

No. 1-12-0562

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT C. AUSTIN and KATHRYN C. GAMBLE,)	Appeal from the
Plaintiffs-Appellants,)	Circuit Court of
)	Cook County.
v.)	
)	
METROPOLITAN DEVELOPMENT ENTERPRISES, INC.,)	
Defendant-Appellee,)	
)	
and)	
)	
CAROL J. TAXMAN,)	
Defendant. ¹)	
)	No. 09 L 6598
)	
METROPOLITAN DEVELOPMENT ENTERPRISES, INC.,)	
Counterplaintiff-Appellee,)	
)	
v.)	
)	
ROBERT C. AUSTIN and KATHRYN C. GAMBLE,)	
Counterdefendants-Appellants,)	
)	
and)	
)	Honorable
CAROL J. TAXMAN,)	Sanjay T. Tailor,
Counterdefendant.)	Judge Presiding.

¹Carol Taxman is not a party to this appeal.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted a directed finding in favor of real estate development company and against purchasers of real property on breach of contract claim; however, the trial court improperly granted real estate development company judgment on its counterclaim for breach of contract. Award of attorney fees and costs is vacated.

¶ 2 This appeal arises from the June 3, 2011 order entered by the circuit court of Cook County in a breach of contract action, which granted a directed finding against plaintiffs Robert Austin (Robert) and Kathryn Gamble (Kathryn), and in favor of defendant Metropolitan Development Enterprises, Inc. (MDE), and which entered judgment in favor of MDE on its counterclaim for breach of contract against the plaintiffs. This appeal also arises from the circuit court's February 3, 2012 order, which granted MDE \$140,106.08 in attorney fees and costs. On appeal, the plaintiffs argue that: (1) the trial court erred in entering a directed finding in favor of MDE and dismissing their breach of contract claim against MDE; (2) the trial court erred in awarding judgment in favor of MDE on its counterclaim for breach of contract; and (3) the trial court erred in awarding MDE attorney fees and costs in the amount of \$140,106.08. For the following reasons, we affirm in part, reverse in part, vacate in part the judgment of the circuit court of Cook County, and remand the matter for further proceedings in accordance with this order.

¶ 3 **BACKGROUND**

¶ 4 Plaintiffs Robert and Kathryn are a married couple with several residences around the country. Robert is a musical director, conductor and entrepreneur, and has his principal residence

in Greeneville, Tennessee. Kathryn is a veterinarian at Lincoln Park Zoo and resides in Chicago, Illinois. On April 16, 2004, the plaintiffs entered into a contract with MDE, a real estate development company, for the purchase and construction of a row home at 1914 North Clark Street in Chicago, Illinois. The home was originally designed to have three levels of outdoor terraces. The contract was signed by the plaintiffs and the president of MDE, Paul Hardej (Hardej). The plaintiffs were represented by counsel in connection with the general preparation and wording of the contract.

¶ 5 Paragraph 3 of the contract listed the purchase price of the property at \$2.5 million, "except as altered by the terms of Paragraph 12(b)" and "the total amount of any extras or upgrades." Pursuant to paragraph 3, the plaintiffs were obligated to pay \$5,000 in earnest money with the execution of the contract, and within seven days after the acceptance of the contract, they were required to "deposit an unconditional Letter of Credit, in substance and form acceptable to [MDE] in the amount of **\$245,000 (two hundred and forty-five thousand dollars)** to [MDE's] attorney, Carol J. Taxman, as an earnest money deposit (the 'additional earnest money') to be held in accordance with the terms of an escrow agreement attached hereto as Exhibit XX." (Emphasis in original.) The provision specified that the acceptable form and substance of the letter of credit was contained in Exhibit ZZ, which was attached to the contract, and that the plaintiffs, as the buyers of the property, "would make every effort to have the issuing bank use the form and substance contained in Exhibit ZZ." Under paragraph 3, the plaintiffs were also required to deposit an additional \$50,000 as "second additional earnest money" by August 1, 2004.

¶ 6 Paragraph 12(a) specified that funds charged for the "extras"—any additions, deletions, and substitutions that deviate from the original plans and specifications of the property—shall be paid to

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MDE at "market standards," and that any disputes regarding the charges for the "extras" that would alter the purchase price of the property shall be decided by MDE's architect. Paragraph 12(b) provided that MDE agreed to enclose the rear terraces, to the maximum extent permitted by the city building codes, as a "(a) finished interior space at a cost not to exceed \$175 per square foot, (b) solarium space at a cost to be negotiated in good faith between the [p]arties, or (c) a combination of both." Pursuant to paragraph 12(b), the plaintiffs were required to deposit 50% of the cost of the terrace enclosure and solarium as prepayment of an "extra" by August 1, 2004.

¶ 7 The default provision under paragraph 6 of the contract stated that in the event that the plaintiffs fail to carry out their contractual obligations, the total earnest money shall be retained by MDE as a "sole and exclusive" remedy under the contract. Paragraph 6 further provided that "[t]he prevailing party shall be entitled to any and all reasonable legal fees and litigation costs relating to or arising out of [MDE's] need to collect the [t]otal [e]arnest [m]oney and/or prepayment of extras and upgrades in the event of the default of [the buyers]." Paragraph 13(c) contained an integration clause stating that "[n]o representations, warranties, undertakings, or promises other than those expressed herein, whether oral, implied, written or otherwise shall be considered a part of the [c]ontract. *** All agreements, covenants, and promises are contained herein, and this [c]ontract contains the entire agreement and understanding between [the parties]."

