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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ATLANTIS PRODUCTS, INC., a Nevada Corporation, d/b/a METALCO FENCE RAILING SYSTEMS,)	Appeal from the Circuit Court of DuPage County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-873
)	
MERIDIAN FENCE AND SECURITY, L.P., A Texas Limited Partnership,)	
)	The Honorable
)	Dorothy F. French
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court was permitted to consider parol evidence where the written waiver of a contractual down payment requirement created an ambiguity as to seller's delivery obligations. Given the waiver, absence of the down payment did not excuse the delivery delay. Seller breached the contract by failing to deliver the materials within the period set forth by contract. Because seller breached the contract, it could no longer benefit from the contract's attorney fees provision.

¶ 1 Appellant, Atlantis Products, Inc., challenges the trial court's ruling that it materially breached a contract for the sale of fencing materials when it failed to deliver, within 8 to 12 weeks,

the materials to appellee, Meridian Fence and Security, L.P. Additionally, Atlantis appeals the trial court's denial of attorney fees. For the reasons that follow, we affirm.

¶ 2

I. BACKGROUND

¶ 3 This matter arises from a commercial contract for fencing materials between Atlantis (seller) and Meridian (buyer). Meridian was acting as a subcontractor to a company called Balfour Beatty on a Texas highway project. The president of Atlantis is Gerald Schiller, and the president of Meridian is Darnell Dow. Each has been in the fencing business for over 10 years. In January 2008, Dow contacted Schiller regarding the purchase of fence products (plates and posts). On February 27, 2008, Meridian sent Atlantis approved shop drawings of its desired order. The parties proceeded to formulate a written agreement.

¶ 4

A. The February 28, 2008, Fax

¶ 5 On February 28, 2008, Atlantis's office manager faxed to Meridian for signing a two-page contract that included a sales order slip and a page of "terms and conditions." The fax cover sheet contained a note that said:

"The following is our sales order ***. Please sign, date and fax back. An original will be mailed.

Since this is the first project we have with your company and because we are offering open account terms please have the following credit application completed and faxed back. Also, please forward a copy of your contract and bond for this project.

It is my understanding that [Schiller] has waived the 50% deposit for this project, however because the posts will be customized with base plates a small deposit of \$5,000 will be required." (Emphasis added.)

¶ 6 B. The March 4, 2008, Contract

¶ 7 On March 4, 2008, Meridian signed and returned the two-page contract. The first page of the two-page contract, *i.e.*, the sales order slip, showed a total purchase price of \$105,831.37. It stated in pertinent part (and in conflict with the prior representation regarding the smaller, \$5,000 down payment amount):

“Unless otherwise agreed in writing above, *Buyer’s down payment of 50% [i.e., \$52,915.69] is due with acceptance of this sales order. A signed original of this sales order and the down payment are required to proceed with this order. *** The balance is payable C.O.D. [collect on delivery] by certified check. *** Seller requires approximately 8-12 weeks for delivery following Seller’s receipt of approved shop drawings from Buyer. *** This sales order is subject to all terms and conditions set forth on the reverse hereof.*” (Emphasis added.)

¶ 8 The second page of the contract was entitled “Terms and Conditions of Sales Order.” The terms and conditions contained various clauses; the four most relevant to this case are:

1. The INTEGRATION clause:

“This Agreement contains all of the representations and agreements between the parties hereto. *No prior or contemporaneous agreements or representations*, whether oral or written, which tend to alter, change, modify or amend the terms of this Sales Order, acknowledged or not, *shall be considered part of this Agreement.*” (Emphasis added.)

2. The PAYMENT clause:

“Seller reserves the right, among others remedies, either to terminate this Agreement or to *suspend any delivery or deliveries upon failure of Buyer to make any payment* as herein provided.” (Emphasis added.)

