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THIRD DIVISION
September 16, 2015

No. 1-14-2217

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

STATE BANK OF COUNTRYSIDE, As Trustee of land trust agreement dated January 8, 2003 and known as Trust Number 03-2481, as Successor in interest to Oak Brook Bank, as Trustee,)	Appeal from the
)	Circuit Court
)	of Cook County,
)	Illinois.
Plaintiff-Appellee,)	No. 11L12186
)	
v.)	The Honorable
)	John C. Griffin,
VILLAGE OF WILLOW SPRINGS, An Illinois municipal corporation,)	Judge Presiding.
)	
Defendant-Appellant.)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 Held: In breach of contract action regarding an annexation agreement, trial court affirmed where there is no condition precedent apparent on the face of the contract; plaintiff was not required to notify the municipality of an alleged assignment of rights in an underlying land trust; plaintiff did not waive its rights under the contract by failing to manifest its intent to exercise its rights; and plaintiff did not file the lawsuit in violation of the statute of limitations. Affirmed.

¶ 2 Defendant-appellant Village of Willow Springs (the Village) appeals from the circuit court's determination, following a bench trial, that it breached an annexation agreement (annexation agreement or the contract), and grant of judgment in favor of plaintiff-appellee State Bank of Countryside, as trustee of land trust agreement dated January 8, 2003 and known as Trust Number 03-2481, as Successor in interest to Oak Brook Bank, as Trustee (State Bank of Countryside) in the amount of \$143,824. On appeal, the Village contends the trial court erred in granting judgment in favor of defendant. Specifically, the Village argues: (1) even if a specific tax reimbursement was required, plaintiff failed to comply with a condition precedent, that is, to submit documentation on an annual basis in order to be entitled to reimbursement, and therefore the tax obligation was terminated; (2) the Village was not contractually obligated to "respond to the demand for payment or reimburse" the requesting party because it had not been notified of any assignment of rights; (3) plaintiff waived its right of reimbursement; and (4) the lawsuit is barred by the statute of limitations. For the following reason, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 25, 1999, David Hickey, Patricia Hickey, and Gregory Pawlowicz entered into a land trust agreement known as Trust Number 3059 with Oak Brook Bank. David, Patricia, and Gregory were each named beneficiaries in the land trust¹ (the Oak Brook Bank parcel or the property). On February 22, 1999, the beneficiaries conveyed a commercial

¹ The beneficiaries are listed as follows:
Patricia Hickey – sixty (60%) percent and upon her death to David Hickey
David Hickey – twenty (20%) percent and upon his death to Patricia Hickey
Gregory Pawlowicz – twenty (20%) percent

property located on West 91st Street in Hinsdale, Illinois, to Oak Brook Bank as Trustee of the land trust. According to trial testimony by David Hickey, the trust was created to provide collateral to Oak Brook Bank for a line of credit to Air Design Systems, Inc., one of the businesses on the commercial property.

¶ 6 On June 29, 1999, the Village entered into an annexation agreement with Oak Brook Bank, "as Trustee under Agreement dated January 25, 1999; known as Trust No. 3059."² There is no disagreement that the Village entered into the annexation agreement in regards to the commercial property at issue, termed in the annexation agreement as the "Oak Brook Bank Parcel." The annexation agreement specifies:

"[T]he Village's Corporate Authorities have determined that the annexation of said Parcels will logically extend the corporate limits and jurisdiction of the Village, will permit orderly growth, planning and development of the Village, will increase the tax base of the Village, will promote the general welfare of the Village and will serve the best interests of the Village[.]"

¶ 7 By the annexation agreement, the Village agreed to:

"take all actions necessary to cause the annexation to the Village of the Indian Head Parcel and the Oak Brook Bank Parcel. The Village, upon annexation, agrees to make available to said Parcels the Village's police services, fire protection services, public works services and emergency services and all other Village services as are provided to all properties within the Village."

¶ 8 The Village agreed in the annexation agreement to:

² The annexation agreement includes a neighboring property, as well, owned by Indian Head, Inc.

"cause sanitary sewer and water service to be extended to and connected to the Indian Head Parcel and the Oak Brook Bank Parcel within one hundred eighty (180) days of the annexation of such Parcels at a cost to Indian Head and Oak Brook Bank, respectively, of up to, but not to exceed, the sum of [\$14,500] each. The Owners share of such work (not to exceed \$14,500.00 each) shall be paid to the Village within thirty (30) days after the completion of such work and the systems being fully operational."

