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Karen A.Yarbrough
Cook County Recorder of Deeds
Date: 09/02/2014 01:48 PM Pg: 1 of 9

COURT ORDER
FOR DECLARATORY JUDGMENT
RELATING TO REAL ESTATE

9 W. Erie Holdings, LLC v.
Aspen Thorn, LLC,
Case No. 13 CH 20883
The Circuit Court of Cook County, Illinois,
Chancery Division

(Space above for Recording Data)

Attached is the certified copy of the MEMORANDUM OPINION & ORDER, entered in the above-captioned case, granting a declaratory judgment on the pleadings in favor of 9 W. Erie Holdings LLC and which declared that Aspen Thorn LLC has no option to purchase relating to the legally described real estate:

PARCEL 1: A PART OF LOTS 1 AND 2 OF ASSESSORS DIVISION OF LOT 16 IN BLOCK 24 IN WOLCOTT'S ADDITION TO CHICAGO AND THE NORTH ½ OF BLOCK 37 IN KINZIE'S ADDITION TO CHICAGO DESCRIBED AS FOLLOWS: COMMENCING AT A POINT ON THE NORTH LINE OF SAID LOT 1, 20 FEET 2 INCHES WEST OF THE NORTH EAST CORNER OF SAID LOT 1; RUNNING THENCE SOUTH ON A LINE PARALLEL WITH THE EAST LINE OF SAID LOTS 1 AND 2, 51 FEET TO THE SOUTH LINE OF SAID LOT 2; THENCE WEST ON THE SOUTH LINE OF SAID LOT 2, 19 FEET AND 4 INCHES; THENCE NORTH ON LINE PARALLEL WITH THE EAST LINE OF SAID LOTS 1 AND 2, 51 FEET TO THE NORTH LINE OF SAID LOT 1; THENCE EAST 19 FEET 4 INCHES TO THE PLACE OF BEGINNING IN SECTION 9, TOWNSHIP 39 NORTH, RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL 2: A TRACT OF LAND DESCRIBED AS FOLLOWS: COMMENCING AT A POINT ON THE NORTH LINE OF LOT 1 OF ASSESSORS DIVISION OF LOT 16 IN BLOCK 24 OF WOLCOTT'S ADDITION TO CHICAGO AND THE NORTH ½ OF BLOCK 37 OF KINZIE'S ADDITION TO CHICAGO, 39 FEET 6 INCHES WEST OF THE NORTH EAST CORNER OF SAID LOT 1; THENCE RUNNING SOUTH ON A LINE PARALLEL WITH THE EAST LINE OF SAID LOT 1 AND LOT 2 IN SAID ASSESSOR'S DIVISION, 51 FEET TO THE SOUTH LINE OF THE SAID LOT 2; THENCE WEST ALONG THE SOUTH LINE OF SAID LOT 2, 19 FEET 4 INCHES; THENCE NORTH ON A LINE PARALLEL WITH THE EAST LINE OF SAID LOTS 1 AND 2, 51 FEET TO THE NORTH LINE OF SAID LOT 1; THENCE EAST 19 FEET 4 INCHES TO THE PLACE OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL 3: THE WEST 20.66 FEET OF LOTS 1 AND 2 IN ASSESSOR'S DIVISION OF LOT 16 IN BLOCK 24 IN WOLCOTT'S ADDITION TO CHICAGO WITH THE NORTH ½ OF BLOCK 37 IN KINZIE'S ADDITION TO CHICAGO, IN SECTION 9, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL 4: LOT 14 IN BLOCK 24 IN WOLCOTT'S ADDITION TO CHICAGO IN THE EAST ½ OF THE NORTH EAST ¼ OF SECTION 9, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PARCEL 5: LOT 15 IN BLOCK 24 IN WOLCOTT'S ADDITION TO CHICAGO IN THE EAST ½ OF THE NORTH EAST ¼ OF SECTION 9, TOWNSHIP 39 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

COMMONLY KNOWN AS: 5-9 W. Erie Street, Chicago, Illinois 60610

PINs: 17-09-227-007-0000
17-09-227-008-0000
17-09-227-017-0000
17-09-227-018-0000
17-09-227-019-0000

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IN THE CIRCUIT COURT OF COOK COUNTY
CHANCERY DIVISION

Judge Jean Prendergast Rooney
AUG - 6 2014
Circuit Court – 2044

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9 W. Erie Holdings, LLC,
Plaintiff,

v.

