2012 IL App (2d) 110469-U
No. 2-11-0469
Order filed March 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AUTOZONE DEVELOPMENT CORP. and AUTOZONE PARTS, INC.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	
v.	)	No. 09-MR-116
NORTHLAND MALL LIMITED PARTNERSHIP,	)	Honorable Bonnie M. Wheaton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court's ruling that the parties' lease was ambiguous was correct; the trial court's declaration that the parties intended for AutoZone to use the rear hallway for its deliveries was not against the manifest weight of the evidence, and the trial court's grant of a permanent injunction was affirmed.

¶ 1 Defendant, Northland Mall Limited Partnership, appeals from an order of the circuit court of Du Page County granting a declaratory judgment and permanent injunction in favor of plaintiffs, AutoZone Develpment Corporation and AutoZone Parts, Inc. (collectively AutoZone). For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 AutoZone is a retail auto parts dealer that sells its merchandise through stand-alone stores that it owns or stores it leases that are located in shopping malls throughout the country. Defendant owns a shopping center, the Northland Mall (mall), in Carol Stream, Illinois. On April 22, 2004, the parties entered into a lease for an AutoZone store in the mall. A dispute arose between the parties in approximately April 2008 over AutoZone's use of a "loading hallway," which is located at the rear of the AutoZone store. The hallway runs adjacent to other tenants of the mall, who also use the hallway, and terminates at double doors that open to the rear exterior of the mall. AutoZone, from the inception of its lease, used the "loading hallway" to bring its product from its semi truck into the back of its store on pallet jacks[1], a tool used to lift and move the pallets of materials, which are shrink-wrapped, can weigh up to a thousand pounds, and can reach up to seven feet in height. In April 2008, defendant demanded that AutoZone pay common area maintenance (CAM) fees for the use of the hallway. When AutoZone pointed out to defendant that its lease did not require the payment of CAM for the use of the hallway, defendant demanded that AutoZone cease using the hallway. In August 2008, defendant installed a "bollard," a concrete post, in the middle of the threshold of the double doors at the rear exterior of the mall between two other bollards, the effect of which was to prevent AutoZone's pallet jacks from entering the hallway through the double doors. The usual reason for bollards is to protect the building and fixtures from damage from motor vehicles.

[1]Defendant refers to the machine AutoZone used as a forklift. However, photographs in evidence show a manual pallet jack, which is a hand-powered jack.

¶ 4 On July 15, 2009, AutoZone filed suit against defendant. Count I sought a declaration that defendant's installation of the middle bollard breached AutoZone's express right under the lease to use the "loading hallway." Count I also sought a permanent injunction. Count II was for breach of contract and sought damages plus attorney fees under the lease. At the summary judgment stage of the lawsuit (AutoZone's motion for summary judgment), the trial court determined that the lease was ambiguous and required the parties to furnish parol evidence of their intentions regarding the use of the hallway at the time they entered into the lease. The trial court found the lease to be ambiguous because Exhibit B to the lease, a drawing of the leased premises, did not include the hallway.

¶ 5 The parol evidence showed the following on AutoZone's behalf. AutoZone's representatives viewed the proposed store location and the mall prior to entering into the lease. Defendant furnished them with a "Lease Plan" showing the proposed space. The "Lease Plan" included a drawing of the hallway and the double doors exiting to the rear of the mall. Defendant's representative assured AutoZone that its use of the "loading hallway" would not be restricted. Dale Stallings, who negotiated the lease with defendant, testified that unrestricted use of the area outside the double doors and the hallway were essential terms of the lease, because of the necessity of getting the product into the back of the store. According to Stallings, nonaccess was a "deal breaker." Stallings testified that defendant agreed that access to the "loading hallway" would not be obstructed. According to Stallings, defendant also agreed that AutoZone could modify the rear double doors to accommodate its deliveries through the hallway. The evidence showed that modification of the rear double doors was included in the architectural plans of AutoZone's store build-out and that these plans were transmitted to defendant. The modification of the doors was, in fact, done by AutoZone.

The AutoZone attorney who drafted the lease testified that it was his intention to include terms of unrestricted access in the lease and that he did so, using general rather than specific language.