3. The MODIFICATION OR WAIVER clause:

“No modification of this Agreement *or waiver of the terms or conditions hereof shall be binding upon Seller unless approved in writing by Seller’s authorized agent at Seller’s corporate office in Darien, IL*, or shall be effected by an acknowledgment or acceptance of Sales Order forms containing other or different terms from those contained herein and whether or not signed by an authorized agent of Seller.” (Emphasis added.)

4. And the GOVERNING LAW clause:

“The validity, interpretation and performance of this Agreement with respect to any material delivered hereunder shall be governed by the law of the State of Illinois. *** *Buyer shall pay all fees and expenses related to said arbitration, suit or claim* including but not limited to Seller’s attorney’s fees, filing fees, travel expenses and all related cost of said arbitration, suit or claim.” (Emphasis added.)

¶ 9 C. Post-Contract Communications

¶ 10 On March 7, 2008, Meridian submitted the \$5,000 down payment requested in the February 28, 2008, fax. Atlantis did not object to this amount, though it was clearly less than the 50% (\$52,915.69) down payment required by the March 4, 2008, contract.

¶ 11 On April 25, 2008, Atlantis’s office manager sent Meridian the following letter, on corporate letterhead, favorably acknowledging the pre-contractually agreed upon \$5,000 down payment

amount, indicating that it had proceeded with the order, and requesting only additional credit assurances—not additional down payment funds:

“We have submitted [your] information to our credit insurance company[;] however[,] they were not able to increase your credit limit. Your current credit limit is \$70,000 total. [H]owever[,] the pending order is \$105,831.37[,] of which we have received \$5,000.

As we are not able to secure a higher credit limit[,] the difference, \$30,831.37, will have to be secured by a letter of credit or payment on delivery.”

¶ 12 On April 29, 2008, Atlantis’s office manager sent Meridian a letter on corporate letterhead regarding estimated ship dates. The letter represented that the posts would be shipped the week of May 14, 2008, and the panels would be shipped the week of May 28, 2008.

¶ 13 On May 13, 2008, just one day prior to the estimated ship date, Meridian submitted a check to Atlantis in the amount of \$30,831.37. This was the amount Atlantis had requested in the April 25, 2008, letter to clear up remaining credit concerns.

¶ 14 On May 29, 2008, approximately two weeks past the first estimated shipping date, Atlantis, through Schiller, sent Meridian an e-mail explaining the delay. Atlantis explained that it was very busy and that “the holiday didn’t help either.” Atlantis stated that it hoped to get the posts shipped by Friday and the panels shipped by the following Wednesday.

¶ 15 On June 3, 2008, Atlantis sent Meridian another e-mail regarding the delay:

“I am writing you in regards to the delay for the delivery of the fence panels. ***[I]t is completely beyond our control. *** Getting steel from a mill is like trying to dig up gold lately. *** In 15 years, we haven’t seen such a shortage.”

¶ 16 On June 6, 2008, Meridian, through Dow, responded in an e-mail:

“Pursuant to our conversation in February this year, you were made aware of the deadline that we were to maintain by our client, Balfour Beatty *** and the Texas Department of Transportation. *** Additionally, there are attached accounts of delay on your part, and promissory letters of receipt that have not been fulfilled. Be aware that legal counsel has been hired.”

¶ 17 On June 6, 2008, Atlantis replied in an e-mail to Meridian’s implicit threat of lawsuit, for the first time raising what it considered to be *Meridian’s* shortcomings (in pertinent part):

“ ***

3) Our legally binding contract states approximate[ly] 8 to 12 weeks of lead time. Of course[,] that is after all conditions, such as credit approval and down payment[,] are fulfilled.

4) You stated several times that you “don’t have credit.” We were generous enough to extend you a \$70,000 credit line, despite the fact that your credit history is insufficient. You then took more time until you made payment on [May 13, 2008].

5) We are still within our contractually agreed delivery time of 8 to 12 weeks per our contract.

***”

¶ 18 On June 9, 2008, Meridian sent an e-mail stating that it would accept delivery if the materials arrive “no later than” July 1, 2008. Meridian explained that it, too, had performance obligations to fulfill, and it requested a response by 2 p.m. that day.

