STATE OF INDIANA
COUNTY OF HOWARD

IN THE HOWARD CIRCUIT COURT
CAUSE NO. 34C01-2410-PL-003718

CITY OF KOKOMO,

Plaintiff/Counterclaim Defendant,

Vs.

MKE BASEBALL, LLC, and

Defendant,

KOKOMO BASEBALL, LLC,

Defendant/Counterclaim Plaintiff.

NORTHWOODS LEAGUE, INC.,

Intervenor.

ENTERED
FEB 24 2025
HOWARD CIRCUIT COURT

ORDERS RE: MOTIONS FOR SUMMARY JUDGMENT

Plaintiff and Counterclaim Defendant City of Kokomo (herein "City" or "Kokomo") filed its motion for summary judgment with designation of evidence on January 6, 2025, a response in opposition to Kokomo Baseball's motion for summary judgment filed January 20, 2025, and a motion to strike Northwoods League, Inc.'s untimely motion for summary judgment on January 27, 2025. Defendant Kokomo Baseball, LLC (herein "Kokomo Baseball" or "Baseball Entity") filed its motion for summary judgment with memorandum of law and designation of evidence on January 6, 2025, and a memorandum of law in response and opposition to the City's motion for summary judgment on January 21, 2025. Intervenor Northwoods League, Inc. (herein "Northwoods League") filed its intervenor's concurrence with defendant's motion for summary judgment on January 20, 2025, and response to plaintiff's motion to strike concurrence on January 28, 2025. On January 30, 2025 at a hearing, the City of

Kokomo appeared by counsel Blake Burgan and Julia Ware, Kokomo Baseball, LLC appeared by counsel Minh Wai, and Northwoods League, Inc. appeared by counsel Samuel Gilbertson; and at that hearing, arguments were submitted and concluded. The court having considered the motions, memoranda, designated evidence, and responses filed, the arguments submitted, the record, and applicable law, herein enters its findings and Orders.

1. On July 11, 2014, the City of Kokomo and MKE Baseball, LLC, by their respective agents and representatives, entered into a written agreement titled Baseball Stadium Use Agreement (herein "Agreement"). Several months later, on November 1, 2014, MKE Baseball, LLC assigned its interest in the Agreement to Kokomo Baseball, LLC ("Baseball Entity"). The Agreement provided terms for the use of the City's municipal baseball stadium by a summer league baseball team owned by Kokomo Baseball, LLC known as the Kokomo Jackrabbits.
2. Section Two of the Agreement titled "Term" provides that the initial five year term of the Agreement would commence October 1, 2014 and end on September 30, 2019. Regarding renewals of the Agreement's Term, section A provides as follows: "Baseball Entity shall have the exclusive right to renew this Agreement for another two (2) additional five-year term [sic]. The Baseball Entity and the City may enter into one (1) additional five-year term with the approval of both parties." Section C provides "Baseball Entity shall exercise its right of renewal by written notice to the City, delivered no later than 90 days prior to the conclusion of the then current Term."

3. The parties to the Agreement negotiated and entered into two addenda, in June 2018 and December 2019, respectively. The addendum in 2018 added the Northwoods League as a party to the Agreement and provided that if the City terminated the Agreement pursuant to section 25 (Baseball Entity's bankruptcy, insolvency, or default), the City had to provide notice to the Northwoods League. The addendum in 2019 modified section 9 (permitted uses) including the schedule of the baseball season (May 1 through August 31 each year); and amended sections 6 (operation and maintenance), 17 (alterations and improvements), and 19 (utilities). Neither addendum altered Section Two provisions regarding the Term of the Agreement.
4. On June 26, 2019, Michael Zimmerman, owner of Kokomo Baseball, LLC (Baseball Entity) and holding company ROC Ventures sent to Kokomo Mayor Greg Goodnight a written notice of renewal of the Agreement for an additional five (5) year term. Said notice referenced Section Two of the July 11, 2014 Baseball Stadium Use Agreement to invoke and renew the Agreement with the City for an additional five (5) year term.
5. The 2019 Notice of Renewal sent by Michael Zimmerman on behalf of the Baseball Entity extended the term of the Agreement to September 30, 2024.
6. Pursuant to the 2014 Agreement and the 2019 renewal, over the course of nearly ten (10) years, the Kokomo Jackrabbits baseball team played and hosted game events utilizing the City's stadium through the 2024 baseball season.
7. Pursuant to the Agreement's provisions, specifically Section Two, the Baseball Entity had the exclusive right to extend the Agreement for an additional five (5)

year term by sending a written notice of renewal to the City by ninety (90) days before the end of the Agreement's term, September 30, 2024, to-wit: by July 2, 2024.