¶ 9 By the annexation agreement, the Village also agreed to reimburse Oak Brook Bank, as Trustee, for portions of the paid real estate taxes relating to the property for 10 years (2000-2009). Specifically, the annexation agreement provides:

"5. PROPERTY TAX REIMBURSEMENT TO OWNERS

A. Commencing with the year 2000 Cook County real estate tax bills payable in the year 2001, and for ten (10) consecutive years thereafter (i.e. through the year 2009), the village shall reimburse to Indian Head and Oak Brook Bank the net difference between that amount of real estate taxes paid by each Parcel to the Pleasantview Fire Protection District for the 1997 tax year and the real estate taxes paid to the Village of Willow Springs and/or the Pleasantview Fire Protection District during the period from years 2000 to 2009. The amount of real estate taxes paid to the Pleasantview Fire Protection District for the year 1997 were as follows:

- (i) Indian Head Parcel, the sum of \$5,195.01; and
- (ii) Oak Brook Bank Parcel, the sum of \$3,857.29.

B. The Village shall pay the amount agreed to in Paragraph A above annually for said ten (10) year period within thirty (30) days of receipt of evidence from Indian Head or Oak Brook Bank of the payment of the second installment real estate tax bill for the respective year for which the payment is due."

¶ 10 At the time the parties entered into the annexation agreement, title to the Oak Brook Bank parcel was held in the land trust. Oak Brook Bank, as Trustee, was the signator to the annexation agreement.

¶ 11 The parties specified in the annexation agreement that any written notice or communications to Oak Brook Bank should be directed to David Hickey³ of Air Design Systems, with a copy to law firm Levin, McFarland, Phillips & Leydig. Specifically, this provision in the annexation agreement provides:

"8. NOTICES. All notices, demands or other communications which any party may desire or may be required to give to any other party shall be in writing and shall be deemed given: (i) if and when personally delivered; (ii) upon receipt if sent by a nationally recognized overnight courier addressed to a party at his/its address set forth below; or (iii) on the second (2nd) Business Day after being deposited in United States registered or certified mail, postage prepaid, addressed to a party at his/its address set forth below, or to such other address as the party to receive such notice may have designated to all other parties by notice in accordance herewith:

* * *

³ The agreement in fact states "Dan Hickey," but there is no argument on appeal that this is anything but a scrivener's error.

IF TO OAK BROOK BANK: c/o AIR DESIGN SYSTEMS, INC

 12011 West 91st Street

 Willow Springs, IL 60480

 Attn: [David] Hickey

WITH COPY TO: LEVIN, MCFARLAND, PHILLIPS &

 LEYDIG

 180 North Wacker Drive, #300

 Chicago, IL 60606

 Attn: James E. McFarland, Esq.

or at such other address or to such other party which any party entitled to receive notice hereunder designates to the other in writing."

¶ 12 The annexation agreement also included a "successors and assigns" provision:

"11. SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon the successors in title of the Owners and their respective successors, grantees, lessees and assigns, and upon successor Corporate Authorities of the Village and its successor municipalities. The rights and obligations of Owners under this Agreement shall be personal to owners and shall also be binding upon Owners and any person, partnership or other entity which succeeds to Owners' interest under this Agreement. Except as specifically provided herein, this Agreement or any part thereof may be assigned by Owners without the Village's prior approval; however, any such assignment shall not be effective until the Village is provided notice thereof."

¶ 13 At trial, David Hickey described the creation of the annexation agreement, explaining that the Village attorney drew up the agreement and then forwarded it to his attorney. His attorney reviewed the annexation agreement before David signed it.

¶ 14 The Oak Brook Bank parcel has two tenants, Cross Tread Industries, Inc. and Air Design Systems, Inc. Cross Tread Industries is owned by David Hickey, and Air Design Systems is owned by Patricia Hickey. The Oak Brook parcel is managed by Flag Creek Development (Flag Creek), which itself is comprised of a partnership between trust beneficiaries David Hickey, Patricia Hickey, and Greg Pawlowicz. Flag Creek maintains the Oak Brook Bank parcel and pays the real estate taxes on the property.

¶ 15 Village of Willow Springs Mayor Alan Nowaczyk testified at trial that he was a village trustee at the time of the annexation agreement contract formation. As trustee, Nowaczyk voted to approve the annexation of the property. Nowaczyk testified that he knew Oak Brook Bank was not located on the annexed property, and he knew David Hickey was involved with the property and that his businesses were on the property to be annexed. Nowaczyk testified that he as well as the Village reviewed the annexation agreement prior to voting on an ordinance to annex the property. Nowaczyk was aware of the provision in the annexation agreement regarding the tax reimbursements, and understood there "could be a liability to the Village" if Oak Brook Bank or the property owners requested the tax reimbursements.