¶ 19 On June 9, 2008, at 4 p.m., Atlantis sent an e-mail declining to guarantee the new, July 1, 2008, deadline. Atlantis advised that it would respond as soon as its attorney reviewed the matter.

¶ 20 Meridian (allegedly) never received, and the record does not contain written evidence of, a guarantee from Atlantis that it would be able to deliver by July 1, 2008. Therefore, on June 26, 2008, Meridian entered into a contract with another fence supplier.

¶ 21 Atlantis (allegedly) informed Meridian, on July 2, 2008, that it was ready to ship the materials, but Meridian responded that it did not want the materials anymore.

¶ 22 D. The Lawsuit

¶ 23 Atlantis filed a lawsuit against Meridian. Atlantis alleged that Meridian breached the contract when, on June 26, 2008, it contracted with a different fence supplier and subsequently refused to accept the materials from Atlantis. Atlantis noted that the outstanding balance on the contract was \$70,000, and requested damages plus attorney fees.

¶ 24 Meridian filed a counter-claim. Meridian alleged that Atlantis breached the contract when it failed to deliver the materials within the 8 to 12 week time frame set forth in the contract. Meridian requested a \$35,831.37 refund of monies paid to Atlantis, plus attorney fees.

¶ 25 At trial, Schiller and Dow were the only two witnesses to testify. As is relevant to this appeal, they debated as to whether Atlantis ever assured a July 2, 2008, delivery. Additionally, Schiller testified that Atlantis delayed delivery due to lack of a 50% down payment and credit assurance that Meridian would ultimately be able to pay for the (partially) custom order.

¶ 26 The trial court ruled in favor of Meridian, after hearing testimony by both Schiller and Dow and accepting into evidence the parties' numerous written correspondence. The trial court found that Atlantis breached the contract because it did not deliver the materials within the 8 to 12 week period

set forth in the contract. The trial court considered the three events set forth in the contract that *could* trigger the beginning of the delivery period: the 50% down payment, the submission of the signed contract, and the submission of the shop drawings.

¶ 27 The court found that the April 25, 2008, letter constituted a waiver of the contract's condition that a 50% down payment was needed to proceed with the order. The April 25 letter indicated that Atlantis had *already* proceeded with the order and that no additional funds were due until delivery. The INTEGRATION clause prevented prior and contemporaneous agreements (such as the February 28, 2008 fax) from altering the contract. However, the contract contained a MODIFICATION OR WAIVER clause that allowed for *subsequent* waivers (such as the April 25, 2008, letter).

¶ 28 The trial court turned to parol evidence to determine if, *prior* to the April 25, 2008, letter, Meridian's failure to submit the 50% down payment tolled the delivery period. The trial court, looking to the various written correspondence (from February 28, April 29, May 27, June 3, and June 6, 2008), determined that the parties always understood that the 50% down payment would be waived. Therefore, the absence of the 50% down payment prior to April 25, 2008, did not excuse Atlantis for the delay of shipment. This left only submission of the signed contract and shop drawings to trigger the 8 to 12 week delivery period.

¶ 29 The court found that Meridian returned the signed contract on March 4, 2008, and that Meridian submitted approved shop drawings on February 27, 2008. The court stated that the contract's use of the phrase "*approximately* 8 to 12 weeks" allowed for some flexibility, but that, as both parties understood the word "approximate" to mean no more than 10% or an additional week or two, the materials should have been delivered by early June 2008 ("*approximately*" 8 to 12 weeks after submission of the contract and shop drawings). Because Atlantis did not deliver the materials

by early June 2008, Atlantis breached the contract. The court ordered Atlantis to refund \$35,831.37 to Meridian, plus 5% interest and court costs. The court did not award attorney fees to either party. This appeal followed.