Aspen Thorn, LLC,
Defendant.

Case No. 13-CH-20883

Calendar 8
Judge Jean Prendergast Rooney

MEMORANDUM OPINION & ORDER

This case is before the court on the parties' cross-motions for judgment on the pleadings. Plaintiff 9 W Erie Holdings, LLC ("W.E. Holdings") requests declaratory relief in its complaint against defendant Aspen Thorn, LLC ("Aspen Thorn"). For the reasons stated below, W.E. Holdings' motion for judgment on the pleadings is granted, and Aspen Thorn's motion for judgment on the pleadings is denied.

Background

Plaintiff W.E. Holdings is the present owner of the property commonly known as 5-9 West Erie Street, Chicago, Illinois, 60610 (the "Property"), and is a successor-in-interest to 9 West Erie, LLC (the "Purchaser")—a former record owner of the Property. Aspen Thorn succeeded to Erie Canal, LLC's (the "Seller's") interests in this matter.[1] The Purchaser and the Seller were parties to a 2007 land-sale contract (the "Agreement") for the Property.

The Seller originally obtained the Property by special warranty deed from AT&T in March, 2007. Compl. ¶ 11. In order to secure financing for that sale, the Seller granted the Purchaser a mortgage on the Property, securing the necessary loan of $3,213,000.00. Compl. ¶ 12. On December 26, 2007, the Purchaser and the Seller closed on a deal to convey the Property to the Purchaser by special warranty deed. Compl. ¶ 13. The terms of that deal are memorialized in the Agreement, described below. Compl. Ex. A.

In the Agreement, the Seller conveyed the land and all fixtures to the Purchaser for $3,515,000. However, the Agreement additionally and separately obligated the Purchaser to construct a mixed-use development with 8,500 square feet of retail space (the "Development"). The Seller attached three documents with

[1] The parties concede for purposes of this motion that the Purchaser and the Seller properly assigned their interests for purposes of this litigation to the plaintiff and defendant, respectively. P.'s Mot. pg. 6 fn. 2; Resp. pg. 1 fn. 1 (the parties "agree that plaintiff stands in the shoes of the purchaser and defendant in the shoes of the seller.")

Exhibit

specifications and plans for the Development, labeled E, F, and G.[2] By the terms of the Agreement, the Development consisted of the "Retail Area," the "Garage," and a remaining, undefined "Residential Parcel." Compl. Ex. A.

The Agreement set multiple deadlines for construction, with limited provisions to accommodate "Unavoidable Delays." The Agreement set the completion date of the Retail Area as December 1, 2008. The timeline for construction concluded with a "Full Completion Date" of March 1, 2009.

The contract secured these obligations—referred to in the Agreement as the "Secured Obligations"—by providing for either a letter of credit in favor of the Seller, or assigned mortgage documents to be held by the Seller. Compl. Ex. A ¶ 15(c). The Seller chose to secure the Secured Obligations (the obligation to construct the Development on the specified timeline) by holding mortgage documents securing a $2.5 Million note. Compl. ¶ 6. The Seller, as its "sole remedy" for breach of the Secured Obligations pursuant to the Agreement, could accept and dispose of the note and mortgage documents. Compl. Ex. A ¶¶ 15.