¶ 16 David Hickey testified at trial that, although the annexation agreement specified the property would receive sewer and water connection within 180 days of annexation, the Village did not, in fact, connect the water until one year after annexation and the sewer until nearly three years after annexation. According to Hickey, he did not "bring up" the issue of

tax reimbursement during those three years "because of the difficulties we were having." Eventually, Hickey asked Roemmich to seek the tax refunds from the Village on behalf of Flag Creek Partnership, of which Hickey is a beneficiary. Hickey explained to Roemmich at the time that he had forgotten about the tax refund. Hickey did not recall himself or his partners notifying the Village that Flag Creek partners had any ownership or interest in the property in question, although the Cook County property tax bills submitted with the request reflected Flag Creek as the listed landowner.

¶ 17

On January 8, 2003, due to a line of credit being moved from Oak Brook Bank to State bank of Countryside, the three trust beneficiaries (David Hickey, Patricia Hickey, and Gregory Pawlowicz) entered into a different land trust agreement known as Trust Number 03-2481 with the State Bank of Countryside. The property was transferred from the Oak Brook Bank land trust to the State Bank of Countryside land trust. The three beneficiaries remained the same in the State Bank of Countryside trust, listed as follows:

Patricia Hickey – sixty (60%) percent and upon her death to David Hickey

David Hickey – twenty (20%) percent and upon his death to Patricia Hickey

Gregory Pawlowicz – twenty (20%) percent

Per the trust:

"The beneficiary or beneficiaries hereunder shall in his, her or their own right have the full management of said property and control of the selling, renting and handling thereof, and any beneficiary or his or her agent shall collect and handle the rents, earnings, avails and proceeds thereof, and said Trustee shall have no duty in respect to the management or control of said property or in respect to the payment of taxes or assessments, or in respect to insurance, litigation or

otherwise, except on written direction as hereinabove provided, and after the payment to it of all monies necessary to carry out said instructions."

¶ 21 Flag Creek Development is the listed landowner on the Cook County property tax bills regarding the property. Many of these tax statements are in the record on appeal, including, for example, tax year 2000 in the amount of \$51,660; tax year 2000, second installment, in the amount of \$71,212; tax year 2001 in the amount of \$35,281; tax year 2002, first installment, in the amount of \$47,636; and tax year 2003, second installment, in the amount of \$61,288. Each of these tax bills list Flag Creek Development as the owner.

¶ 22 Prior to the execution of the Annexation Agreement, the Oak Brook Bank parcel became subject to a Cook County real estate tax incentive known as the Class 6B tax incentive. The Village was not involved in obtaining this 6B tax incentive for the property.

¶ 23 Clark Roemmich is the CFO of Air Design Systems. He is an accountant who handles various financial aspects of the Hickey's business, including being responsible for the day-to-day financial operations of Air Design Systems, performing financial work for Cross Tread Industries, and is responsible for tax and financial issues for the Flag Creek partnership. Roemmich and David Hickey testified at trial that David Hickey authorized Roemmich to act on behalf of the land trust beneficiaries and on behalf of Flag Creek in regard to the property in the trust, the 6B tax incentive issue, and the reimbursement of the property taxes.

¶ 24 Roemmich sent a letter to William Murray, Village Administrator for Willow Springs, on December 4, 2009, requesting the Village support a resolution on behalf of Flag Creek and Cross Tread Industries for the renewal and 10-year extension of a Cook County Class 6B tax incentive on the property. The letter was written on Cross Tread Industries letterhead and

signed: "Clark Roemmich, Cross Treads Industries, Inc." The letter itself indentified Flag Creek as the owner of the property and Cross Tread as the lessee of the property.

¶ 25 Murray replied to Roemmich by letter on December 30, 2009, stating in part:

"Please be advised that the Willow Springs Village Board is still considering your request for a letter of support for the Flag Creek and Cross Treads Class 6B application to Cook County."

¶ 26 The letter was written on Village of Willow Springs letterhead and addressed to "Clark Roemmich, Cross Treads Industries."

¶ 27 Village administrator Murray testified at trial that the Village obtains funds through a tax levy and follows a budget and appropriation process to receive funds. Murray became Village Administrator in 2008. He testified that, prior to December 2009, he had never heard of Flag Creek partnership, and prior to March 2010, he had never seen documents concerning the Flag Creek partnership.