¶ 30

II. ANALYSIS

¶ 31 On appeal, Atlantis makes no substantive challenge to the premise that failing to deliver the materials within the 8 to 12 week period set forth by contract would constitute a breach, or to the trial court's factual determinations that the shop drawings were submitted February 27, 2008, and the signed contract was submitted March 4, 2008. Instead, Atlantis focuses on the 50% down payment requirement. Atlantis argues that the 8 to 12 week delivery period was never triggered because Meridian never submitted the 50% down payment that the contract "required to proceed with [the] order." Atlantis contends that it never waived the 50% down payment requirement. Atlantis further asserts that, *even if* the April 25, 2008, letter constituted a waiver, the waiver did not apply retroactively. This would mean that the 8 to 12 week delivery period did not trigger until April 25, 2008, and that less than 12 weeks would have passed when, in late June 2008, Meridian entered into contract with another supplier and refused to accept the materials from Atlantis.

¶ 32 Additionally, Atlantis argues that the contract entitles it to recover attorney fees, regardless of the trial outcome. For the reasons that follow, we reject each of Atlantis's arguments.

¶ 33

A. General Contract Law

¶ 34 We begin our analysis with a review of basic contract law. Where, as here, the contract contains an integration clause, courts apply the four corners rule of contract interpretation. *Air Safety v. Teachers Realty Corporation*, 185 Ill. 2d 457, 466 (1999). The four corners rule states:

“An agreement, when reduced to writing, must be presumed to speak for the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.” *Id.* at 462 (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962) (internal quotations omitted)).

¶ 35 In applying the four corners rule, a court initially looks only to the language of the contract. *Id.* The contract is to be construed as a whole, giving effect to every provision, because it must be assumed that each provision was intended to serve a purpose. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). If the language of an agreement is facially unambiguous, then it is interpreted as a matter of law, subject to *de novo* review, without resort to parol (or extrinsic) evidence. *Air Safety*, 185 Ill. 2d at 462. If, however, a facial ambiguity is present, then parol evidence may be admitted to aid the trier of fact in resolving the ambiguity. *Id.* at 462-63. A contract contains an ambiguity where the words in it are reasonably susceptible to more than one meaning. *Central Illinois*, 213 Ill. 2d at 153. Additionally, an ambiguity is present if the language is obscure in meaning through indefiniteness of expression. *Id.* (internal quotations omitted). A contract is not rendered ambiguous just because the parties disagree on the meaning. *Id.* Whether an ambiguity is present is a matter of law, subject to *de novo* review. *Id.* at 154. However, a trial court’s *factual* determinations regarding properly admitted parole evidence will not be reversed unless they are against the manifest weight of the evidence. *Meyer v. Ranson*, 80 Ill. App. 2d 175, 178 (1967).

¶ 36

B. Issue I: Down Payment

¶ 37 Atlantis challenges the trial court’s ruling that it (Atlantis) breached the contract by failing to deliver the materials within the 8 to 12 week delivery period set forth by contract. Atlantis argues that Meridian’s failure to submit the 50% down payment *tolled* the 8 to 12 week delivery period, meaning that its delivery obligation had not yet ripened when, in late June 2008, Meridian entered into a contract with a competing manufacturer. For the reasons that follow, we find that Atlantis waived the 50% down payment requirement and that, therefore, Meridian’s failure to submit the 50% down payment did not toll the 8 to 12 week delivery period.

¶ 38 i. March 4, 2008, Contract Required 50% Down Payment

¶ 39 We do, initially, agree with Atlantis that the plain language of the contract required a 50% down payment (*i.e.*, \$52,915.69) to proceed with the order. A condition precedent is one that must be performed before a contract becomes effective or that is to be performed by one party to an existing contract before the other party is obligated to perform. *Premier Electrical Construction Company v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 824 (1995). Courts will enforce a condition precedent if the language is clear and both parties have agreed on the condition. *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corporation*, 132 Ill. App. 3d 325, 329 (1985). Here, the plain language states: “[u]nless otherwise agreed in writing above, Buyer’s down payment of 50% is due with acceptance of this sales order. A signed original of this sales order and the down payment *are required to proceed with this order.*” (Emphasis added.) The contract did not contain an agreement to the contrary.