Finally, the Agreement gave the Seller a "Purchase Option," granting the Seller the chance to buy back the Retail Area—along with a Reciprocal Easement and Operating Agreement—for $3,315,000 "not later than ninety (90) days after the Retail Area and the Garage shall be deemed completed." It also provided that the Purchaser "shall" pay $2.5 million to the Seller if the Seller failed to timely exercise its Purchase Option once it had vested. Compl. Ex. A ¶ 16.

The Purchaser did not comply with any of the deadlines for construction imposed in the Agreement. The Seller then notified the Purchaser that it considered the Purchaser in default of the Secured Obligations, and intended to exercise its "sole remedy" of accepting the $2.5 million note and mortgage documents. On December 21, 2007, the Seller assigned its interests in the Agreement to Aspen Thorn. Compl. Ex. D. Aspen Thorn then notified the Purchaser that the Aspen Thorn sold the security collateral to Aspen Thorn's affiliate for $2,502,000. Compl. ¶¶ 22-25.

W.E. Holdings bought the Property from the Purchaser on June 25, 2012. Defendant Aspen Thorn learned of this conveyance, and notified plaintiff (in an e-mail dated August 31, 2012) that it intended to exercise the Purchase Option, or receive $2.5 Million from plaintiff, if "there is ever a building on [the Property] with retail space." Compl. Ex. B.

Plaintiff maintains that this August 31, 2012 communication from defendant clouds its title and creates a controversy between the parties ripe for judicial decision. Defendant agrees that this is an actual controversy, and both parties

[2] The copy of the Agreement filed with the court contained blank pages in place of those specifications, labeled E, F, and G.

concede the relevant facts regarding formation and breach of the covenants in the Agreement. Each party has thus asked this court for a judgment on the pleadings. W.E. Holdings requests, in its single count for declaratory relief, a declaration that Aspen Thorn's acceptance of the $2.5 million note extinguished the Purchase Option. The plaintiff asks this court to declare that the Purchase Option "never came into existence due to the Purchaser's default" of failing to comply with development deadlines. Compl. ¶ B. Aspen Thorn seeks "a judgment on the pleadings in favor of defendant, Aspen Thorn LLC, and against plaintiff 9 W Erie Holdings." Resp. pg. 15

Motion for Judgment on the Pleadings

Judgment on the pleadings is properly entered in instances where no genuine issue of material fact exists and where the movant is entitled to judgment as a matter of law. *M.A.K. v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 198 Ill. 2d 249, 255 (2001). Unlike summary judgment where the court may consider affidavits and other documents, the court is limited to the allegations of the complaint, in order to determine a motion for judgment on the pleadings. *Mount Vernon Fire Ins. Co. v. Heaven's Little Hands Day Care*, 343 Ill. App. 3d 309, 314 (1st Dist. 2003). Specifically, the court may only consider the facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 56-57 (2004). All well-pleaded facts and all reasonable inferences from those facts are taken as true. *M.A.K.*, 198 Ill. 2d at 255. The court considers exhibits attached to a complaint as part of the pleadings for a judgment on the pleadings. *In re Estate of Davis*, 225 Ill. App. 3d 998, 1000 (2d Dist. 1992).

I. Expiration of the Purchase Option Would Not Create a Windfall for the Purchaser Under the Agreement.

W.E. Holdings argues that the Agreement's Purchase Option expired as a matter of law when the Purchaser failed to begin or complete construction within the agreed-to time limits. Aspen Thorn counters that this would create an absurd result, allowing the Purchaser to unilaterally defeat the Purchase Option by willful delay of construction. Aspen Thorn thus seeks a declaration from this court that the Agreement grants it a continuing option to purchase a retail area if one is constructed on the Property.

Courts interpret the meaning of written contracts as a question of law. *Szczerbaniuk v. Mem'l Hosp.*, 180 Ill. App. 3d 706, 713, (2d Dist. 1989). Where the language of a contract is unambiguous, courts ascertain the intention of the parties by the language utilized and not by the construction placed upon it by the parties. *Id.* Moreover, a court cannot construe the contract contrary to the plain and obvious meaning of the language. *Johnstowne Centre P'ship v. Chin*, 99 Ill.2d 284, 287, (1983); *Szczerbaniuk*, 180 Ill. App. 3d at 713. Courts presume that the terms and

conditions are purposefully inserted and that the language is not idly employed. *Szczerbaniuk*, 180 Ill. App. 3d at 713.