¶ 8 It is undisputed that, contemporaneous with the execution of the contract, the plaintiffs paid the requisite \$5,000 in earnest money. However, the plaintiffs were unable to obtain a letter of credit for \$245,000 to be deposited as "additional earnest money" with MDE's attorney, Carol Taxman (Attorney Taxman), within seven days of executing the contract—as required by paragraph 3 of the

contract. As a result, on April 29, 2004, the parties executed an amendment to the contract (the amended contract) by adding the following language to the end of paragraph 3:

"Notwithstanding anything herein to the contrary, [b]uyer shall have *the option of depositing the [i]nitial [e]arnest [m]oney in cash to be held in escrow pursuant to the provision of this paragraph,* and if, *at a later date, [b]uyer obtains a letter of credit for the amount of the [i]nitial [e]arnest [m]oney, [b]uyer may deposit the letter of credit with [Attorney Taxman], who will then promptly refund the funds on deposit in the amount of the [i]nitial [e]arnest [m]oney to [b]uyer.*

* * *

Notwithstanding anything stated above, the [parties] agree that the exhibit XX shall be modified as follows: Instead of the bank holding a letter of credit, [Attorney Taxman] will hold the cash earnest money, and in the event of default under the terms of the contract, [MDE] can present to [Attorney Taxman] a letter of direction, signed by [MDE], stating that a default has occurred and all monies are to be released to [MDE]." (Emphases added.)

¶ 9 On May 4, 2004, the plaintiffs, pursuant to paragraph 3 of the amended contract, wired \$245,000 in cash as earnest money to Attorney Taxman to be held in escrow. On June 23, 2004, Greeneville Federal Bank (Greeneville Bank) in Tennessee, at the request of Robert, submitted a

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proposed letter of credit in the amount of \$245,000 (the 2004 letter of credit) to Attorney Taxman, in order that the \$245,000 cash held in escrow by Attorney Taxman may be refunded to the plaintiffs under paragraph 3 of the amended contract. The 2004 letter of credit was signed by Bobby Wells (Wells), as the senior vice-president of Greeneville Bank, and differed in a few aspects from the sample letter of credit—Exhibit ZZ—that was part of the contract. The 2004 letter of credit varied from Exhibit ZZ in that it was issued by Greeneville Bank; that it contained the addition of an "unpaid invoices" provision; and that it referenced Tennessee law rather than Illinois law. Thereafter, throughout the summer of 2004, the plaintiffs' Tennessee lawyer, Kenneth Hood (Attorney Hood), made several unsuccessful attempts to contact Attorney Taxman in order to determine whether the 2004 letter of credit was acceptable, and to obtain a refund of the \$245,000 cash deposit in escrow. By late July 2004, Attorney Taxman had not responded to Attorney Hood as to whether the 2004 letter of credit was acceptable for a refund of the \$245,000 earnest money cash deposit to the plaintiffs. In an email dated July 25, 2004, Robert informed Hardej that the plaintiffs needed to pay the \$50,000 "second additional earnest money" and the deposit of 50% of the cost of the terrace enclosures, which were due by August 1, 2004 pursuant to the contract terms, with the \$245,000 earnest money cash that was still held in escrow by Attorney Taxman. Robert asked Hardej for his assistance in getting the 2004 letter of credit approved so that the funds in escrow could be released. In response, in a July 26, 2004 email, Hardej informed Robert that he would help by speaking to Attorney Taxman regarding the situation. It is alleged by the plaintiffs that, on July 26, 2004, Hardej made an oral waiver agreeing not to enforce the August 1, 2004 deadline for payments required pursuant to the contract terms, and allowed the plaintiffs time until

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the release of the \$245,000 cash from escrow in order to pay the \$50,000 "second additional earnest money" and the deposit of 50% of the cost of the terrace enclosures.

¶ 10 Between April and August 2004, the plaintiffs requested various customized design changes to the home, including the installation of an aviary, the enclosure of all outdoor terraces, and the substitution of specific fixtures chosen by MDE with those that were independently purchased by the plaintiffs—such as the master bathtub and antique fireplace mantels. On August 16, 2004, Hardej, as representative of MDE, sent a proposed change order estimate to the plaintiffs, which stated that the cost of the design changes totaled \$136,459. The plaintiffs and Hardej disagreed on the costs and surcharges of these changes, and the plaintiff did not approve the proposed change order estimate.

¶ 11 In a letter dated September 1, 2004, pursuant to paragraph 12(a) of the contract, the plaintiffs informed MDE's architect, Steve Rezabek (Rezabek), of the parties' impasse relating to issues of costs and surcharges. The letter sought resolution from Rezabek on the following issues in dispute: the cost and surcharge of the enclosure of the "winders" for the rear outdoor terraces; the surcharge for substituting the master bathtub with one purchased by the plaintiff; and the surcharge for substituting the fireplace mantels with antique ones purchased by the plaintiffs. In response, on September 13, 2004, Rezabek stated that the modifications requested by the plaintiffs regarding the rear outdoor terraces necessitated the enclosure of the entire staircase serving the fourth floor; that the substitution of the master bathtub required an "upcharge" based either on the contractor's actual costs or negotiations with the developer; and that installation costs and other costs "to receive, secure, deliver to the appropriate location, and unpack" the substituted fireplace mantels may be imposed.