¶ 6 After the lease was signed, AutoZone used the hallway for its weekly deliveries. The merchandise arrived in an 18-wheel semi with a long nose cab, which parked in the rear of the mall—the "loading area"—opposite the double doors. AutoZone store employees loaded the merchandise, which was on large pallets, onto a pallet jack they wheeled through the double doors, down the hallway, and into the back of the store, a "staging area." They unwrapped the pallets in the staging area and then loaded the heavy items, like car batteries, onto shelves from the rear. The items would slide downward on the shelves so that customers on the floor in the shopping area of the store would pick out the oldest items first. The mess created by unwrapping the pallets was confined to the staging area rather than the customer shopping areas.

¶ 7 Sometime in 2006, defendant notified AutoZone that its deliveries were causing damage to the hallway. In response to defendant's complaint, and at its own expense, AutoZone lined the hallway with plywood. AutoZone then continued to make its deliveries through the double doors and down the hallway. After defendant installed the middle bollard, and rear deliveries were no longer possible, AutoZone brought its product through the front door, used by customers, which caused customer disruption and unsightly and unsafe conditions within the store. The lack of rear delivery facilities meant that the AutoZone semi had to park in front of the store in a fire lane. The semi also blocked the free flow of vehicular traffic while it was parked in the fire lane. The bollard caused economic hardships because AutoZone had to assign more employees to unload the semi.

¶ 8 Defendant presented one witness, William Spatz, defendant's principal. Spatz testified that AutoZone reconfigured the rear double doors without his knowledge or permission. He denied

seeing any plans for modifications to the doors. Spatz denied that defendant knew AutoZone was using the hallway for deliveries. He also denied that defendant ever gave AutoZone permission to use the hallway for deliveries. Spatz testified that the use of the hallway was never brought up in the lease negotiations, which he conducted on defendant's behalf. According to Spatz, he first became aware that AutoZone was using the hallway for deliveries when he was notified by mall personnel that AutoZone had caused damage to the hallway. Spatz denied that he caused the bollard to be installed in retaliation over the CAM dispute, and explained that the bollard was a safety measure to insure that mall property and other tenants who used the hallway were not placed in danger of injury from AutoZone's pallet jacks.

¶ 9 In making its oral ruling, the trial court first considered the Lease Plan. That was the document AutoZone's representative testified he was furnished by defendant when he first inspected the site prior to the execution of the lease. The court noted that the Lease Plan showed the existence of the rear hallway with the double doors and only one other door in the front of the store. "So that indicates to the [c]ourt that it was intended at some time and certainly at the time of the—of entry into the lease that this rear corridor be used by AutoZone pursuant to the terms of the lease." The trial court then found AutoZone's witnesses more credible than Spatz. The court found that AutoZone had conversations with representatives of defendant about the use of the hallway. The court stated that whether those conversations were authorized by Spatz was not at issue, because defendant's representatives had apparent authority to negotiate the lease. The court found that the hallway was not a common area as defined by the lease but that it was a common area in the generic sense that other tenants used it. The court further found that "at all times it was contemplated that all of the users of this hallway would use that particular space for delivery of their goods." The court

found that defendant knew that auto parts were going to be delivered through the hallway "by some mechanism."

¶ 10 The court then discussed the testimony relating to AutoZone's loading from either its front door or its side door and concluded the following:

> "I think it is absolutely untenable and incredible that a sophisticated national company and a sophisticated owner of multiple shopping malls would ever enter into a lease that called for loading across a sidewalk in a fire zone or across an area that is traveled by other *** users of the shopping center. The only reasonable conclusion that can be drawn is that the parties intended the use of this hallway by AutoZone to deliver its product into its store."

The court went on to comment that "[p]erhaps the most telling evidence of the intention of the parties is their post-signing conduct." The court found that defendant knew of AutoZone's use of the hallway for its deliveries and did not object to AutoZone's use of the hallway for at least two and a half years. The court found that the lease did not either grant or deny AutoZone the ability to use pallet jacks, which was common in the industry, so that defendant could not dictate AutoZone's method of delivery. Finally, the court declared that AutoZone's use of the hallway for its deliveries was "specifically contemplated and is allowed by the terms of the lease." The court enjoined defendant from "constructing any barriers in that rear area which would impede the ability of AutoZone to make deliveries in any reasonable manner that it sees fit."[2]

¶ 11 Defendant filed a timely appeal.