¶ 28 In January 2010, Roemmich informed Murray that Flag Creek would be requesting reimbursement of the real estate taxes pursuant to section 5 of the annexation agreement. Roemmich provided Murray with a copy of the annexation agreement at that time. Roemmich explained at trial that, after providing Murray with the annexation agreement, Roemmich, Murray, and Michael McGrath, attorney for the Village, held a meeting at which they discussed the tax reimbursement. Roemmich testified that he discussed the tax reimbursement on behalf of Flag Creek. According to Roemmich, McGrath "requested that in order for the city to agree to pass the ordinance for the 6B renewal that we waive the [] reimbursement of the taxes," and Flag Creek refused.

¶ 29 The Village discussed the 6B extension requests at a board meeting in December 2009, as well as at two board meetings in January 2010. According to Murray, the Village board discussed both the tax reimbursement and the 6B tax incentive issues at a January 28, 2010, executive session, as well. At that point, it was clear to the Village board that an issue existed regarding Roemmich's request for payment of the tax reimbursements based on the annexation agreement. Murray explained at trial that, in order to comply with "the spirit" of the 6B incentive, the Village had to gain something in return. The Village approached Air Design and Cross Tread about putting a bike path through the property, and they declined. At the executive meeting, the Board authorized the 6B tax extension with the contingency that Murray and McGrath "work[] out all the details," noting in its meeting minutes:

"Motion by Trustee Bartik, second by Trustee Imbarrato to approve Ordinance # 2010-O-5 to permit Air Design to extend their 6B tax status, with the contingency that Attorney McGrath and Administrator work out all the details prior to the signing of the ordinance and a letter of support. They Air Design will have to provide the original agreement. *** Motion Carried."

Eventually, these negotiations failed and the Village did not support extension of the 6B tax incentive for the property.

¶ 30 Roemmich testified he had a telephone conversation with McGrath in February 2010 during which McGrath again asked Flag Creek and the Hickeys to waive the tax reimbursement. Roemmich testified:

"[THE WITNESS ROEMMICH] A. We said no. They [the tax incentive and the tax reimbursement] were both required in the annexation. Why would we give up such a large amount of money for no reason?"

¶ 31 Beginning in March 2010, Roemmich on behalf of Flag Creek submitted 10 separate requests, each representing one calendar year for the years 2000 to 2009, to the Village, requesting, pursuant to the annexation agreement, reimbursement of real estate taxes paid. The letters each contain a similar opening paragraph:

"This letter represents a request from Flag Creek Development for their portion of the reimbursement from the Village of Willow Springs for the 2009 real estate taxes paid to the Village as set forth in the Annexation Agreement for 12011 and 12049 West 91st Street, dated June 29, 1999. Enclosed is the 2009 second installment real estate tax bill along with the evidence of payment."

¶ 32 Each mailing included the tax bill as well as proof of payment. The Cook County Property Tax bills included with the submissions identified the taxpayer as Flag Creek Development, and identified the real property with the identical PIN (23-06-300-006) as that for the Oak Brook Bank parcel in the annexation agreement. All real estate taxes on the parcel were paid in full between 2000 and 2009.

¶ 33 The documents submitted by Roemmich total a request of \$143,824 in tax reimbursements. In its answer to plaintiff's complaint for breach of contract, the Village acknowledges that Roemmich "sent real estate tax bills and receipts as well as correspondence concerning same to [the Village] for the tax years 2000-2009 seeking reimbursement for Flag Creek Development." The Village also admitted in its answer that it "did not pay real estate tax reimbursements to Clark Roemmich of Flag Creek Development."

¶ 34 In February 2013, an attorney for the trust beneficiaries sent a letter to the Village, providing it with specific notice that the property had been transferred from Oak Brook Bank

to State Bank of Countryside. The Village admits to receiving this letter. In pertinent part, the letter provides:

"To the extent legally necessary, this letter serves as written notice to you pursuant to paragraph 11 of the Annexation Agreement that State Bank of Countryside, as Trustee under Trust Agreement dated January 8, 2003 and known as Trust Number 03-2481 succeeded to the rights and obligations of the Owner, Oak Brook Bank, as Trustee under Agreement dated January 25, 1999, known as Trust No. 3059, in the Annexation Agreement. On or about January 31, 2003, title to the real property commonly known as 12011 W. 91st Street in the land trust was transferred from the land trust at Oak Brook Bank to the succeeding land trust identified above at State Bank of Countryside.

The beneficiaries do not believe that providing this written notice was contractually required pursuant to paragraph 11 of the Annexation Agreement, but are providing the notice to you anyway to in [*sic*] an effort to avoid further pointless litigation on this purported 'issue' asserted by the Village in the pending lawsuit."