The principle objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *USG Corp. v. Sterling Plumbing Group, Inc.*, 247 Ill. App. 3d 316, 318 (1993). The "four corners" rule states that if a contract is clear on its face, no evidence outside the contract may be considered. *Ahsan v. Eagle, Inc.*, 287 Ill. App. 3d 788, 790 (3d Dist. 1997) (citing *Home Ins. Co. v. Chicago & Northwestern Transp. Co.*, 56 F.3d 763, 767 (7th Cir. 1995)). The court will not "construe the contract contrary to the plain and obvious meaning of the language." *M X L Indus. v. Mulder*, 252 Ill. App. 3d 18, 29 (2d Dist. 1993) (citing *Johnstowne Centre P'ship v. Chin*, 99 Ill. 2d 284, 287 (1983)).

Aspen Thorn argues that the Agreement unambiguously creates an option to purchase the Retail Area, which is distinct from the Secured Obligations and its exclusive remedies. Resp. pgs. 12-13. It claims that any other interpretation would render an absurd and unfair windfall to the Purchaser, because "the Purchaser could unilaterally defeat the Seller's Purchase Option by intentionally breaching its Secured Obligations, even by missing the deadline by a single month or even a day." Resp. pg. 12. However, the Purchaser achieved no windfall in this case by breaching its Secured Obligations, because the breach gave the Seller the right to collect on its security in the amount of $2.5 Million. Compl. Ex. A ¶15(c). The Agreement clearly contemplated the Secured Obligations together with the Purchase Option. Compl. Ex. A ¶¶ 15-16. As discussed further below, the Agreement must be read as a whole, and the provisions for security on the Secured Obligations sufficiently ensured that the Purchaser did not receive an unjust windfall by failing to construct the Retail Area on time.

II. The Purchase Option Expired After the Retail Area Could No Longer be "Deemed Completed."

Defendant asserts that the Agreement failed to expressly extinguish the Purchase Option through the passage of time, and that this court cannot "add another term about which the agreement is silent." Resp., pg. 8. However, as a matter of law, an option to purchase must leave the option open at a fixed price *within a time certain. Bruss v. Klein*, 210 Ill. App. 3d 72, 79 (2d Dist. 1991); *see also Wolfram P'Ship v. Lasalle Nat'l Bank*, 328 Ill. App. 3d 207, 216 (1st Dist. 2001). This court must construe the contract to provide for some expiration of the option, in order for it to survive as a valid option to purchase under Illinois law.

The Agreement reads as follows:

> Purchaser hereby grants Seller the Option to Purchase ("Purchase Option") the Retail Area shown in Exhibit F, together with the certain

> common rights to be established pursuant to the REOA, as hereinafter defined, at a Purchase Price of Three Million Three Hundred and Fifteen Thousand Dollars ($3,315,000) ("Retail Purchase Price") on a date that is not later than ninety (90) days after the Retail Area and the Garage shall be deemed completed as provided in Paragraph 15 hereof.

Compl. Ex. A ¶16(a). This language unambiguously grants the Seller a right to purchase a specific area of a specific building, conforming to some specific plan. Such an option could only vest if the Retail Area were built according to the terms of the Agreement. It does not and cannot, as a matter of contract construction, grant the Seller an eternal right to purchase any retail area that may ever be erected on the Property. *See Bruss*, 210 Ill. App. 3d at 79 (purchase options must expire "within a time certain").