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[2]By the time of trial, defendant had removed the bollard that obstructed the pallet jacks' access to the hallway through the double doors pending resolution of the lawsuit.

¶ 12 ANALYSIS

¶ 13 Defendant raises numerous issues that can be broken into two arguments: (1) the trial court erred in finding the lease to be ambiguous; and (2) the trial court erred in finding that the parties intended that AutoZone use the rear hallway for its deliveries.

¶ 14 Was the Lease Ambiguous?

¶ 15 We begin with the familiar principles of contract construction. "When construing a contract, the court's primary objective is to give effect to the intent of the parties, as revealed by the language used in the agreement." *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009). Where a contract incorporates another document by reference, that document's terms become part of the contract. *Lease Management*, 392 Ill. App. 3d at 685. If the contract is clear and unambiguous, it must be given its plain, ordinary, and popular meaning, and it will be applied as written. *Lease Management*, 392 Ill. App. 3d at 686. A contract is not ambiguous merely because the parties disagree as to its meaning. *Lease Management*, 392 Ill. App. 3d at 686. The court interprets a facially unambiguous contract as a matter of law without the aid of extrinsic evidence. *Lease Management*, 392 Ill. App. 3d at 685. However, if the contract is susceptible to more than one meaning, an ambiguity is present, and parol evidence may be admitted to aid the trier of fact in resolving the ambiguity. *Lease Management*, 392 Ill. App. 3d at 685. To determine whether an ambiguity exists, the court looks to the language of the agreement alone. *Lease Management*, 392 Ill. App. 3d at 685.

¶ 16 The first question this appeal poses, that is, whether the lease was ambiguous, is a matter of law and thus our review is *de novo*. *St. George Chicago, Inc. v. George J. Murges & Associates*, 296 Ill. App. 3d 285, 290 (1998).

¶ 17 Defendant contends that the lease was unambiguous because it nowhere included any reference to either AutoZone's right to use the hallway or AutoZone's delivery method. Defendant asserts that the parties' unambiguous intention that AutoZone have no access to the hallway is reinforced by the exhibits to the lease that were incorporated therein, which did not show or reference the hallway. Exhibit "A" to the lease contained legal descriptions of the "demised premises" and the "entire premises." Exhibit "B" was a "Lease Plan," a diagram of the mall that specifically pointed to a drawn rectangle with the notations "AZ" and "protected area." The hallway and double doors did not appear on the diagram. Defendant relies on the principle that contracts are generally construed against the party who prepared them and cites *Coney v. Rockford Life Insurance Co.*, 67 Ill. App. 2d 395, 399-400 (1966) ("Contracts are generally construed against the party who prepared them, for having chosen the words and grammar used, he is held responsible for the ambiguity.").

¶ 18 AutoZone likewise argues that the lease was unambiguous but contends that the "loading hallway" was referenced "indirectly" throughout the lease. AutoZone maintains that the definition of "demised premises" in the lease included the hallway and the "loading area" outside the double doors because the 6,500 square foot premises shown on Exhibits "A" and "B" to the lease were leased "together" with "all improvements now existing or hereafter erected thereon and all rights, benefits, appurtenances, right of ways and easements thereunto belonging (collectively, the 'Demised Premises')." (Emphasis in original).

¶ 19 AutoZone points to other provisions in the lease that it argues support its position that it had the right to unobstructed use of the hallway. Under the "Common Areas" clause, the lease provided, *inter alia*, that "Landlord hereby grants to Tenant, its employees, customers invitees, the right to use,

in common with all other tenants of the Entire Premises, all of said Common Areas and any enlargement thereof for ingress and egress to and from the Demised Premises ***." The same clause further provided, "Landlord grants Tenant the right to access its loading area from the Entire Premises." According to AutoZone, the "loading hallway" is part of the "entire premises." Paragraph 8(c) of the lease provided in pertinent part that "Tenant *** at all times *** shall have unobstructed and adequate means of ingress and egress." Paragraph 8(g) of the lease provided that the landlord shall not, without the prior written consent of the tenant, permit the construction of any structure that would adversely affect the quantity of access to parking for, or physical access to, the demised premises. Paragraph 13(a) grants the tenant "quiet and peaceful possession and enjoyment of the Demised Premise, the Common Areas of the Entire Premises and all easements, rights and appurtenances thereunto belonging." Lastly, AutoZone argues that paragraph 25 of the lease, which grants AutoZone the right to place a dumpster near the loading area, supports the proposition that the lease included access to the hallway.

