the time for performance of the contract and bring suit after that time has arrived. *Tower*

Investors, LLC, 371 Ill. App. 3d at 1032; see also *Yale Development Co.*, 95 Ill. App. 3d at 526. Though the nonrepudiating party is relieved if its obligation to perform, it must still show a willingness and ability to perform had the breach not occurred. *Pope*, 335 Ill. App. 3d at 46-47; *Yale Development Co.*, 95 Ill. App. 3d at 526.

¶ 29 Here, the Quatemans claim that they could have provided the disclosure statement prior to closing because the board "may have decided to fill in the form with an indication such as 'not applicable' in answer to the requests which did not apply." This argument is premised on pure speculation. The record reflects that, on May 7, 2004, the board's attorney sent Jean Perkins, the board president, an email in which he advised that the board was not obligated to divulge the requested information and that "[t]he disclosure requests should have been voided from the contract." He further indicated that the board should supply copies of the corporation's financial statement and federal income tax return for 2003, as well as a standard certificate of insurance for the building. Finally, he counseled that "the parties will have to resolve other issues between themselves." Three days later, Perkins faxed a copy of the attorney's email to Mickey Light, the cooperative's manager, referencing the legal advice as to which documents the board should provide. She stated that the board should supply copies of the corporation's 2003 federal income tax return, the 2004 budget, a certificate of insurance, and the financial statement for 2002 because the 2003 statement was not available. Although these documents may have provided some of the information requested in the disclosure statement, the Quatemans did not present any evidence that the board members intended to complete the disclosure statement and return it to the Burkes. As the circuit court observed, the only evidence in the record showed that the board did not intend to complete the disclosure

statement.

¶ 30 The Quatemans also challenge the circuit court's conclusion that, even if the board had decided to complete the disclosure statement, it could not have done so in a timely manner. The Quatemans correctly assert that, because there was no time limitation specified for delivery of the completed disclosure statement, a reasonable time must be implied. See *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1092, 799 N.E.2d 469 (2003); *Yale Development Co.*, 95 Ill. App. 3d at 525. According to the Quatemans, a reasonable time for delivery of the disclosure statement would have been after May 11 (the deadline for approving the Burkes' offer to purchase shares in the cooperative) and before May 23 (five days prior to the scheduled closing date). The fundamental flaw in this argument is that the Quatemans did not present any evidence that the board would have completed the disclosure statement during this 12-day time period.

¶ 31 As noted by the circuit court, the evidence in the record establishes that the disclosure statement was not addressed at the board's formally scheduled meeting on April 26, 2004, and Mr. Quateman did not attend that meeting to press the issue. Three days later, his attorney sent a letter to counsel for the Burkes, stating that his client had been "informed that the board needs to meet to review the [disclosure] form and complete it." It is undisputed that the next formal board meeting was scheduled for May 26, 2004, which was too late to allow for the five-day review period prior to the May 28 closing date.

¶ 32 The Quatemans claim that the board could have conducted an informal meeting after the Burkes had been approved as potential shareholders. In support, the Quatemans rely on the affidavit of board member Ann Coyle, who attested that applications of prospective owners of the cooperative

frequently were considered during informal meetings and discussions. We note, however, that Mr. Quateman testified that he did not know whether any of the board members were available to complete the disclosure statement, and the Quatemans did not present any evidence that the board members intended to meet informally in order to complete the statement prior to May 23, 2004.

¶ 33 The Quatemans further contend that their failure to demonstrate the ability to provide the disclosure statement was attributable to the Burkes because the disclosure statement was not applicable to cooperatives and because the board ceased to consider the disclosure form when the contract was cancelled. The first assertion is unpersuasive because the Quatemans failed to reject the disclosure statement as inappropriate. To the contrary, they accepted the proposed form and agreed to provide the requested information to the Burkes. The second assertion is refuted by the record. The Quatemans contend that the board would not have continued to consider the disclosure statement after the contract was cancelled and, as a result of the Burkes' termination of the contract, they were prevented from proving their ability to perform. Yet, the record reflects that, although the board was aware that the contract had been cancelled on May 4, 2004, Jean Perkins sought legal advice on or about May 7 and then forwarded that advice to Mickey Light, the co-op manager, on May 10. Perkins attested that, "[a]s of May 10, 2004, [she] was of the belief that the transaction might still be completed because otherwise, [she] would not have directed Mickey Light to provide financial information about the corporation." Consequently, there is no merit to the claim that the board's failure to complete the disclosure statement was caused by the Burkes' termination of the contract.

¶ 34 Finally, we reject the Quatemans' argument that the doctrine of law of the case barred the

Burkes from pursuing their second affirmative defense on remand. That affirmative defense, which was based on the assertion that the Quatemans failed to satisfy their duty to provide the disclosure statement and meeting minutes, was stricken by the circuit court prior to the first appeal. In the Quatemans' view, the Burkes were precluded from later raising the affirmative defense because they failed to challenge the order striking it in the previous appeal. Under the law-of-the-case doctrine, questions of law decided in a previous appeal are binding on the trial court on remand as well as on the appellate court on a subsequent appeal. *Norris v. National Union Fire Insurance Co.*, 368 Ill. App. 3d 576, 580, 857 N.E.2d 859 (2006). "However, the doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power.' " *Norris*, 368 Ill. App. 3d at 580 (quoting *People v. Patterson*, 154 Ill. 2d 414, 468, 610 N.E.2d 16 (1992)). Courts have recognized two exceptions to the application of the law-of-the-case doctrine: (1) when a higher reviewing court, subsequent to the lower court's decision, makes a contrary ruling on the same issue; and (2) when a reviewing court finds its prior decision was palpably erroneous. *Norris*, 368 Ill. App. 3d at 581.

¶ 35 Here, although the Burkes' affirmative defense had been stricken prior to the first appeal, the record affirmatively demonstrates that the decision to strike the affirmative defense was predicated on the circuit court's conclusion that the Quatemans had no duty to provide the disclosure statement and meeting minutes. As set forth above, we implicitly reversed the underlying basis of the decision striking the affirmative defense when we held that the Quatemans were bound to provide those documents. Thus, this case falls within the recognized exception to the law-of-the-case doctrine that applies where a higher reviewing court, subsequent to the lower court's decision, makes a contrary

ruling on the same issue. See *Norris*, 368 Ill. App. 3d at 581. Moreover, the original judgment that was the subject of the prior appeal was favorable to the Burkes in all respects. Therefore, they were not obligated to cross-appeal in order to preserve the right to pursue the challenged affirmative defense on remand. See *People ex rel. Sherman v. Cryns*, 327 Ill. App. 3d 753, 760, 763 N.E.2d 904 (2002) (holding that an appellee need not file a cross-appeal to preserve an argument ruled on adversely to the appellee in the trial court, provided the court's judgment was not, at least in part, against him). Consequently, the Burkes were not precluded from pursuing their affirmative defense on remand.

¶ 36 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 37 Affirmed.