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¶ 12 On September 28, 2004, the plaintiffs filed a complaint for declaratory and injunctive relief against MDE and Attorney Taxman (2004 lawsuit) (Austin v. Metropolitan Development Enterprises, Inc., case No. 04 CH 15936). The complaint requested that the court order Attorney Taxman to return the \$245,000 earnest money cash to the plaintiffs; that the court order MDE to reimburse the plaintiffs for certain fees they incurred in connection with the 2004 letter of credit; that the court declare that MDE was not entitled to charge as an "extra" the plaintiffs' design changes concerning the terrace enclosures; that the court declare that MDE has failed to give the plaintiffs appropriate "credits" against the purchase price for design changes that have reduced costs; and that the court direct MDE to grant "credits" to the plaintiffs against the purchase price under the contract in an appropriate amount to be determined by the court. By the time the 2004 lawsuit was filed, MDE had not yet begun demolition of the existing structure on the premises nor initiated construction of the custom home for the plaintiffs. Further, the plaintiffs had not paid the \$50,000 "second additional earnest money" and 50% of the enclosed terrace costs, nor had the \$245,000 cash earnest money been released from escrow.

¶ 13 On October 11, 2004, Hardej, on behalf of MDE, sent a letter to the plaintiffs' Chicago counsel, John Ropiequet (Attorney Ropiequet), requesting that the plaintiffs finalize the selection of finishes for the home.

¶ 14 On October 18, 2004, Attorney Taxman sent a letter to Attorney Ropiequet, informing him that the plaintiffs' 2004 letter of credit was not in conformance with the terms of the contract. On October 27, 2004, Hardej, on behalf of MDE, sent a second and final notice to Attorney Ropiequet, requesting that the plaintiffs finalize the selection of finishes for the property. On that same day,

October 27, 2004, Attorney Ropiequet faxed a letter to Attorney Taxman, stating that, under the terms of the contract, the plaintiffs were entitled to a 21-day grace period for notification of any deadline for the selection of finishes before Hardej could unilaterally select the finishes.

¶ 15 On January 5, 2005, the City of Chicago approved the property's building plans which reflected the terrace enclosures. On January 28, 2005, Attorney Ropiequet, as counsel for the plaintiffs, faxed a second letter of credit in the amount of \$245,000 (the 2005 letter of credit) to Attorney Taxman, in an attempt to trigger a release of the \$245,000 cash in escrow. The 2005 letter of credit was identical in terms to the 2004 letter of credit, with the exception of the issuance date, and was again executed by Greeneville Bank's senior vice-president, Wells.

¶ 16 As of February 2005, the parties had yet to agree upon a final purchase price of the home to reflect the plaintiffs' customized design changes. In February 2005, Attorney Taxman informed the plaintiffs' Chicago counsel, Attorney Ropiequet, that the plaintiffs owed \$82,000 in undisputed change order costs. In a facsimile dated February 15, 2005, Attorney Ropiequet requested Attorney Taxman to provide supporting documentation regarding the \$82,000 charges, and stated that it was his understanding that the 2005 letter of credit would be accepted by MDE. Thereafter, Attorney Taxman did not furnish any supporting documentation to Attorney Ropiequet regarding the \$82,000 charges.

¶ 17 Throughout March 2005, Attorney Ropiequet made several unsuccessful attempts to obtain an answer from Attorney Taxman regarding whether the 2005 letter of credit was acceptable to MDE so as to trigger a refund of the \$245,000 cash deposit in escrow. However, according to Attorney Taxman's trial testimony, she claimed that she had informed the plaintiffs' counsel that the 2005

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letter of credit was unacceptable because it failed to comply with the contract terms.

¶ 18 During a Spring 2005 meeting, the plaintiffs informed Hardej that they wished to have the home built without any customized design changes so that it may be sold to a third-party rather than kept as their own. In May 2005, the plaintiffs' architect, Keith Criminger (Criminger), revised the building plans to de-customize the home. On May 9, 2005, Criminger's revised plans were sent to another attorney representing MDE, David Howard (Attorney Howard). In an August 2005 meeting, Brian Schultz (Schultz), a senior project designer and coworker of Criminger, selected finishes for the home at the request of the plaintiffs and met with a representative of MDE to review the selections.

¶ 19 On February 23, 2006, another counsel for MDE, Paul Bonadies (Attorney Bonadies), sent a "notice of default" to the plaintiffs, stating that the plaintiffs were in default and breach of their obligations under the contract terms. The notice of default specified that the plaintiffs failed to pay the \$50,000 "second additional earnest money" and 50% of the cost of the terrace enclosures by August 1, 2004, and failed to pay a non-refundable 50% of the cost of the "extra or change order items" that were requested by the plaintiffs. On February 24, 2006, Attorney Ropiequet, on behalf of the plaintiffs, responded to the notice of default by stating that the plaintiffs did not default on the contract terms.