¶ 20 In determining whether an ambiguity exists, the court applies the "four corners rule," meaning that the court looks to the language of the contract alone. *Lease Management*, 392 Ill. App. 3d at 685. A contract term is ambiguous if it can reasonably be interpreted in more than one way due to the indefiniteness of the language or because the language has a double or multiple meaning. *William Blair & Co., L.L.C. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). Here, the trial court found that the lease was ambiguous because Exhibit B, the diagram entitled "Lease Plan," did not depict the hallway. Thus, the trial court concluded from the four corners that the lease could reasonably be interpreted in more than one way.

¶ 21 AutoZone argues that the hallway was an "appurtenance," that being something attached to something else. The trial court in its ruling stated, "I don't think that the appurtenance argument is really germane one way or the other." The court then stated that the hallway was not a common area but was "sui generis," because it was used by other tenants whose businesses faced to the south. Defendant asserts that the trial court's designation of the hallway as "sui generis" amounted to a new classification of real property that is without precedent. We disagree. In saying that the hallway was "sui generis," the trial court was not classifying it but was acknowledging what the parties agreed upon, that the hallway was not a common area for which AutoZone had to pay CAM, as defined by the lease. That said, however, it was a common area in the generic sense that other tenants used it. In saying that the hallway was "sui generis," we believe the court was merely commenting on its unique or peculiar character within the facts of the lawsuit.[3]

¶ 22 We agree with the trial court that the lease was ambiguous. The lease nowhere directly mentioned AutoZone's right to use the hallway for its deliveries, although the provisions of the lease cited by AutoZone could be construed to allow AutoZone access to the hallway. The drawing of the "Lease Plan," which was incorporated into the lease, did not depict the hallway, leading to the opposite conclusion, that the parties did not contemplate that AutoZone would have access to the hallway. Thus, the lease could be interpreted in two ways. Accordingly, the trial court did not err in finding that the lease was ambiguous and parol evidence was necessary.

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[3]In its reply brief, defendant argues that the "long-held notion" that a party who does not pay for use of property does not have the right to use it should apply. This is a different issue altogether, one not presented by the evidence. Spatz admitted that he could have negotiated for CAM in the lease but did not do so.

¶ 23 Did the Trial Court Err in Finding that the Parties Intended that AutoZone Use the Hallway?

¶ 24 As we have seen, extrinsic evidence is admissible to determine the parties' intent when the contract language is ambiguous. *Bradley Real Estate Trust v. Dolan Associates, Ltd.*, 266 Ill. App. 3d 709, 712 (1994). The parties' intent and the interpretation of the language is a question of fact. *Bradley*, 266 Ill. App. 3d at 712. Where ambiguity exists, the trial court's determination of the parties' intent will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Bradley*, 266 Ill. App. 3d at 712.

¶ 25 Defendant argues that the trial court ignored Spatz's testimony. This is not true. In its oral ruling, the trial court carefully recounted Spatz's testimony. The trial court then found his testimony to be "untenable" and "incredible." At the same time, the trial court found AutoZone's witnesses to be credible. Nevertheless, defendant relies on Spatz's testimony for its argument that the trial court's ruling was against the manifest weight of the evidence. Defendant points to Spatz's testimony that he never agreed to provide the hallway to AutoZone for its deliveries and that he never approved any construction plans for the modification of the double doors so that the doors could accommodate AutoZone's deliveries. The trial court is in a superior position to observe the witnesses while testifying, to judge their credibility, and to determine the weight of their testimony. *Southwest Bank of St. Louis v.Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010). Consequently, the trial court's findings of fact are entitled to great deference from the reviewing court. *Southwest*, 401 Ill. App. 3d at 891. Resolving conflicts relating to the credibility of the witnesses and determining the weight to be given their testimony is the province of the trial court. *Southwest*, 401 Ill. App. 3d at 891.