8. On April 24, 2024, Nathan Martin, manager of Kokomo Baseball, LLC sent an email with a subject heading "ROC Ventures + City of Kokomo" to Mayor Tyler Moore, Michael Zimmerman, and others requesting to set up a meeting. Nathan Martin's email stated: "I just wanted to send over this email to see what a good time would for all of use to hop on a zoom/teams call to discuss the future with ROC and City of Kokomo. Lease renewal, future plans and etc. The week that works best would be May 6th – 10th, May 13th -17th…" Within a few days of receiving this email, Mayor Moore, Michael Zimmerman, Nathan Martin and others agreed upon and confirmed a meeting day and time for May 17, 2024.
9. There had been similar meetings scheduled and held prior to the baseball season in previous years in which individuals from the City administration and Kokomo Baseball LLC attended. (Tyler Moore deposition, p. 19-20).
10. On May 17, 2024, agents and representatives of the City and Kokomo Baseball, LLC, including Mayor Tyler Moore and Michael Zimmerman (the latter by Zoom) participated in a meeting. There was no written or formal agenda for the meeting, and there was no recording taken of the meeting.
11. When asked what was discussed at the meeting, in his deposition, Michael Zimmerman stated "I recall it was a - - to discuss our renewal. The open items in the lease, i.e. the hop yard, to discuss ownership and my desire and I think the City's desire to bring in more localized ownership and other programming outside

of the stadium, and then also any –if the City had any updates. I believe we also talked about, you know, some promotions that maybe worked or didn't work from the year past. It was very much a looking forward meeting than anything." (Michael Zimmerman deposition, p. 38). When asked as to what was specifically discussed about a renewal of the lease, Mr. Zimmerman stated "I mean, I don't remember the specific words, but can confidently say that I was very clear around our intent, desire to keep moving forward, and that we are renewing the lease." (Id. p. 39).

12. According to Michael Zimmerman, at the meeting of May 17 he was wanting the City to revise some of the terms of the agreement, specifically the maintaining of the hop yard. (Id. p. 26). In his deposition testimony, Mr. Zimmerman reiterated that from his perspective, Kokomo Baseball had renewed its lease in April and verbalized it in May during the meeting, "and as part of that discussion, we asked that they go back and make any modifications and include and sort of reaffirm their obligation under the current agreement." Id. p. 26.

13. When asked what was discussed at the meeting during his deposition, Mayor Tyler Moore responded "[T]hat there were still items and items at the stadium and concerns with the organization's recent performances in recent years and how they would plan to address things going into the 2024 summer baseball season. " (Tyler Moore deposition, pp. 18-19). When asked what he meant by items that were still at the stadium that were discussed, Mayor Moore replied: "The ongoing discussion on the hop yard. The condition of items whether it's the

umbrella bar cover, the age of the turf, the lining - - I mean just overall maintenance issues." (Id.)

14. According to Mayor Moore, there were no discussions about terminating the use agreement after the 2024 baseball season (Id. p. 20). Mayor Moore recalled there were discussions of future plans in general by Kokomo Baseball, LLC for the stadium beyond the 2024 baseball season, as "[T]here were discussions on the possibility of concerts and other activities or events for the community." (Id. p. 20).

15. After the May 17, 2024 meeting, there were no formal meetings planned or held between representatives of the City and Kokomo Baseball, LLC. There were several emails exchanged between representatives concerning related topics such as the possibility of a concert at the stadium; however, none of the emails included written notice from Kokomo Baseball, LLC to the City that it intended to renew the Agreement past the current term ending September 30, 2024.