¶ 40 ii. April 25, 2008, Letter Waived 50% Down Payment

¶ 41 The question now becomes whether Atlantis subsequently waived the down payment requirement. We agree with the trial court that it did. Though the trial court used the terms “waiver” and “modification” interchangeably, a waiver is at issue here, as will become clear below.

¶ 42 A waiver is the voluntary relinquishment of a known right inconsistent with an intent to enforce that right. *R&B Kapital Development LLC v. North Shore Community Bank and Trust Co.*, 358 Ill. App. 3d 912, 922 (2005). Generally, a party to a contract may waive those portions of a contract that are for his or her benefit. *Quake Construction Inc. v. American Airlines*, 141 Ill. 2d 281, 311 (1990). The principles of waiver prevent a party to a contract from lulling the other party into a false assurance that strict compliance with a contractual duty will not be required, and then sue for non-compliance. *Saverslak v. Davis-Cleaver Produce Co.*, 606 F. 2d 208, 213 (7th Cir. 1979). Ordinarily, waiver may be established by an express relinquishment *or* by conduct indicating that strict compliance with contractual provisions will not be required. *Id.*; *R&B Kapital*, 358 Ill. App. 3d at 922. Here, however, the contract contained a MODIFICATION OR WAIVER provision requiring that any subsequent waiver be in writing: “[n]o modification of this Agreement *or* waiver of the terms or conditions hereof shall be binding upon Seller unless approved in writing by Seller’s authorized agent at Seller’s corporate office in Darien, IL.” (Emphasis added.)

¶ 43 The April 25, 2008, letter from Atlantis to Meridian satisfies the plain terms of this waiver provision: (1) written; (2) by an authorized agent (office manager); (3) at the corporate office (as indicated by the letterhead). Again, the letter states:

“We have submitted [your] information to our credit insurance company[;]
however[,] they were not able to increase your credit limit. Your current credit limit is

\$70,000 total. [H]owever[,] the pending order is \$105,831.37[,] of which we have received \$5000.

As we are not able to secure a higher credit limit[,] the difference, \$30,831.37, will have to be secured by a letter of credit or payment on delivery.”

In the letter, Atlantis informed Meridian of a payment schedule that would allow for the total cost to be met by the date of delivery: \$5,000 existing down payment + \$70,000 existing credit line + \$30,831.37 new credit line *or* payment on delivery = \$105,831.37 total cost. In other words, the only “new” or remaining money that Atlantis needed from Meridian was the \$30,381.37, and even that (or proof of a credit line in that amount) was not due *until* delivery. The new money was not needed in order to trigger or even secure delivery. The letter’s demands are inconsistent with the earlier requirement that a 50% down payment was needed to proceed with the order. The letter represents that the order is *already* in progress. Therefore, the letter serves to waive the earlier requirement that a 50% down payment was required before Atlantis would proceed with the order.

¶ 44 Atlantis concedes that its April 25, 2008, letter satisfies the plain terms of the MODIFICATION OR WAIVER provision: (1) written; (2) by an authorized agent; (3) at the corporate office. However, Atlantis contends that the letter does not satisfy common law *modification* requirements, namely: offer, acceptance, and consideration. Atlantis cites *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 112 (1999), among others, in support of its position that a contract modification, like a newly formed contract, requires an offer, acceptance, and consideration to be valid and enforceable. Atlantis’s argument is misplaced because, to our review, the April 25, 2008, letter constitutes a waiver, and the requirements for a contract modification are, therefore, irrelevant. Again, a waiver is the voluntary relinquishment of a known right inconsistent with an

intent to enforce that right. Here, Atlantis knew the contract required a 50% down payment before it was required to proceed with the order, but, in the April 25, 2008, letter, Atlantis stated it had already proceeded with the order and that the remainder of the payment (or a credit assurance thereof) was not due until delivery. Thus, Atlantis demonstrated an intent to waive the 50% down payment.