¶ 26 Dale Stallings was the AutoZone real estate manager who negotiated the lease with defendant. Stallings emphasized repeatedly that delivery access was a "serious issue" in deciding whether to locate a store in a certain location. Stallings testified that he recalled having discussions with defendant about where AutoZone would deliver its merchandise, because "that particular discussion is critical on any existing facility." Stallings testified that the discussion must be had "up front," because "you can't take a deal to the real estate committee [for approval] if you don't understand how you can get product into the store through the rear." Stallings explained that AutoZone was not able to deliver through the front of the store because of the way the product was "palletized" when it was placed on the semis. The only way to get the product off the semi and into the store was by use of pallet jacks. Stallings testified that his negotiations with defendant "revolved around AutoZone's unobstructed use of that hallway for the delivery of [AutoZone's] merchandise and loading product in from the back of the building through that hallway ***." Stallings testified that defendant authorized a change in the rear double doors to accommodate AutoZone's stacked pallets. Stallings further testified that defendant "indicated that the access would be continuing and unobstructed."

¶ 27 George Callow, AutoZone's architect who designed the build-out of the store, testified that loading merchandise into the store is something that is contemplated with every new store design. Callow testified that if there are inadequate loading facilities, the store is disqualified for consideration as an AutoZone store. Callow identified a floor plan that indicated that the rear doors were to be modified. The proposed construction plans were transmitted to defendant. Photographs in evidence showed that the rear double doors were, in fact, modified in accordance with the plans.

¶ 28 Marcus Leaks was AutoZone's construction manager. He walked the site with a representative of defendant prior to the lease being signed, at which time the use of the double doors and the hallway for deliveries was discussed. Leaks testified that it was standard to provide the landlord with a copy of the design drawings. Leaks testified that after AutoZone had been operating the store, defendant requested it to line the hallway with plywood.

¶ 29 AutoZone's Exhibit No. 26 in evidence was a Lease Plan that defendant furnished to AutoZone prior to the lease signing that depicted the hallway and the double doors.

¶ 30 Given that AutoZone placed critical importance on being able to deliver its merchandise through the hallway to the back of its store, it was reasonable for the trial court to have credited Stallings' testimony that he discussed the use of the hallway with defendant's representative. The inclusion of the modifications of the double doors in the architectural drawings strengthens this conclusion. It would be contrary to experience and common sense to believe that AutoZone reconfigured the exterior of the landlord's property without its knowledge or consent. Accordingly, the trial court's finding that the parties intended that AutoZone use the hallway for its deliveries was not against the manifest weight of the evidence.

¶ 31 The trial court placed particular emphasis on the parties' post-signing conduct. Defendant contends this was error, as the lease contained a "no-waiver" provision. Defendant argues that it is "immaterial whether the use of the hallway for deliveries was granted at any one time," because Spatz never intended to relinquish his right to enforce safety, supposedly by banning the use of "forklifts" in the hallway. Defendant relies on paragraph 40(c) of the lease, related to "General Provisions," which provided in pertinent part:

> "Each and every waiver of any covenant, representation, warranty or other provision hereof must be in writing and signed by each party whose interests are adversely affected by such waiver. No waiver granted in any one instance shall be construed as a continuing waiver applicable in any other instance."

Defendant apparently is arguing that AutoZone's use of pallet jacks to deliver its product through the hallway constituted a breach of the lease, because the lease did not provide specifically for the use of pallet jacks. Defendant then cites paragraph 40(c) and concludes that any waiver of AutoZone's "breach" was not a continuing waiver. Defendant cites *Justine Realty Co. v. American Can Co.*, 119 Ill. App. 3d 582 (1983), a case involving the landlord's failure to take immediate action to terminate unauthorized subleasing, for the proposition that language in a lease that is similar to paragraph 40(c) must be interpreted as defendant suggests. However, defendant's entire argument and its reliance on *Justine Realty* are misplaced. The trial court in our case did not admit the post-signing evidence to show waiver, and AutoZone did not introduce the parties' post-signing conduct to prove that defendant waived any alleged breach of the lease by AutoZone. Rather, the trial court found that the post-signing conduct was relevant to the parties' intent when they entered into the lease that AutoZone would have access to the hallway for the purpose of its deliveries. Where a contract is ambiguous, the court may determine the parties' intent by looking to the parties' contemporaneous or subsequent conduct. *Thread & Gage Co., Inc. v. Kucinski*, 116 Ill. App. 3d 178, 183 (1983).

