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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JF & LN, LLC, Appellant/Cross-Appellee, v. ROYAL OLDSMOBILE-GMC TRUCKS COMPANY and THE BEST RESTAURANT ON 41, LLC, Appellees/Cross-Appellants.	)	Case No. 2D18-523

Opinion filed February 28, 2020.

Appeal from the Circuit Court Sarasota County; Brian Iten, Judge.

Anne Willis Chapman and Charles F. Johnson of Blalock Walters, P.A., Bradenton, for Appellant/Cross-Appellee.

David A. Wallace of Bentley & Bruning, P.A., Sarasota; and M. Lewis Hall, III, of Williams Parker, Sarasota, for Appellee/Cross-Appellant Royal Oldsmobile-GMC Trucks Company.

No appearance for Appellee The Best Restaurant on 41, LLC.

CASANUEVA, Judge.

JF & LN, LLC appeals, and Royal Oldsmobile-GMC Trucks Company cross-appeals, a final judgment entered after a five-day bench trial. To resolve the

primary issues raised in this case's appeal and cross-appeal, we are required to examine the language set forth in a written lease and its exhibit entitled "Option to Purchase Rider." Based upon our resolution of the issues presented, we affirm in part, reverse in part, and remand.

FACTS

In 2010, Royal Oldsmobile-GMC Trucks Company (hereinafter identified as "Royal") owned property located south of downtown Sarasota and agreed to lease the property to The Best Restaurant on 41, LLC (hereinafter identified as "Best Restaurant"). The lease was executed in September 2010 for a five-year term, and it provided that Best Restaurant could renew the lease at the end of the term for three additional five-year terms if Best Restaurant was not in default at the time of its election to renew the lease. The lease also gave Best Restaurant an option to purchase the property. The property's prior use had been as an automobile dealership, and the parties contemplated that Best Restaurant would use the property for a restaurant and hotel. In pursuit of that goal, Best Restaurant undertook and completed substantial improvements to the property.

The lease prohibited Best Restaurant from assigning or subletting the lease without the prior written consent of Royal. However, on January 21, 2015, without the prior written approval of Royal, Best Restaurant and JF & LN, LLC, executed an assignment of the lease and an assignment of the option to purchase, which provided for JF & LN to step into the shoes of Best Restaurant. Best Restaurant remained in possession of the property, and thus, the assignment of lease was never acted upon.

On February 24, 2015, Best Restaurant gave Royal a formal written

notice of its intent to exercise the option to purchase, along with a cashier's check in the amount of $100,000.[1] Royal claimed that Best Restaurant could not exercise the option because Best Restaurant was in default. The default arose from two checks that were returned for insufficient funds in February 2015−one for rent and one for ad valorem tax escrow. Best Restaurant sent Royal valid replacement checks to cure the default, and Royal accepted the checks. However, in March 2015, Royal returned to Best Restaurant the cashier's check related to the option to purchase. In the weeks that followed, there were more problems with returned checks that were thereafter replaced with valid checks.

On April 30, 2015, Royal announced that it accepted Best Restaurant's election to exercise the option to purchase. The parties could not agree on the fair market value of the property, so the appraisal process began on the option to purchase. Best Restaurant chose Richard W. Bass as its appraiser, and he asserted that the property's value was $3,713,264. Royal selected Randall Planthaber of BeShears and Associates as its appraiser, and he asserted that the property's value was $5,440,000.

However, Best Restaurant's checks for the amount due in July for rent and ad valorem taxes were returned for insufficient funds. In response, Royal declared that Best Restaurant was in default and it terminated the lease and option to purchase on July 27, 2015. Although Best Restaurant presented Royal with checks in an attempt to cure the default, Royal rejected those checks.

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[1]Best Restaurant had previously notified Royal of its intent to exercise the option to purchase the property in August 2014. Royal responded that the option to purchase could not be exercised because the lease was in default.

On August 6, 2015, Royal filed a complaint for breach of contract or in the alternative, for declaratory judgment. In its second amended complaint, Royal alleged a claim for breach of contract based on Best Restaurant's failure to pay rent, a claim for occupation and use seeking rent and a writ of attachment on the goods and chattels of Best Restaurant, and two claims for declaratory judgment seeking: 1) an order requiring Best Restaurant to obtain a new appraisal of the property; or 2) an order finding that the lease and option to purchase had expired. JF & LN was allowed to intervene in the case. As to the claim that Best Restaurant was required to obtain a new appraisal, Royal alleged that Mr. Bass's appraisal contained improper deductions and methodologies to determine the fair market value of the property.