¶ 45 iii. The Waiver's Effect on the Delivery Period

¶ 46 Having established that Atlantis waived the 50% down payment requirement, we consider the waiver's effect on the delivery date. Atlantis contends that 8 to 12 week delivery period would begin to run on the date of the waiver (April 25, 2008), meaning that the materials would not be due until late July 2008. Meridian contends that the waiver simply eliminated the 50% down payment requirement altogether, leaving the submission of the sales order and shop drawings as the only arguable conditions precedent. Because the shop drawings were submitted February 27, 2008, and the sales order was submitted March 4, 2008, the materials would be due by early June 2008 at the latest (as the trial court found).

¶ 47 Looking first to the language of the contract *and* the written waiver, we find either interpretation to be reasonable. The March 4, 2008, contract stated that:

 “Unless otherwise agreed in writing above, Buyer's down payment of 50% is due with acceptance of this sales order. *A signed original of this sales order and the down payment are required to proceed with this order.* *** The balance is payable C.O.D. [collect on delivery] by certified check. *** Seller requires approximately 8-12 weeks for delivery following Seller's receipt of approved shop drawings from Buyer.” (Emphasis added.)

The April 25, 2008, written waiver stated that:

“*** the *pending* order is \$105,831.37[,] of which we have received \$5,000.

As we are not able to secure a higher credit limit[,] *the difference, \$30,831.37, will have to be secured by a letter of credit or payment on delivery.*” (Emphasis added.)

The written waiver stated that it had already proceeded with the order, calling it “pending,” and that no additional funds (or assurances thereof) would be due *until* delivery. However, the written waiver did not specify how it would affect the triggering of the 8 to 12 week delivery period. Atlantis can make a reasonable argument that, because the contract required a 50% down payment to trigger the 8 to 12 week delivery period, a subsequent waiver of the 50% requirement would, at best, itself trigger the 8 to 12 week delivery period. However, Meridian can make a reasonable argument that, because, in the waiver, Atlantis accepted \$5,000 as the down payment amount, the 8 to 12 week delivery period had already been triggered upon payment of that amount (on March 7, 2008).

¶ 48 Because either interpretation is reasonable, an ambiguity is present. See *Central Illinois*, 213 Ill. 2d at 153. The trial court, therefore, correctly turned to parol evidence to resolve the ambiguity. See *Air Safety*, 185 Ill. 2d at 462-63. As set forth below, the trial court did not err in determining that the parol evidence weighed in favor of Meridian’s interpretation.¹

¶ 49 The parol evidence in favor of Atlantis’s interpretation is its president’s (self-serving) *testimony* that, before Atlantis fabricated the (partially) custom order, it needed the 50% down payment to ensure that Meridian would be able to pay the entire \$105,831.37. That is why,

¹ Atlantis opened its brief with the argument that the contract’s INTEGRATION clause precluded the trial court from considering pre-contractual evidence, such as the February 28, 2008, fax. However, this was not a proper threshold matter—we could not, and did not, reach this issue until we determined whether an ambiguity was present.

according to the president, Atlantis did not start producing the order until May 2008, when it received the \$30,831.37 (the new amount needed to alleviate credit concerns).