¶ 20 On April 24, 2006, MDE filed a counterclaim to the plaintiff's 2004 lawsuit, alleging breach of contract by the plaintiffs on the bases that they failed to pay the \$50,000 "second additional earnest money" by August 1, 2004; failed to pay 50% of the cost of the terrace enclosures; failed to pay 50% of the cost of change orders; and failed to make selections for finishes within 21 days of

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receiving notice from MDE that such selections were necessary. The counterclaim alleged that, as a result of the plaintiffs' breach of contract, MDE was forced to incur costs that should have been incurred by the plaintiffs in order to complete the construction project. MDE requested that the court order Attorney Taxman to release the \$245,000 earnest money cash in escrow, plus interest, to MDE, and award MDE reasonable attorney fees and costs.

¶ 21 In early 2006, the plaintiffs' architect, Criminger, was denied access to the property by MDE, although he had regular access to the home on previous occasions. Subsequently, the plaintiffs obtained a court order, which allowed Criminger to regain access to the property. In July and December 2006, upon inspection of the property, Criminger noticed that construction changes, which differed from Criminger's May 2005 revised plans and were not authorized by the plaintiffs, had been made to the home.

¶ 22 Subsequently, the plaintiffs amended their complaint in the 2004 lawsuit several times. On March 14, 2007, the plaintiffs filed a fourth amended complaint, alleging a count for "accounting" relating to adjustments to the contract price (count I) and a count for specific performance to transfer title of the premises to the plaintiffs (count II). On April 10, 2007, MDE filed a motion to dismiss the plaintiff's fourth amended complaint, which the trial court granted on July 26, 2007. On August 22, 2007, the plaintiffs filed a motion to reconsider or for leave to file a fifth amended complaint. On November 20, 2007, the trial court denied the plaintiffs' motion to reconsider and for leave to file a fifth amended complaint, noting that the plaintiffs may be entitled to bring a breach of contract complaint against MDE which was not connected with or did not have any relationship with the causes of action that were filed in the 2004 lawsuit. Thereafter, on November 29, 2007, while the

dismissal of the 2004 lawsuit was pending on appeal, the plaintiffs filed the instant breach of contract action against MDE and Attorney Taxman, requesting the return of the \$5000 and \$245,000 in earnest money, plus interest, held in escrow by Attorney Taxman (*Austin v. Metropolitan Development Enterprises, Inc.*, case No. 07 L 13348). On January 9, 2008, the trial court entered an order consolidating case No. 07 L 13348 with MDE's counterclaim in case No. 04 CH 15936.

¶ 23 On February 5, 2009, this court affirmed the trial court's dismissal of the plaintiffs' fourth amended complaint in the 2004 lawsuit (case No. 04 CH 15936), finding that, in the event of default by MDE, the return of earnest money and any prepayments for upgrades and extras was the only remedy available to the plaintiffs under the express terms of the contract. *Austin v. Metropolitan Development Enterprises, Inc.*, No. 1-07-3327 (2009) (unpublished order under Supreme Court Rule 23). This court noted that the plaintiffs suffered no prejudice from the trial court's denial for leave to file a fifth amended complaint because the plaintiffs had since filed a new complaint (case No. 07 L 13348) in the trial court requesting the return of earnest money as relief. *Id.*

¶ 24 On June 5, 2009, the trial court entered an order directing the clerk of the circuit court to administratively renumber the instant case from case No. 07 L 13348 to case No. 09 L 6598.

¶ 25 On May 24, 2011, a bench trial commenced during which Robert, Attorney Hood, Attorney Taxman, Criminger, Wells, and Hardej testified. On June 3, 2011, following the plaintiffs' case-in-chief, MDE moved for a directed finding, which the trial court granted. The trial court further entered judgment in favor of MDE on its counterclaim for breach of contract against the plaintiffs in the amount of \$245,000 plus all accrued interest, and directed Attorney Taxman to release the entirety of the escrow proceeds in the amount of \$245,000, plus interest, to MDE.

¶ 26 On July 1, 2011, the plaintiffs filed a notice of appeal, appealing from the trial court's June 3, 2011 judgment. On that same day, July 1, 2011, MDE filed a petition for attorney fees in the amount of \$140,106.08. On August 11, 2011, the plaintiffs filed a response to MDE's petition for attorney fees, arguing that the fee provision under the contract was inapplicable to the instant case. On February 3, 2012, the trial court granted MDE's petition for attorney fees in the amount of \$140,106.08, plus costs. On February 16, 2012, the plaintiffs filed a notice of appeal, appealing from the trial court's February 3, 2012 order.

¶ 27 ANALYSIS

¶ 28 We determine the following issues on appeal: (1) whether the trial court erred in entering a directed finding in favor of MDE at the close of the plaintiffs' case-in-chief in the breach of contract action against MDE; (2) whether the trial court erred in awarding judgment in favor of MDE on its counterclaim for breach of contract; and (3) whether the trial court erred in awarding MDE attorney fees and costs in the amount of \$140,106.08.

¶ 29 We first determine whether the trial court erred in granting a directed finding in favor of MDE at the close of the plaintiffs' case-in-chief in a breach of contract action against MDE.