16. After the baseball season concluded in August 2024, the City replaced the turf, installed new lighting, and had a concrete ramp installed at the stadium at its cost, of which none of the work was done in coordination with Kokomo Baseball, LLC.. (Tyler Moore deposition, pp. 24-25).

17. On September 18, 2024, the City by its attorney sent Kokomo Baseball, LLC a notice that the Agreement would expire pursuant to its terms on September 30, 2024 since Kokomo Baseball, LLC had not provided a written notice renewing the Agreement by July 2, 2024. In its notice, the City stated it expected Kokomo Baseball, LLC to vacate the stadium premises by September 30, 2024.

18. On September 20, 2024, Kokomo Baseball, LLC by its attorney sent the City a letter in response asserting it had renewed the Agreement for an additional five (5) years by expressly advising the City of its intention to renew during the meeting of May 17, 2024. The letter also provided: ".. please consider this letter as formal notice that, as advised in May, 2024, the Baseball Entity invokes and otherwise renews the Agreement for an additional 5-year term, running through 2029."
19. On October 31, 2024, the City as plaintiff initiated this action by filing a Complaint seeking Declaratory Relief for the court to find the Agreement expired on September 30, 2024, and order the Baseball Entity (Kokomo Baseball, LLC and MKE Baseball, LLC) to quit and surrender the baseball stadium to the City.
20. On November 11, 2024, in response to the City's complaint, the defendant Kokomo Baseball, LLC filed a motion to dismiss, to compel arbitration, and for injunctive relief to maintain the status quo pending arbitration.
21. On November 11, 2024, Kokomo Baseball, LLC also filed counter-claims against the City demanding arbitration, seeking declaratory relief, specific performance, and alleging the City breached the Agreement in part by failing to allow a sixty (60) days cure period.
22. On November 14, 2024, Northwoods League, Inc. filed a motion to intervene, of which an order was entered granting the motion on December 5, 2024 after no objections were filed.
23. After coordinating a date with the parties' respective counsel, the court set a hearing for December 17, 2024 to hear evidence and argument on the

motions/claims to demand arbitration, specific performance, and grant an injunction.

24. On December 16, 2024, the day prior to the scheduled hearing, the respective counsel for the parties (City, Kokomo Baseball, LLC, and Northwoods League) contacted the court by telephone to jointly request the December 17th hearing be lifted as the parties agreed they would submit the issues to the court by way of motions for summary judgment as to the declaratory judgment relief each requested. These events and the court's scheduling order as to the filing of motions for summary judgment was reduced to a court order and entry entered upon the court's docket in this cause on December 17, 2024.

25. Subsequently, on December 18, 2024, Kokomo Baseball, LLC filed a motion to withdraw its motion to dismiss, compel arbitration, and for injunctive relief.

26. As agreed to during the December 16th telephone conference and pursuant to the court's order and entry, the plaintiff and defendants/intervenor would file its motions for summary judgment with designated evidence and supporting memorandum by January 6, 2025; responses to the motion(s) would be filed by January 21, 2025; and a hearing on the motions for summary judgment would be held January 30, 2025 at 9 a.m..

27. On January 6, 2025, the City and Kokomo Baseball, LLC filed its respective motions for summary judgment with supporting memorandum and designated materials. The City and Kokomo Baseball, LLC each filed responses to the opposing party's motions on January 21, 2025.

28. On January 20, 2025, intervenor Northwoods League filed its concurrence with defendant's motion for summary judgment. Subsequently, on January 27, 2025, the City filed a motion to strike Northwoods League's motion for summary judgment as untimely, to which Northwoods League filed a response on January 28, 2025.

29. On January 30, 2025, a hearing was held in which the court heard arguments on the motions for summary judgment, and the City's motion to strike intervenor's motion for summary judgment. The court took the motions under advisement pending a written order.

30. Summary judgment is appropriate if the designated evidentiary matters show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Ind. Trial Rule 56(C).* A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." Williams v. Tharp, 914 N.E.2d 756,761 (Ind. 2009).