¶ 32 It is clear from the court's remarks that the court considered the post-signing conduct on the issue of intent. The court said: "Perhaps the most telling evidence of the intention of the parties is their post-signing conduct." Moreover, the trial court's finding that the lease did not refer to the

method of delivery—it did not either grant or deny AutoZone the ability to use pallet jacks—was correct. Therefore, defendant's conclusion that AutoZone's use of pallet jacks was a breach of the lease is incorrect.

¶ 33 Defendant argues that the trial court ignored defendant's contractual duty to protect and maintain the premises by allowing the use of "forklifts," a use defendant terms so "egregious" it was beyond the contemplation of the parties.[4] Defendant relies on Spatz's testimony that his concerns about safety prompted him to erect the bollard to block AutoZone's deliveries through the hallway. Defendant maintains that AutoZone's use of pallet jacks presented a danger to the property as well as to the other tenants who had the right to use the hallway. Defendant also maintains that, as to AutoZone, the hallway was a convenience rather than a necessity. Basically, defendant argues that the hallway was an emergency exit that the presence of the pallet jacks obstructed.

¶ 34 The trial court found that defendant knew at the time it entered into the lease that AutoZone was going to deliver auto parts through the hallway "by some mechanism." The court also found that the hallway was a "multiple-use hallway." While the court took judicial notice of the applicable fire codes at defendant's request, the court did not make a finding that AutoZone was either in compliance or not in compliance with the codes. However, the trial court heard extensive testimony about the danger posed by loading the AutoZone store from the front door. The semi had to park in a fire lane. While it was parked in the fire lane, it blocked other vehicular traffic. The seven-foot high pallets barely fit through the front door and obstructed customers. The pallets posed a risk to customers because the operator of the pallet jack could not see whether people were in the way. The

[4] We again note that the evidence, including photographic evidence, established that AutoZone used pallet jacks, a device that is different in character and configuration from a forklift.

pallets had to be unwrapped in the customer area of the store, leaving debris on the floor. The trial court rejected the argument that the hallway was not a necessity when it said:

> "I think it is absolutely untenable and incredible that a sophisticated national company and a sophisticated owner of multiple shopping malls would ever enter into a lease that called for loading across a sidewalk in a fire zone or across an area that is traveled by other members—or other users of the shopping center."

The trial court's rejection of defendant's argument that AutoZone should load from the front instead of the hallway essentially was a finding that it did not find Spatz's testimony credible. Given the overwhelming evidence of the risks and dangers posed by loading from the front, the trial court's determination was not against the manifest weight of the evidence.

¶ 35 Defendant maintains that the trial court erred in barring it from presenting evidence of damage caused by AutoZone to the hallway. The trial court ruled that such evidence was irrelevant to the issue of intent and noted that defendant had not filed a counterclaim for damages. The trial court commented that the reason defendant erected the bollard had no bearing on the issue of the interpretation of the lease. Defendant argues that without evidence that AutoZone damaged the hallway, the court was operating in a "vacuum" in that "it appeared that [defendant's] actions in installing the bollard were not prompted by AutoZone." It is within the trial court's discretion to decide whether evidence is relevant and admissible. *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 564 (2008). Evidence is relevant if it has any tendency to make the existence of a fact more or less probable than it would be without the evidence. *Fronabarger*, 385 Ill. App. 3d at 564.

¶ 36 Here, the reason the trial court admitted extrinsic evidence was to ascertain the intent of the parties at the time they entered into the lease with respect to AutoZone's use of the hallway to make

its deliveries. The damage to the hallway had not occurred at the time the lease was signed and had no bearing on the parties' intent. Moreover, the trial court heard evidence that AutoZone's use of the hallway damaged it. The evidence revealed that defendant required AutoZone to line the hallway with plywood at its own expense because the pallets were causing damage. The trial court indicated that it was aware of the reason defendant erected the bollard—the court even found the reason interesting. In its oral ruling on the declaratory judgment and injunction, the court noted that the dispute between the parties arose not from the fact AutoZone was using the hallway but "the manner in which it was being used." Thus, the record demonstrates that the trial court was not in a "vacuum."