¶ 30 When ruling on a motion for a directed finding, the trial court must employ a two-step analysis. *Law Offices of Colleen M. McLaughlin*, 2011 IL App (1st) 101849, ¶ 39. First, the court must determine as a matter of law whether the plaintiff has established a *prima facie* case. *Id.* A plaintiff presents a *prima facie* case when he or she presents some evidence on each element essential to the cause of action. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). Second, if the plaintiff has presented some evidence on each element, the court must then consider and weigh the

totality of the evidence presented, including evidence favorable to the defendant, to determine whether the *prima facie* case survives. *Id.* If the trial court finds that the plaintiff has failed to establish a *prima facie* case as a matter of law, the appellate standard of review is *de novo*. However, if the trial court moves on to consider the weight and quality of the evidence and finds that no *prima facie* case remains, the appellate standard of review is manifest weight of the evidence." *Warning v. City of Joliet*, 2012 IL App (3d) 110309, ¶ 24. A decision is against the manifest weight of the evidence if the opposite conclusion is clearly apparent. *Id.* Based on our review of the entirety of the trial court's ruling in the trial transcripts, we are persuaded that the trial court found that the plaintiffs failed to establish a *prima facie* case as a matter of law and the court did not proceed to the second step of the analysis under MDE's motion for a directed finding, which compels us to review the trial court's decision *de novo*.

¶ 31 This case involves the parties' competing breach of contract claims for the \$245,000 earnest money deposit held in escrow by Attorney Taxman. To establish a *prima facie* case for breach of contract, a plaintiff must produce evidence of: (1) the existence of a valid and enforceable contract; (2) the plaintiff's performance of his contractual obligations; (3) the defendant's breach; and (4) the resultant damages to the plaintiff. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 78.

¶ 32 It is undisputed that the plaintiffs presented evidence at trial that the contract, which was amended on April 29, 2004, was valid and enforceable. Thus, the first element of the plaintiffs' breach of contract claim against MDE is not in question.

¶ 33 With regard to the second element of the claim, we find that the plaintiffs have not presented evidence that they performed their obligations under the contract. It is undisputed that, pursuant to

paragraph 3 of the contract, the plaintiffs paid the requisite \$5,000 in earnest money at the time they executed the contract. Pursuant to the amended contract, the plaintiffs deposited \$245,000 in cash as "additional earnest money," which was held in escrow by Attorney Taxman. However, the plaintiffs failed to present any evidence that they paid the \$50,000 "second additional earnest money" or deposited 50% of the cost of the terrace enclosures by August 1, 2004, as required by the express terms of the contract. Indeed, Robert testified at trial that neither he nor Kathryn paid the \$50,000 "second additional earnest money" and the 50% of the cost of the terrace enclosures by August 1, 2004, or at any time after MDE sent a notice of default to the plaintiffs in February 2006.

¶ 34 The plaintiffs argue that in July 2004, Hardej made an oral waiver by which he agreed not to enforce the August 1, 2004 deadline for payments required under the contract terms, until the \$245,000 cash deposit was released from escrow. The plaintiffs point to portions of Hardej's trial testimony, in which he testified that he understood that Robert needed the release of the cash from escrow before he could make the payments, and that Hardej had "no problem with that at all."

¶ 35 In granting MDE's motion for a directed finding, the trial court found that "[t]he central issue in this case is whether the letter of credit submitted by the plaintiffs complied with the terms of the contract." The trial court determined that the letters of credit did not comply with the terms of the contract, and did not reach the issue of whether the alleged oral waiver existed to extend the deadline for making the requisite payments. We agree with the trial court's assessment that the threshold inquiry is whether the 2004 and 2005 letters of credit complied with the terms of the contract, because, even if the alleged oral waiver was valid and existed to extend the deadline of the payments until after the \$245,000 escrow funds are released, the plaintiffs must still provide a compliant letter

of credit in order to secure the release of the escrow funds under the contract.

¶ 36 The plaintiffs argue that even if the letters of credit failed to comply with the terms of the contract, this could not be a basis upon which to dismiss their claim because the submission of a letter of credit was simply an *option*, not a requirement, available to the plaintiffs under the contract terms. We find this argument to be specious and without merit. Paragraph 3 of the contract and amended contract provided the plaintiffs with the option of depositing either \$245,000 cash or a letter of credit in the amount of \$245,000 as earnest money with Attorney Taxman, and that, in the event that \$245,000 earnest money cash is deposited into escrow, a letter of credit for that same amount may later be submitted to Attorney Taxman, who would then refund the funds on deposit. However, nothing in the express language of the amended contract eliminated the requirement that the letter of credit must conform to the "form and substance" of the sample letter of credit contained in Exhibit ZZ of the contract. Having chosen the option of initially depositing \$245,000 earnest money cash with Attorney Taxman, the plaintiffs, who wanted a release of the funds, must submit a letter of credit that complied with the terms of the contract. See *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011) (in construing a contract, the primary objective is to give effect to the intention of the parties based on the plain language of the contract).

¶ 37 The plaintiffs next argue that the 2004 and 2005 letters of credit sufficiently complied with the form and substance required by Exhibit ZZ of the contract, and that any differences between their letters of credit and the sample letter of credit contained in Exhibit ZZ were immaterial and did not justify MDE's refusal to release the escrow funds. The plaintiffs further contend that MDE breached its implied duty of good faith and fair dealing by failing to communicate and negotiate with them

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regarding MDE's purported objections to the 2004 and 2005 letters of credit. MDE counters that the trial court properly determined that the 2004 and 2005 letters of credit never complied with the terms of the contract, and argues that the plaintiffs' argument regarding MDE's duty of good faith and fair dealing was forfeited for review on appeal.