31. The party moving for summary judgment bears the initial burden of demonstrating "the absence of any genuine issue of fact as to a determinative issue." *Id*. Thereafter, the burden shifts to the non-movant to present "contrary evidence showing a triable issue for the trier of fact." *Id*, at 761-762.

32. When ruling on a motion for summary judgment, the court must accept as true any rational assertion of fact and reasonable inferences therefrom and resolve

any doubt as to the existence of a fact or inference in favor of the non-moving party. Webb v. Jarvis, 575 N.E.2d 992,994-995 (Ind. 1991), *reh'g denied.*

33. "Questions such as contract interpretation are well-suited for summary judgment." Dixon v. Shiel Sexton Co., Inc., 196 N.E.32d 717, 719 (Ind. Ct. App. 2022). The interpretation of a contract is a question of law. Techna-Fit, Inc. v. Fluid Transfer Prods., Inc., 45 N.E.3d 399, 413 (Ind. Ct. App. 2015).

34. In interpreting a contract, the primary rule "first requires giving the words of the contract their plain and ordinary meaning." AM General LLC v. Armour, 46 N.E.3d 436,440 (Ind. 2015). Where the terms of a contract are clear and unambiguous, those terms are conclusive and the court must apply the contract provisions. Forty-One Assoc., LLC v. Bluefield Assoc., 809 N.E.2d 422,427 (Ind. Ct. App. 2004).

35. Here, the material facts regarding the terms of the Agreement are clear and unambiguous. The terms of the Agreement, Section Two, give the Baseball Entity, Kokomo Baseball, LLC, the exclusive right to renew the Agreement for an additional five year period beyond September 30, 2024. In order to exercise its right to renew, the Agreement required Kokomo Baseball, LLC as the Baseball Entity to provide written notice of its intent to renew the Agreement to the City at least ninety (90) days prior to the expiration of the Agreement, by July 2, 2024.

36. The written notice requirement is unambiguous and requires no interpretation. "[W]hen the language of a contract is unambiguous, the intent of the parties is determined from the four (4) corners of the instrument." N. Ind. Commuter Transp. Dist. V. Chicago SouthShore & S.Bend R.R., 744 N.E.2d 490,496 (Ind.

Ct. App. 2001); *trans denied*.. Michael Zimmerman owner and manager of Kokomo Baseball, LLC understood the Agreement's requirement for a written notice to renew in 2019 when he provided timely written notice to the City renewing the Agreement for five (5) years through September 2024. There are no facts or circumstances here that would establish the parties intended to waive the requirement of written notice to renew.

37. The relevant material facts of Kokomo Baseball's failure to provide written notice of renewal are also unambiguous. Prior to September 2024, there was no written notice from Kokomo Baseball, LLC to the City stating its intent to renew the Agreement for another five year term. Nathan Martin's April 2024 email requesting a meeting with the City to discuss "the lease" was only an invitation to set a meeting to discuss renewal and other topics. The language of the email falls woefully short of stating an intent to renew by merely listing "lease renewal" as one of the meeting topics.

38. Any verbal advisements made by Michael Zimmerman to the City's representatives at the May 17, 2024 meeting did not constitute "written notice" as required by the Agreement so to legally obligate both the City and the Baseball Entity to renew the Agreement. "[A]ctual or oral notice is insufficient to exercise an option where a party has failed to provide timely written notice. Michigan Wacker Associates, LLC v. Casdan, Inc., 100 N.E.3d 596,603 (Ill Ct. App. 2018).

39. The Indiana appellate court has held that strict compliance with the terms of a lease option to renew should be required. Carsten v. Eickhoff, 323 N.E.2d 664, 668 (Ind. Ct. App.. 1975). There are compelling policy reasons based upon

fairness and the realities of commercial transactions for requiring strict compliance. As with the Agreement here, the City as the lessor does not receive any consideration for agreeing to be bound by the lessee's Baseball Entity's exercise of the option to renew. "At the very least, the lessor ought to be able to demand that, when the parties have agreed on how the option will be exercised, the lessee will be held to that agreement." Thomson v. Learning Inc. v. Olympia Properties, LLC, 850 N.E.2d 314,322 (Ill. Ct. App. 2006).