Despite Aspen Thorn's repeated urging that this court must read paragraphs 15 and 16 as entirely separate obligations and rights (D.'s Mot. pg. 10), a court interprets a contract "as a whole." *Srivastava v. Russell's Barbecue, Inc.*, 168 Ill. App. 3d 726, 730 (1st Dist. 1988); *see e.g. Omnitrus Merging Corp. v. Ill. Tool Works*, 256 Ill. App. 3d 31, 34 (1st Dist. 1993). As such, contrary to Aspen Thorn's argument, paragraphs 15 and 16 must be read in harmony, and not so as to render the meaning of either absurd. *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 20. This court, therefore, looks to definitions provided in paragraph 15 to determine the time limit on the Purchase Option imposed in paragraph 16.

The time limit imposed in paragraph 16 of the Agreement—"a date that is not later than ninety (90) days after the Retail Area and the Garage shall be deemed completed"—is the only discernable time limit on the Purchase Option, and expressly refers to paragraph 15 to determine when the construction is "deemed completed." Compl. Ex. A ¶16(a). According to paragraph 15, the Retail Area and Garage are "deemed completed" only when "the Architect who prepared the plans and specifications for the Development certifies that the Retail Area has been completed in substantial accordance with the plans and specifications attached hereto as Exhibits E, F and G"; when Benihana accepts the completion in writing; and when the Purchaser acquires all necessary permits. Compl. Ex. A. ¶15(b)(i)-(iii). That provision also requires that the Purchaser "shall complete the Retail Area and the Garage on or before . . . December 1, 2008." Compl. Ex. A. ¶ 15(b).

The Agreement makes the Retail Completion Date mandatory in the same clause of the Agreement that defines when the Retail Area and Garage are "deemed completed." Compl. Ex. A. ¶ 15(b). Paragraph 15 also provides security for the Purchaser's obligations—including the December 1, 2008 construction deadline—and the Seller had a "sole remedy" for the Purchaser's failure to satisfy those obligations. Compl. Ex. A. ¶ 15(c). When the construction was not completed by the

Retail Completion Date, the Purchase Option expired by its own terms and the Seller's right to enforce its sole remedy vested. Compl. Ex. A. ¶ 15(c).

The Agreement clearly contemplated a correlation between the Purchase Option and the remedy for breach of the Secured Obligations, because the payout to the Seller was identical ($2.5 Million) whether the Purchaser breached the Secured Obligations or the Seller opted not to exercise its Purchase Option. The Seller gained the right to enforce its remedy against the Purchaser by selling the Purchaser's security collateral upon default of the Secured Obligations. The Purchaser was not "rewarded for its breach" by the extinguishment of the Purchase Option, but instead lost its security collateral simultaneously with the Purchase Option's extinguishment. D.'s Mot. pg. 12.

The Purchase Option in the contract before the court clearly expired when the Purchaser failed to perform its obligations to complete construction of the Retail Area before December 1, 2008. Therefore, W.E. Holdings' motion for judgment on the pleadings is granted, and Aspen Thorn's cross motion for judgment on the pleadings is denied.

WHEREFORE, FOR THE FOREGOING REASONS, IT IS HEREBY ORDERED:

1) Plaintiff 9 West Erie Holdings, LLC's motion for judgment on the pleadings is granted.

2) Defendant Aspen Thorn, LLC's motion for judgment on the pleadings is denied.

3) The Purchase Option contained in the Agreement was extinguished when Buyer failed to "complete the Retail Area and the Garage on or before December 1, 2008." Aspen Thorn thus has no option to purchase any newly-constructed buildings or fixtures on the Property under the Agreement.

Judge Jean Prendergast Rooney

AUG - 6 2014

Circuit Court – 2044

ENTERED: Aug 6, 2014

JUDGE JEAN PRENDERGAST ROONEY

I hereby certify that the document to which this certification is affixed is a true copy.

Date DOROTHY BROWN AUG 2 0 20

Dorothy Brown
Clerk of the Circuit Court
of Cook County, IL

CIRCUIT COURT OF COOK COUNTY, ILLINOIS