Best Restaurant and JF & LN filed a two-count counterclaim. The first count sought a declaratory judgment that Best Restaurant could act as agent for JF & LN, that JF & LN may purchase the property, that JF & LN may appoint a third appraiser to value the property, and that Royal must sell the property to JF & LN. The second count alleged a claim for tortious interference with an advantageous business relationship.[2]

After a five-day bench trial, the trial court entered a final judgment finding in favor of Best Restaurant and JF & LN as to all claims except the claim for declaratory

[2]Best Restaurant filed a second amended counterclaim "as agent of the assignee JF & LN, LLC and for itself in the event [the trial court determined] the assignment to JF & LN, LLC is not effective." It sought a declaratory judgment that Best Restaurant could act as agent for JF & LN, that Best Restaurant had no obligation to notify Royal of the assignment of the option, that JF & LN may purchase the property, that Best Restaurant may appoint a third appraiser to value the property, and that Royal must sell the property to JF & LN. The second count alleged a claim for tortious interference with an advantageous business relationship.

judgment relating to Mr. Bass's appraisal of the property. The court found that his appraisal should be adjusted to $3,713,264 based on the intent of the parties to the option to purchase and the language of the option. The court also found that Mr. Bass and Royal's new appraiser, David BeShears,[3] must appoint a third qualified appraiser to evaluate the property.

Pertaining to its ruling in favor of Best Restaurant and JF & LN in their claim for specific performance under the option to purchase, the court found that Mr. Bass's appraisal of $3,713,264 and Mr. BeShears' appraisal of $5,440,000 were the pertinent appraisals under the option to purchase. As noted above, the court directed that Mr. Bass and Mr. BeShears appoint a third appraiser to examine the property and that the average of the three appraisals would establish the fair market value of the property. The trial court further directed that after the appraisal is completed, the parties must move forward with the closing as contemplated by the option to purchase. The trial court denied the remaining relief sought by the counterclaim.

We conclude that the trial court erred in ruling that Royal's selected appraiser, Mr. Planthaber, did not meet the requirements provided in the option to purchase. Therefore, because the appraiser was qualified, we do not find merit in JF & LN's argument on appeal that it should have been permitted to choose an appraiser for Royal. We also conclude that the trial court correctly found that Best Restaurant was not required to obtain Royal's written consent before assigning the option to purchase to JF & LN and do not find merit in Royal's cross-appeal regarding this issue. However,

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[3]David BeShears replaced Randall Planthaber as Royal's appraiser for reasons discussed below.

we agree with Royal's argument in its cross-appeal that the trial court erred in finding that it breached the implied covenant of good faith by filing a complaint for declaratory relief. Finally, we also agree with Royal's argument in its cross-appeal that the trial court erred in finding in favor of Best Restaurant and JF & LN in their claim for specific performance and in ordering the parties to move forward with the closing as contemplated by the option to purchase. The resolution of the above issues renders the additional points raised by the appeal and cross-appeal moot.

DISCUSSION

I. Royal's Appraiser Mr. Planthaber

Among the contractual duties to be performed after the option to purchase was properly exercised was the designation of an appraiser should the parties, as here, fail to agree upon the fair market value of the property. The fair market value is the agreed upon purchase price.

Paragraph four, subsection (G) of the option to purchase identified the requirements to be an appraiser of the property to be sold. The paragraph stated: "Each appraiser shall be a Florida licensed real estate appraiser and shall have at least 10 years [of] experience in commercial properties in Sarasota, Florida."[4] Royal selected Randall Planthaber as its appraiser. In the final judgment, the trial court agreed with JF & LN and Best Restaurant that Mr. Planthaber was not a qualified appraiser under the above paragraph because he first became a state certified general real estate appraiser

[4]The meaning of "Sarasota, Florida" is not an issue here. Sarasota is not only the name of a municipality but also the name of the county in which it is located.

in 2007. Therefore, as of the summer of 2015, Mr. Planthaber did not have ten years of experience.