40. Kokomo Baseball, LLC argues that despite the fact it failed to provide written notice of renewal as required by the Agreement, its failure to do so should be excused based upon equitable grounds. That argument fails as the designated evidentiary materials do not show evidence of fraud, accident, surprise, or mistake supporting equitable relief excusing Kokomo Baseball from providing written notice of renewal. Mr. Zimmerman, who owns twenty or more businesses, admitted he knew the Agreement required a written notice to renew. (Michael Zimmerman deposition, p. 35). He also admitted no one from the City said to him the written notice requirement was waived or would not be enforced. (Michael Zimmerman deposition, p. 44).

41. Moreover, in his deposition testimony, Mr. Zimmerman suggested that the failure to send a written notice of renewal was strategic. He stated he did not send a written notice of renewal after the May 17th meeting because he believed the City would propose changes to the agreement and it hadn't met its obligations as to maintaining the hop yard. "We were…we were waiting on proposed changes because the City didn't meet their obligations, and if they really had no intent of

doing the hop yard because that cost more money or doing some of the other things, that we were open to that. We've never - - we never got anything back." (Michael Zimmerman deposition, p. 52).

42. Kokomo Baseball, LLC also argues that the terms of the Agreement, specifically Section 26, allows it a sixty (60) day period and opportunity to cure and thus, its attorney's September 20, 2024 response of a written notice of renewal cured its failure to comply with the Agreement. Section 26 of the Agreement applies where either party "shall default in the performance of or compliance with any of the obligations of the said party to be performed under this Agreement..."

43. The Agreement defines default to apply only to situations where there has been a failure to perform an obligation under the Agreement. Here, Kokomo Baseball, LLC's failure to renew was not a failure to perform an obligation under the Agreement or a default, but a decision not to exercise its exclusive right to exercise an option to renew the Agreement for another five years. An option is a choice, not an obligation from which a failure to exercise is a default of the Agreement.

44. By Kokomo Baseball, LLC's failure to renew the Agreement by sending a timely written notice, the Agreement terminated under its own terms on September 30, 2024. The right to cure does not apply to Kokomo Baseball, LLC's failure to renew the Agreement as there was no default.

45. The City was not obligated by the Agreement to provide notice to the Northwoods League. The terms of the June 2018 addendum required the City to notify the League in the event the City terminated the Agreement under certain

conditions specified in section 25 (B) such as upon Kokomo Baseball's bankruptcy or insolvency, none of which apply here. Further, the City did not terminate the Agreement but the Agreement terminated on its own terms when Kokomo Baseball did not submit its timely written notice of renewal.

46. On November 14, 2024, Northwoods League, Inc. filed a motion to intervene pursuant to Ind. Trial Rule 24(A(2) and a concurrence with defendant Kokomo Baseball, LLC's motion to dismiss, compel arbitration, and for injunctive relief. On November 26, 2024, since no objection had been filed to the motion, the court indicated that it would grant the motion to intervene upon submission of a proposed order. Upon Northwoods League's submission of a proposed order, the court entered an order granting the League's motion to intervene as a party in this litigation on December 5, 2024.

47. Defendant Kokomo Baseball, LLC's motion to dismiss, compel arbitration and for injunctive relief (and Northwoods League's concurrence) became moot when the parties agreed for the court to lift the December 17 hearing and the defendant Kokomo Baseball agreed to withdraw its motion to dismiss, compel arbitration, and for injunctive relief. The parties including Northwoods League agreed to submit the issues to the court by way of motions for summary judgment on their respective requests for declaratory relief. The motion/briefing schedule was agreed upon by parties' counsel and memorialized by the court's order and entry entered December 17, 2024.

48. In accordance with the order, the City and Kokomo Baseball LLC filed their respective motions for summary judgment with supporting memoranda and

designated evidence on January 6, 2025, and then, their respective responses to opposing party's motions for summary judgment on January 21, 2025.

49. Intervenor Northwoods League filed its "concurrence with defendant's motion for summary judgment pursuant to Ind. R. Tr. P.56" on January 20, 2025, fourteen (14) days late.