¶ 38 As discussed, on June 23, 2004, the plaintiffs submitted the 2004 letter of credit to Attorney Taxman, in an attempt to obtain a release of the \$245,000 cash in escrow under paragraph 3 of the amended contract. The 2004 letter of credit differed in three aspects from the sample letter of credit contained in Exhibit ZZ of the contract. Specifically, the 2004 letter of credit was issued by Greeneville Bank rather than Oak Brook Bank; the 2004 letter of credit referenced Tennessee law rather than Illinois law; and the 2004 letter of credit contained the addition of an "unpaid invoices" provision. In a letter dated October 18, 2004, Attorney Taxman informed the plaintiffs' counsel, Attorney Ropiequet, that the 2004 letter of credit was not in conformance with the terms of the contract. Thereafter, on January 28, 2005, the plaintiffs submitted a second letter of credit to Attorney Taxman—the 2005 letter of credit—which contained identical terms to the 2004 letter of credit with the exception of the issuance date. At trial, in granting MDE's motion for a directed finding, the trial court noted that the issue of whether the letters of credit complied with the contract terms was a "question for the [c]ourt to decide," and found that the letters of credit on their face failed to meet the form and substance of the sample letter of credit in Exhibit ZZ of the contract. Specifically, the trial court stated that the "unpaid invoices" provision "entirely defeats the purpose of the letter of credit" because there was "no evidence that an invoice would ever be generated if the plaintiffs failed to satisfy their obligations under the contract" and "there's nothing in the contract

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requiring [MDE] to issue an unpaid invoice to the plaintiffs upon the plaintiffs' request." The trial court noted that thus, the 2004 and 2005 letters of credit "would effectively set [MDE] up for failure after the plaintiffs' default by giving the issuing bank the right to withhold payment on the letter of credit by simply claiming that no unpaid invoice had been submitted."

¶ 39 We agree with the trial court and find the 2004 and 2005 letters of credit to be noncompliant with the express terms of the contract. The 2004 and 2005 letters of credit on their face clearly deviate in substance from the sample letter of credit contained in Exhibit ZZ of the contract. Wells, as senior vice-president of Greeneville Bank, testified that it would not advance money to MDE if MDE did not submit an unpaid invoice to Greeneville Bank at the time MDE requested the funds under the letters of credit. Wells explained that "[i]f [MDE] requested funds, [Greeneville Bank] wanted to see that there was truly funds due and payable to [MDE] for [Robert]," and that an unpaid invoice was how Greeneville Bank could verify that fact. Attorney Taxman testified at trial, however, that no unpaid invoices would be generated in the event of default by the plaintiffs as buyers of the property under the contract. We find, as the trial court correctly stated, that the "unpaid invoices" provision in the 2004 and 2005 letters of credit entirely defeated the purposes of the letters of credit because no evidence was presented that an invoice would ever be generated in the event of default by the plaintiffs, and that it would essentially "set [MDE] up for failure" by giving Greeneville Bank the right to withhold payment by claiming that no unpaid invoice had been submitted. Moreover, even assuming, *arguendo*, that the 2004 and 2005 letters of credit complied with Exhibit ZZ of the contract, we find that the plaintiffs could not establish that Hardej's alleged oral waiver, by which he purportedly agreed to extend the August 1, 2004 deadline for making the

requisite payments until the \$245,000 cash deposit was released from escrow, was valid and enforceable under the unambiguous terms of the contract. Paragraph 13(c) of the contract contained an integration clause by which the parties agreed that "[n]o representations, warranties, undertakings, or promises other than those expressed herein, whether oral, implied, written or otherwise shall be considered a part of the [c]ontract. All agreements, covenants, and promises are contained herein, and this [c]ontract contains the entire agreement and understanding between [the parties]." See *Air Safety Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999) ("where parties formally include an integration clause in their contract, they are explicitly manifesting their intent to protect themselves against misinterpretations which might arise from extrinsic evidence"). Thus, the plain and unambiguous language of the contract excluded all extrinsic representations that were neither contained in the contract itself nor in any document incorporated into it. See *Thompson*, 241 Ill. 2d at 441 (2011) (in construing a contract, the primary objective is to give effect to the intention of the parties based on the plain language of the contract).

¶ 40 We further find that the plaintiffs forfeited review of their arguments regarding MDE's alleged breach of its duty of good faith and fair dealing in failing to communicate and negotiate MDE's purported objections to the letters of credit, where such arguments were not presented to the trial court and the plaintiffs raise this issue for the first time on appeal. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶¶ 15, 24; *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 443-44 (2011) (plaintiffs cannot make a claim under the theory of breach of implied duty of good faith and fair dealing where it was not alleged in the complaint). Nowhere in the plaintiffs' instant complaint or at trial did the plaintiffs make a claim that MDE breached its duty of good faith and fair