However, the trial court disagreed with JF & LN and Best Restaurant's assertion that, because Royal did not choose a qualified appraiser, they could appoint an appraiser on behalf of Royal. JF & LN and Best Restaurant based their argument on subsection (E) of paragraph four, which provides that "[i]f either party fails to appoint an appraiser in the manner and within the time frame described above, then the other party may by written notice to the first party appoint an appraiser on behalf of the first party." The trial court held that "[w]hile Planthaber is not qualified, his lack of the necessary qualifications did not cause Royal Olds to forfeit its right to select another appraiser . . . ." While we agree that Royal did not forfeit its contractual right to select an appraiser, we disagree with the trial court's interpretation of the contract pertaining to the required qualifications of an appraiser.

We review the trial court's construction of a contract de novo. On Target, Inc. v. Allstate Floridian Ins. Co., 23 So. 3d 180, 182 (Fla. 2d DCA 2009). Here, the trial court concluded that paragraph four (G) required an appraiser to have ten years of experience in commercial properties while being, at the same time, a Florida licensed real estate appraiser. We conclude that is not what the provision requires. Key to the analysis, in our view, is the conjunction "and," which is defined in Black's Law Dictionary as "[a] conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first." Black's Law Dictionary 86 (6th ed. 1990). Black's indicates that "it is said that there is no exact synonym of the word in English, it

has been defined to mean 'along with,' 'also,' 'and also,' 'as well as,' 'besides,' 'together with.' " Id. (quoting Oliver v. Oliver, 149 S.W.2d 540, 542 (Ky. 1941)).

The use of the conjunction "and" is discussed in Reading Law: The Interpretation of Legal Texts. ANTONIN SCALIA & BRYAN A. GARNER, Reading Law: The Interpretation Of Legal Texts 116 (Thomson/West, 1st ed. 2012). The authors write, "*and* combines items." Id. Further, "[a] common interpretative issue involves the conjunction *and*, which (if there are two elements in the construction) entails an express or implied *both* before the first element." Id. at 117.

Applying Black's Law first, the appraiser requirement would read:

> Each appraiser shall be a Florida licensed real estate appraiser
> [along with/as well as]
> shall have at least 10 years experience in commercial properties. . . .

Applying the interpretive rule of Scalia and Garner, the provision would read:

> Each appraiser shall be [both] a Florida licensed real estate appraiser
> and
> shall have at least 10 years experience in commercial properties. . . .

We conclude the provision at issue must be read as imposing two requirements: first, the appraiser must be a Florida licensed real estate appraiser, and second, the appraiser must possess ten years of experience in commercial properties in Sarasota, Florida. Royal's selection of Mr. Planthaber met the contractual requirements. To the extent the trial court's holding conflicts with this construction, we reverse.

II. Consent to Assign Option

Royal argues in its cross-appeal that the trial court erred in finding that Best Restaurant was not required to obtain Royal's written consent before assigning the option to purchase to JF & LN. Royal contends that the language of the lease requiring the "prior written consent of [the] Landlord" was engrafted onto the option thus rendering the assignment from Best Restaurant to JF & LN void. The trial court ruled that "[a] lease involves an ongoing relationship between a landlord and a tenant, while an option to purchase does not. . . . With the Lease, its plain language explains that an assignment of same without the written consent of the Landlord 'shall be void.' The Option, by comparison, has no parallel language." We agree with the trial court's ruling.

The lease and the option to purchase were executed on the same day by Royal and Best Restaurant. "The law is well established that two or more documents executed by the same parties, at or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract." Citicorp Real Estate, Inc. v. Ameripalms 6B GP, Inc., 633 So. 2d 47, 49 (Fla. 3d DCA 1994); see also Rios v. Quiala, 279 So. 3d 1244, 1246 (Fla. 3d DCA 2019).

Paragraph twenty of the lease is titled "Assignment and Subletting" and it provides in pertinent part: "[T]his Lease may not be assigned or sublet in whole or in part without the prior written consent of Landlord, which consent may not be unreasonably withheld, and any attempted assignment or subletting of this Lease of any of the Premises without such written consent shall be void." The lease contains a clause in paragraph thirty-eight that notes that an option to purchase rider is attached to the lease and "the terms and conditions contained therein are made a part hereof."

The option to purchase rider describes the actions the buyer must take in order to exercise the option in paragraph three. It provides that "[i]n order to exercise the Option, Buyer must notify Seller in writing of Buyer's election to exercise the Option ('Buyer's Election') at any time during the term of the Option."