¶ 37 After the court made its factual findings, the court declared that AutoZone's use of the hallway for its deliveries was specifically contemplated by the parties and was allowed by the terms of the lease. The court followed its declaration of the rights of the parties under the lease by issuing a permanent injunction barring defendant from constructing any barriers in the rear loading area that would impede AutoZone's ability to make deliveries "in any reasonable manner that it sees fit."

¶ 38 Illinois' statutory declaratory judgment procedure (735 ILCS 5/2-701 (West 2008)) allows the court to take hold of a controversy one step sooner than normally—after a dispute has arisen but before steps are taken that give rise to claims for damages or other relief. *Brandt Construction Co. v. Ludwig*, 376 Ill. App. 3d 94, 101 (2007). The essential requirements of a declaratory judgment action are (1) a plaintiff with a legal tangible interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Brandt*, 376 Ill. App. 3d at 101. Defendant in the instant case urges that our review of the trial court's resolution of the merits of AutoZone's declaratory judgment complaint is *de novo*. In urging this standard of review,

defendant misreads our opinion in *In re Marriage of Rife*, 376 Ill. App. 3d 1050 (2007), where we held that the trial court's judgment on the merits is subject to *de novo* review "to the extent it is not based on factual determinations that are the trial court's province." *Rife*, 376 Ill. App. 3d at 1059-60. We clarified again in *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 591 (2009), that our review is *de novo* only to the extent the trial court's decision was not based on factual determinations. For instance, in *Pekin*, the sole basis for the trial court's declaratory judgment was the legal arguments raised by the parties at the summary judgment stage. *Pekin*, 392 Ill. App. 3d at 593. Here, the trial court resolved conflicts in witnesses' testimony, and it found AutoZone's witnesses to be more credible than Spatz. Thus, the trial court's sole basis for its declaratory judgment was its factual determinations. As we discussed above, those factual determinations were not against the manifest weight of the evidence. Accordingly, the trial court properly granted the declaratory judgment in AutoZone's favor.

¶ 39 We next address the propriety of the permanent injunction. A party seeking a permanent injunction must prove it has a clear and ascertainable right in need of protection, irreparable harm will result if injunctive relief is not granted, and no adequate remedy at law exists. *Bogner v. Villiger*, 343 Ill. App. 3d 264, 270 (2003). A court considering injunctive relief should also balance the equities. *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 688 (2010). It is the fact finder's role to resolve conflicts in the evidence, assess witnesses' credibility, and determine the weight to be given to the witnesses' testimony. *Bos*, 406 Ill. App. 3d at 688. The trial court's factual determinations will not be reversed unless they are against the manifest weight of the evidence. *Bos*, 406 Ill. App. 3d at 688. This court typically applies the abuse-of-discretion standard in reviewing a trial court's decision whether or not to grant a permanent injunction unless

the permanent injunction is based on pure questions of fact, in which case we will not reverse unless it is against the manifest weight of the evidence. *Bos*, 406 Ill. App. 3d at 688. Here, the trial court's grant of the permanent injunction was based on pure questions of fact.

¶ 40 Defendant asserts, for all of the reasons detailed above, that AutoZone had no clear and ascertainable right under the lease to use the hallway. We have held that the trial court's factual findings were not against the manifest weight of the evidence. Accordingly, the trial court did not err in granting the permanent injunction.

¶ 41 Defendant's last argument is that AutoZone was not the prevailing party under the lease for purposes of rendering it liable for AutoZone's attorney fees. Pursuant to paragraph 40(d) of the lease, the successful or prevailing party in the litigation shall be entitled to recover its attorney fees, costs, and expenses incident to appeals. AutoZone was the successful party in the trial court and in this court. Accordingly, the trial court did not err in awarding fees and costs. We grant AutoZone's request to file a fee petition to recover its expenses in connection with this appeal. We remand this matter to the trial court to make the determination on the fee petition.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed and remanded.

¶ 44 Affirmed and remanded.