dealing. However, even assuming, *arguendo*, that the issue of MDE's alleged breach of good faith and fair dealing was not forfeited for review on appeal, the claim must fail where this court has determined that the trial court properly found that the 2004 and 2005 letters of credit were noncompliant with the express terms of the contract. Because the letters of credit in question were not compliant with the parties' contract terms, the plaintiffs' claim that MDE breached its duty of good faith and fair dealing with regard to MDE's alleged failure to communicate its purported objections to the letters of credit was inapplicable and without merit. Indeed, although there is evidence to support the plaintiffs' claim that Attorney Taxman was unresponsive on multiple occasions with regard to requests for confirmation of compliance made by the plaintiffs' attorney, the record shows that on October 18, 2004, Attorney Taxman did send a letter to the plaintiffs' counsel, Attorney Ropiequet, informing him that the 2004 letter of credit was not in conformance with the terms of the contract. Yet, despite being informed of this, the plaintiffs later submitted the 2005 letter of credit which was identical in terms to the 2004 letter of credit. Further, it is undisputed that the plaintiffs, in executing the parties' contract, was aware of the existence of Exhibit ZZ which was made a part of the contract and set forth a sample letter of credit that would be acceptable to MDE.

¶ 41 Accordingly, we hold that the plaintiffs failed to present evidence that they performed their obligations under the contract, where there was no evidence that they paid the \$50,000 "second additional earnest money" or the 50% of the cost of the terrace enclosures by August 1, 2004 or at any time after MDE sent a notice of default to the plaintiffs in February 2006. Therefore, the second element of the plaintiff's breach of contract claim was not satisfied and the plaintiffs failed to

establish a *prima facie* case as a matter of law. Accordingly, we find that the trial court properly entered a directed finding in favor of MDE at the close of the plaintiffs' case-in-chief.

¶ 42 We next determine whether the trial court erred in awarding judgment in favor of MDE on its counterclaim for breach of contract.

¶ 43 Following the trial court's entry of a directed finding against the plaintiffs on their breach of contract claim against MDE, the trial court entered judgment in favor of MDE on its counterclaim for breach of contract against the plaintiffs in the amount of \$245,000, plus all accrued interest, and directed Attorney Taxman to release the entirety of the escrow proceeds in the amount of \$245,000, plus interest, to MDE. As discussed, MDE's counterclaim for breach of contract alleged that the plaintiffs failed to pay the \$50,000 "second additional earnest money" by August 1, 2004; failed to pay 50% of the cost of the terrace enclosures; failed to pay 50% of the cost of change orders; and failed to make selection for finishes within 21 days of receiving notice from MDE that such selections were necessary.

¶ 44 The plaintiffs argue that the trial court erred in awarding judgment in favor of MDE on its counterclaim for breach of contract, because a motion for a directed finding could not serve as a basis for the entry of a judgment awarding affirmative relief, and the entry of judgment on MDE's counterclaim at the conclusion of the plaintiffs' case-in-chief violated the plaintiffs' due process rights. The plaintiffs further contend that the trial court's determination that the 2004 and 2005 letters of credit failed to comply with the terms of the contract did not justify awarding judgment in favor of MDE on its counterclaim, and that the evidence in the record did not support entering judgment in favor of MDE on its counterclaim.

¶ 45 MDE counters that the trial court properly awarded judgment in favor of its counterclaim following the entry of a directed finding against the plaintiffs, because all of the evidence and arguments necessary for the resolution of the plaintiffs' claim and MDE's counterclaim were presented before the trial court and the plaintiffs' due process rights were not violated. MDE argues that the court's determination that the 2004 and 2005 letters of credit failed to comply with the terms of the contract was law of the case which served as a determinative decision as to both the claim and counterclaim. MDE further contends that the evidence in the record was sufficient to support the entry of a judgment in favor of MDE on its counterclaim.

¶ 46 Section 2-1110 of the Illinois Code of Civil Procedure (the Code) provides in relevant part that if a trial court directs a finding in favor of a defendant at the close of the plaintiff's case-in-chief, "a judgment dismissing the action shall be entered." 735 ILCS 5/2-1110 (West 2010). We find that the procedure employed by the trial court in entering judgment on MDE's counterclaim at this juncture of the proceedings finds no support in either the Code (735 ILCS 5/1-101 *et seq.* (West 2010)) or the Illinois Supreme Court Rules. At the close of the plaintiffs' case-in-chief and on motion of MDE, the initial question before the trial court was a narrow one, namely whether the plaintiffs had established a *prima facie* case. *People ex rel. Sherman v. Crynes*, 203 Ill. 2d 264, 275 (2003). Once the trial court had entered judgment in favor of MDE at the close of the plaintiffs' case-in-chief, MDE should have been put to its proofs on the counterclaim. It was MDE that was the burdened party on the counterclaim; that is to say, it was MDE that had to come forward with evidence of: (1) the existence of a valid and enforceable agreement between it and the plaintiffs; (2) that the plaintiffs breached the contract; (3) that it performed its obligations under the contract; and

(4) the damages resulting from the plaintiffs' breach. See *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 78.

¶ 47 Even assuming that the evidence adduced during the plaintiffs' case-in-chief established elements 1 and 2, there still remained MDE's burden to establish that it performed all of its obligations under the contract and the plaintiffs' right to be heard in defense of the claim. By entering what appears to be a summary judgment in favor of MDE on its counterclaim at the close of the plaintiffs' case-in-chief, the trial court not only dispensed with MDE's burden to establish that it performed *all* of its obligations under the contract, it deprived the plaintiffs of their right to be heard in defense of the claim. Due process mandates that a defendant, or in this case counterdefendants, be afforded an opportunity to be heard in their defense. See *Aaron v. Hendrickson*, 221 Ill. App. 3d 842, 850 (1991); *Nye v. Parkway Bank & Trust Co.*, 114 Ill. App. 3d 272, 274 (1983). A right of which the plaintiffs were deprived by the procedure employed by the trial court in this case. For this reason, we reverse the judgment entered in favor of MDE on its counterclaim and remand the matter for a new trial on the claim.