Again, our standard of review of a contractual provision is de novo. On Target, Inc., 23 So. 3d at 182. "Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning." Gulliver Sch., Inc. v. Snay, 137 So. 3d 1045, 1047 (Fla. 3d DCA 2014) (quoting Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A., 771 So. 2d 628, 631 (Fla. 4th DCA 2000)); see also Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995).

We agree with the trial court's construction of the pertinent provisions of the lease and the option. Paragraph twenty of the lease specifically refers to the lease and can only be read in context as applying to the lease. It states, "this Lease may not be assigned . . . without the prior written consent of Landlord." The provision discusses in further detail conditions that may occur should the lease be assigned. We note that paragraph twenty also prohibits an assignment of the lease should the tenant be in default.

Although paragraph thirty-eight of the lease specifically provides "the terms and conditions contained [in the option to purchase] are made a part hereof," this section does not incorporate any of the lease's terms into the option to purchase. Nor can a voiding provision be located in the pertinent written provisions of the option to purchase. The manner of exercising this option is merely for the buyer to "notify Seller

in writing of Buyer's election to exercise the Option." Moreover, paragraph twelve (D) of the option recites that the written option is the "entire agreement." And paragraph twelve (I) provides that the option is binding on certain designated parties, including "assigns." Although the option, by this language, contemplates the possibility of an assignment, no restrictive or voiding language relevant to assignment can be found. Therefore, on this issue, we affirm the trial court.

III. Breach of Implied Covenant of Good Faith

The trial court ruled in the final judgment that Royal "breached its implied covenant of good faith and fair dealing." Royal argues in its cross-appeal that the trial court erred in finding that it breached the implied covenant of good faith by filing a complaint for declaratory relief. We agree.

In the final judgment, the trial court made three salient findings. First, the trial court found that "[t]he ability to exercise the Option was never contingent on the Tenant not being in default." We later address the default issue. Second, the court found that the delay can be attributed to Royal's ill-advised selection of Mr. Planthaber as its initial appraiser. This finding fails. We noted in a prior section that the contractual interpretation utilized by the trial court to determine the necessary qualification of an appraiser under the contract was erroneous. Royal's selection of Mr. Planthaber met the contractual requirements.

Third, the trial court found that Royal improperly rejected Dale Hayes' appraisal services. Mr. Hayes was a third appraiser selected to evaluate the property.[5]

[5]A third appraisal was required pursuant to paragraph four (F) of the option because there was more than a ten percent difference between the first two appraisals.

Before Mr. Hayes could conduct an appraisal, Royal objected and withdrew its agreement to his appointment. The trial court found that this rejection of Mr. Hayes, coupled with Royal's filing of its initial complaint for declaratory relief, "clearly establish that [Royal] breached its implied covenant of good faith and fair dealing."

Initially, we note the trial court awarded, in part, relief to Royal pursuant to its action for declaratory relief. We next discuss the implied covenant. "The implied covenant of good faith exists in virtually all contractual relationships." Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. 2d DCA 2005) (quoting Sepe v. City of Safety Harbor, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000)). "Its purpose is to protect the reasonable expectations of the contracting parties." Id. (citing Cox v. CSX Intermodal, Inc., 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999)). Like most rules, it comes with limitations.

Claims involving the implied covenant have two limitations: "(1) where application of the covenant would contravene the express terms of the agreement; and (2) where there is no accompanying action for breach of an express term of the agreement." QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, 94 So. 3d 541, 548 (Fla. 2012) (citing Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001)). The first limitation logically follows because the implied covenant is not an independent contractual term. Rather, its operation attaches to the performance of a specific contractual provision. Snow, 896 So. 2d at 792.

We also note that the implied covenant cannot be utilized to create a breach where there has been no breach of an express term of the contract. Generally then, the matter of an ulterior motive is of no relevance. If the contract granted a party a

right, nothing more is required. "[T]he duty of good faith performance does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not." Id.

Here, Royal did not breach the contract by selecting its initial appraiser nor did it breach the contract by filing a declaratory relief action in which it prevailed, at least in part. We reverse the trial court's determination that the implied covenant of good faith was breached.