50. On January 27, 2025, the City filed a motion to strike Northwoods League's motion for summary judgment based upon its untimeliness, and alleging it contained statements purportedly factual unsupported by designated evidence in violation of Trial Rule 56.

51. The court finds that the City's motion to strike is well taken. Northwoods League has been a party since the court entered its order granting the motion to intervene on December 5, 2024. Through its counsel, it participated in the telephonic conference agreeing to a summary judgment proceeding on the competing requests for declaratory judgment, and the setting of the summary judgment briefing schedule that took place on December 16, 2024. The court memorialized the schedule in its order and entered it in this cause's public record the next day. The schedule provided for a deadline of January 6 for the filing of motions for summary judgment by the parties including the intervenor so there would be sufficient time for the filing of responses due January 21, and then before oral argument held on January 30th.

52. Northwoods League's arguments that it should not have had to adhere to the schedule for the filing of its "concurrence" are not supported by either the record or by the Trial Rules. Under Trial Rule 16, the court can set enforceable

deadlines for the filing of dispositive motions, such as motions for summary judgment. It did so in this case after consultation and agreement by the parties' counsel, including counsel for intervenor Northwoods League during the telephonic conference on December 16, 2024.

53. Trial Rule 56 (b) which allows summary judgment motions to be filed at any time before the dispositive motion deadline expires does not apply to Northwoods League here, as that subsection specifically applies only to parties against whom a claim, counterclaim, cross-claim or declaratory judgment is asserted. Here, no such relief against Northwoods League by the plaintiff is sought, only as against Kokomo Baseball, LLC.. Furthermore, Northwoods League's untimely filing of its motion for summary judgment did not permit sufficient opportunity for the opposing party plaintiff to file a response prior to hearing.

54. The "concurrence" filed January 21, 2025 by Northwoods League is in actuality its own motion for summary judgment not simply a concurrence, as there are arguments and purported facts not included in defendant Kokomo Baseball, LLC's motion. Certain purported facts included in the motion are not supported by any designated evidence and as such, should be stricken. When ruling on a motion for summary judgment, the court can consider only properly designated evidence which would be admissible at trial. MLS Enterprises, LLC v. Norman, 209 N.E.3d 30, 34 (Ind. Ct. App, 2023). "Unsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence." Smith v. Delta Tau Delta, Inc., 9 N.E.3d 154,159 (Ind. 2014).

55. The court finds and orders that the "Intervenor's Concurrence with Defendant's Motion for Summary Judgment Pursuant to Ind. R. TR. 56" filed January 20, 2025 is struck as being untimely filed.

56. In summary, based upon the unambiguous language in the Agreement, the Baseball Entity, Kokomo Baseball, LCC was required to provide written notice to the City by July 2, 2024 if it wanted to exercise its exclusive right to renew the Agreement for the use of the Kokomo Municipal Stadium for another five years. Kokomo Baseball LLC did not provide timely written notice to the City. The City has not waived the Agreement's requirement of a timely written notice of renewal. The Agreement entered into on July 11, 2014 between the City of Kokomo and the Baseball Entity (Kokomo Baseball, LLC) terminated on September 30, 2024.

57. The court finds that the designated evidentiary matter shows that there is no genuine issue as to any material fact and the City is entitled to a finding as a matter of law that Kokomo Baseball failed to provide written notice to renew the Agreement, and that the Agreement terminated on September 30, 2024.

58. Based upon the foregoing, the court grants the City's motion for summary judgment and denies the Kokomo Baseball, LLC's motion for summary judgment.

59. The court expressly determines that there is no just reason for delay and directs entry of a grant and a denial of summary judgment from which the parties may take immediate appeal.

SO ENTERED THIS 24TH DAY OF FEBRUARY, 2025.



Lynn Murray, Judge
Howard Circuit Court

Distribution:

Blake J. Burgan, Esq.
Julia E. Ware, Esq.
Ricardo J. Aguirre, Esq.
Minh C. Wai, Esq.
Samuel Gilbertson, Esq.