¶ 48 We next determine whether the trial court erred in awarding MDE attorney fees and costs in the amount of \$140,106.08. A trial court's construction of a fee agreement in awarding attorney fees is a question of law that we review *de novo*. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 263 (2002). However, a party's challenge to the amount of attorney fees awarded by the trial court is reviewed under an abuse of discretion standard. *Id.* at 262-63.

¶ 49 As discussed, following the trial court's June 3, 2011 ruling in favor of MDE, MDE filed a petition for attorney fees in the amount of \$140,106.08. On August 11, 2011, the plaintiffs filed a

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response to MDE's petition for attorney fees. On February 3, 2012, the trial court granted MDE's petition for attorney fees in the amount of \$140,106.08, plus costs.

¶ 50 The plaintiffs argue that the trial court erred in awarding MDE attorney fees and expenses, arguing that the fee provision in paragraph 6 of the contract was not triggered in this case because the plaintiffs did not breach the contract and MDE had no "need to collect" the earnest money deposit in escrow. They further contend that the trial court erred in awarding the full amount of attorney fees requested by MDE, and that it should have limited the amount of the attorney fees award to \$60,509.43.

¶ 51 MDE counters that, based on the clear and unambiguous language of the contract, MDE was entitled to attorney fees and costs under the fee provision in the contract. MDE argues that there was a "need to collect" the earnest money in escrow because the parties had competing claims to the total earnest money and Attorney Taxman did not release the funds until the parties' claims were resolved by the court. MDE further contends generally that the trial court acted properly in awarding MDE attorney fees and costs in the amount of \$140,106.08.

¶ 52 The fee provision under paragraph 6 of the contract provided that "[t]he prevailing party shall be entitled to any and all reasonable legal fees and litigation costs relating to or arising out of [MDE's] need to collect the [t]otal [e]arnest [m]oney and/or prepayment of extras and upgrades in the event of the default of [the buyers]." As discussed, the plaintiffs failed to present evidence that they performed their contractual obligations and thus, the trial court properly granted a directed finding in favor of MDE at the close of the plaintiffs' case-in-chief.

¶ 53 Further, we reject the plaintiffs' argument that the fee provision was not triggered because

MDE did not have a "need to collect" the earnest money deposit in escrow. In support of their argument, the plaintiffs point to paragraph 3 of the amended contract, which stated that "in the event of default under the terms of the contract, [MDE] can present to [Attorney Taxman] a letter of direction, signed by [MDE], stating that a default has occurred and all monies are to be released to [MDE]." The plaintiffs maintain that MDE could have obtained the release of the \$245,000 in escrow from Attorney Taxman by simply presenting her with a letter as instructed by paragraph 3 of the amended contract, and thus, had no "need to collect" the funds by filing a counterclaim against the plaintiffs. We find the plaintiffs' argument to be unpersuasive. At trial, Attorney Taxman testified that MDE had indeed presented her with a notice of the plaintiffs' default, but that she refused to release the escrow proceeds without a court order. We further find the plaintiffs' cited authority, *Chicago Land Clearance Comm'n v. Jones*, 13 Ill. App. 2d 554 (1957), to be inapposite and factually distinguishable. *Jones* involved the interpretation of the fee provision in an unambiguous real estate contract, where the trial court declined the sellers' suggestion to alter the parties' contract by substituting the word "or" for the word "and" in the fee provision in order to allow sellers to collect attorneys fee upon the buyer's default. *Jones*, 13 Ill. App. 2d at 558-60. Unlike *Jones*, the case at hand does not involve any proposed alteration of the wording of the fee provision in the contract. The plain language of the provision in question says: "[t]he prevailing party shall be entitled to any and all reasonable legal fees and litigation costs relating to or arising out of [MDE's] need to collect the [t]otal [e]arnest [m]oney and/or prepayment of extras and upgrades in the event of the default of [the buyers]." Thus, we find that, under the express terms of the contract, MDE as the prevailing party, is certainly entitled to the attorney fees and costs which

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it incurred in defense of the plaintiffs' action. However, in light of our holding that the trial court erred in entering judgment in favor of MDE on its counterclaim, MDE is not entitled to an award of attorney fees and costs incurred in the prosecution of its counterclaim unless and until it prevails on the counterclaim after a trial on the merits. Consequently, we vacate the trial court's award of attorney fees and costs in the amount of \$140,106.08, remand that matter with instructions to segregate the attorney fees and costs incurred by MDE in defense of the plaintiffs' action and enter judgment in its favor for that sum, and to reserve the question of attorney fees and costs attributable to the counterclaim until the matter has been tried.

¶ 54 For the foregoing reasons we affirm in part, reverse in part, and vacate in part, the judgment of the circuit court of Cook County, and remand for further proceedings in accordance with this order.

¶ 55 Affirmed in part; reversed in part; vacated in part; and remanded with directions.