¶ 50 In comparison, the parol evidence in favor of Meridian's interpretation are the numerous *writings* by Atlantis (or its agents), each of which represent that Atlantis did *not* require the 50% down payment and that the absence of the large down payment did not cause the delivery delay. These writings include: (1) the February 28, 2008, fax cover sheet (stating that Atlantis waived the \$52,915.69 (50%) down payment but that a lesser, \$5,000 down payment would be needed because the base plates would be customized); (2) the April 29, 2008, letter (estimating shipping dates of May 14 and May 28, 2008); (3) the May 27, 2008, e-mail (apologizing for the delay and stating that Atlantis hoped to get the posts to Meridian by that Friday); (4) the June 3, 2008, e-mail (apologizing for the delay of the panels and explaining that there was an industry-wide steel shortage); and (5) the June 6, 2008, e-mail (written *after* Meridian's threat of a lawsuit for the delay, stating that the 8 to 12 week delivery period does not begin until conditions such as down payment—amount not specified—and credit are fulfilled, essentially concluding that, as the *credit* payment was not made until May 13, 2008, Atlantis was still within the contractually agreed delivery time). The February 28, 2008, letter expressly states that the 50% down payment was not necessary. When Meridian submitted the \$5,000 down payment for the customized plates, Atlantis never contacted Meridian for a larger payment. Atlantis proceeded with the order. The May 27 and June 3, 2008, e-mails *apologize* for delivery delay and offer the excuse of an industry-wide steel shortage. It was not until June 6, 2008, after Meridian's threat of a lawsuit, that Atlantis first implies it was exercising its right to delay delivery based on *Meridian's* lack of performance. Even then, Atlantis elaborated only on

the credit issue. While Atlantis named the down payment as a condition precedent, it did not state that the \$5,000 down payment was inadequate.

¶ 51 Therefore, we affirm the trial court's findings that: (1) the April 25, 2008, letter constituted a waiver that satisfied the contract's MODIFICATION OR WAIVER clause; (2) looking to the parol evidence, this waiver operated to eliminate the 50% down payment provision altogether, leaving only the submission of the signed contract and shop drawings to trigger the 8 to 12 week delivery period; (3) the delivery period had, therefore, been triggered in late February or early March; and (4) Atlantis breached the contract by failing to deliver the materials by early June 2008.

¶ 52 C. Issue II: Attorney Fees

¶ 53 Next, Atlantis contends that the trial court erred in failing to award it attorney fees. Atlantis points to the following contractual provision:

“GOVERNING LAW: The validity, interpretation and performance of this Agreement with respect to any material delivered hereunder shall be governed by the law of the State of Illinois. *** Buyer shall pay all fees and expenses related to said arbitration, suit or claim including but not limited to Seller's attorney's fees, filing fees, travel expenses and all related cost of said arbitration, suit or claim.”

Atlantis argues that the plain language of the contract does not contain a “prevailing party” provision, and, therefore, the contract entitles it to recover attorney fees regardless of the trial outcome. We disagree.

¶ 54 Under contract law, the party seeking to enforce a provision of the contract has the burden of showing substantial compliance with all material terms of the contract. *Goldstein v. Lustig*, 154 Ill. App. 3d 599, 595 (1987). The party that materially breaches the contract cannot enforce or

benefit from other terms of the contract. *Id.* Here, Atlantis seeks to enforce the provision requiring Meridian to pay attorney fees, but Atlantis cannot show substantial compliance with all material terms of the contract. Atlantis breached the contract when it failed to deliver the materials in a timely manner, and it cannot now seek to benefit from other terms of the contract.

¶ 55 One can imagine the unfairness that would result from a policy that enabled the breaching party to collect attorney fees for the ensuing lawsuit. The wronged party would not only suffer damages from the breach, but could conceivably be fiscally prevented from seeking relief. This turns on its face the purpose of ordering attorney fees, which is to provide potential litigants with access to legal assistance so that they might pursue a remedy for their injury or loss. *Cannon v. Williams Chevrolet*, 341 Ill. App. 3d 674, 686 (2003). Each of the cases cited by Atlantis is misplaced, because they do not involve the collection of attorney fees by a breaching party. See, e.g., *Bright Horizon Children's Center, LLC, v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 254 (2010); *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 226 (2007); *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004); *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001); and *Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830, 838 (1991).

¶ 56 For the reasons set forth above, the trial court did not err in denying Atlantis attorney fees.

¶ 57 III. CONCLUSION

¶ 58 For the aforementioned reasons, we affirm the judgment of the trial court.

¶ 59 Affirmed.