IV. Specific Performance Under the Option to Purchase

Next, we address whether there has been a breach of the parties' contract sufficient to obviate Royal's duty to perform. This court has held that the three elements of an action for a breach of contract are: "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." Rollins, Inc. v. Butland, 951 So. 2d 860, 876 (Fla. 2d DCA 2006). Later, we identified the three elements for a cause of action for breach of contract as: "(1) a valid contract, (2) a material breach,[6] and (3) damages." Havens v. Coastal Fla., P.A., 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013); accord Nat'l Collegiate Student Loan Tr. 2006-4 v. Meyer, 265 So. 3d 715, 719 (Fla. 2d

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[6]Regarding the element of materiality, note Hostway Services, Inc. v. HWAY FTL Acquisition Corp., 2010 WL 3604671, at *9 (S.D. Fla. 2010), where District Judge Cohn wrote:

> Because the materiality requirement appears to be the result of spontaneous generation, the Court is reluctant to require an aggrieved party to prove a "material breach" to establish a breach of contract under Florida law. Indeed, this Court has found no case where the Supreme Court of Florida has held that a party must prove a material breach to prevail in a breach of contract action.

See also John G. Crabtree, *The Material Difference in Florida Contract Law*, Fla. B.J., Mar. 2016, at 36.

DCA 2019); Ferguson Enters., Inc. v. Astro Air Conditioning & Heating, Inc., 137 So. 3d 613, 615 (Fla. 2d DCA 2014); Havens v. Coast Fla., P.A., 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013); Deauville Hotel Mgmt., LLC v. Ward, 219 So. 3d 949, 953 (Fla. 3d DCA 2017).

The essential factual elements for a breach of contract action are expressed in the standard jury instructions for contract and business cases somewhat differently. Instruction 416.4 requires a plaintiff in a breach of contract action to prove the following: 1) the parties entered into a contract; 2) the plaintiff "did all, or substantially all, of the essential things which the contract required" the plaintiff to do unless he or she was excused from doing those things; 3) "all conditions required by the contract for (defendant's) performance had occurred"; 4) the defendant "failed to do something essential which the contract required [the defendant] to do"; and 5) the plaintiff was harmed by the failure. Fla. Std. Jury Instr. (Cont. & Bus.) 416.4.

When focusing on the breach of the contract, not every breach permits the nonbreaching party to cease performance. Instead, the failure to perform the contractual obligation must be central to the contract or, in other words, material. To determine whether the conduct rose to the level of a "material breach," we must look to the language of the contract and measure the breaching party's shortfall or failure in performance.[7] As stated by our sister court, "To constitute a vital or material breach a defendant's nonperformance must be such as to go to the essence of the contract; it must be the type of breach that would discharge the injured party from further contractual duty on his part." Beefy Trail, Inc. v. Beefy King Intern., Inc., 267 So. 2d

[7]See Brian A. Blum, Contracts § 17.3.2, at 578 (4th ed. 2007).

853, 857 (Fla. 4th DCA 1972). A trivial noncompliance or minor failure to perform is not a material breach. Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 960 (Fla. 5th DCA 2015).

Our examination begins with the pertinent contractual provisions at issue here. First to be examined are the provisions of the option to purchase rider. Best Restaurant was expressly granted "an exclusive option to purchase" the real property described in the option. To become a binding agreement or contract of sale, Best Restaurant was required to perform the conditions and terms primarily set forth in paragraphs four and six. Pursuant to paragraph six of the option to purchase, Best Restaurant was to pay a fair market value for the property and close on the transaction within "20 days from the date the purchase price is determined under paragraph 4 of this Option to Purchase."

The option to purchase was a rider to the lease. The lease, too, contained provisions relating to the option to purchase, particularly paragraph thirty-eight, which is titled "Option to Purchase" and provides in part: "If Tenant exercises the Option to Purchase, the term of this Lease shall be extended to the date of closing, and Tenant shall continue to pay prorated rent hereunder to the closing date." On April 30, 2015, Royal announced that it accepted Best Restaurant's election to exercise the option to purchase. However, Best Restaurant's checks for the amount due in July for rent and ad valorem taxes were returned for insufficient funds. In response, Royal declared that Best Restaurant was in default and it terminated the lease and option to purchase on July 27, 2015. Although Best Restaurant presented Royal with checks in an attempt to cure the default, Royal rejected those checks. We conclude that the breach by reason

of the timely failure to pay rent was a material breach of the underlying lease sufficient to permit the cancellation of the option to purchase. Therefore, the trial court erred in finding in favor of Best Restaurant and JF & LN in their claim for specific performance and in ordering the parties to move forward with the closing as contemplated by the option to purchase.

Accordingly, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Affirmed in part; reversed in part; remanded.

LUCAS and BADALAMENTI, JJ., Concur.