¶ 35 In June 2014, the trial court entered judgment in favor of plaintiff and against the Village in the amount of \$143,824, plus costs.

¶ 36 The Village appeals.

¶ 37 II. ANALYSIS

¶ 38 The Village appeals, contending the trial court erred in granting judgment in favor of defendant. Specifically, the Village argues: (1) even if reimbursement to Flag Creek

Development was required, plaintiff failed to comply with a condition precedent, that is, to submit documentation each year in order to be entitled to reimbursement, and therefore the tax obligation was terminated; (2) the Village was not contractually obligated to "respond to the demand for payment or reimburse Flag Creek Development" because it had not been notified of any assignment of rights; (3) plaintiff waived its right of reimbursement; and (4) the lawsuit is barred by the statute of limitations. We take each argument in turn.

¶ 39 The basic requirements of a contract are an offer, acceptance, and consideration. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 151 (2006). To succeed on a claim for breach of contract, a plaintiff must plead and prove the existence of a contract, the performance of its conditions by the plaintiff, a breach by the defendant, and damages as a result of the breach. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1019 (2005). There is no argument on appeal regarding the existence of the contract or the amount of damages.

¶ 40 i. Condition Precedent

¶ 41 Initially, we consider whether the annexation agreement contained a condition precedent such that, when plaintiff failed to comply with said condition, the Village's duty to reimburse paid taxes was extinguished. The Village argues that the annexation agreement imposed a condition precedent upon Oak Brook Bank to submit documentation on an annual basis in order to be entitled to reimbursement. In support of this argument, the Village points to section 5 of the annexation agreement, which provides:

"5. PROPERTY TAX REIMBURSEMENT TO OWNERS

A. Commencing with the year 2000 Cook County real estate tax bills payable in the year 2001, and for ten (10) consecutive years thereafter (i.e. through the year

2009), the village shall reimburse to Indian Head and Oak Brook Bank the net difference between that amount of real estate taxes paid by each Parcel to the Pleasantview Fire Protection District for the 1997 tax year and the real estate taxes paid to the Village of Willow Springs and/or the Pleasantview Fire Protection District during the period from years 2000 to 2009. The amount of real estate taxes paid to the Pleasantview Fire Protection District for the year 1997 were as follows:

(i) Indian Head Parcel, the sum of \$5,195.01; and

(ii) Oak Brook Bank Parcel, the sum of \$3,857.29.

B. The Village shall pay the amount agreed to in Paragraph A above annually for said ten (10) year period within thirty (30) days of receipt of evidence from Indian Head or Oak Brook Bank of the payment of the second installment real estate tax bill for the respective year for which the payment is due."

¶ 42 The Village acknowledges that the annexation agreement "clearly and unequivocally contemplates annual payments by the Village," but only after Oak Brook Bank submits, each year, evidence of payment of the second tax installment for each respective tax year. Each failure by plaintiff each tax year to request reimbursement terminated the Village's obligation to pay for that year. The Village argues that, because this is the only reasonable interpretation of the contract language, there was no breach of contract. Additionally, the Village points out that the budget and appropriation requirements of a municipality make it difficult if not impossible to provide tax reimbursements beyond an annual basis.

¶ 43 The primary objective in contract construction is to give effect to the intent of the parties. *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 34 (1993).

¶ 44 If the contract is clear and unambiguous, the court must determine the parties' intent solely from the ordinary and natural meaning of the language of the contract. *Omnitrus Merging Corp.*, 256 Ill. App. 3d at 34. The agreement is to be interpreted as a whole, giving meaning and effect to every provision when possible. *Coles-Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999). A court will not interpret the agreement in a way that would nullify provisions or render them meaningless. *Coles-Moultrie Electric Cooperative*, 304 Ill. App. 3d at 159. Our review of the terms of a contract is *de novo*. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 488 (2010).

¶ 45 A condition precedent is a condition that " 'must be performed either before a contract becomes effective or which is to be performed by one party to an existing contract before the other party is obligated to perform.' " *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 282 (2007) (quoting *M X L Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 26 (1993)). Conditions precedent are generally not favored. *Premier Electric Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 824-25 (1995). Conditions are not to be read into a contract, and the intent to create a condition must be apparent from the face of a contract. *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 309 (2000).

¶ 46 Here, when we consider the contract as a whole, remaining cognizant that the intent to create a condition precedent must be apparent on the face of the contract (*Catholic Charities of Archdiocese of Chicago*, 318 Ill. App. 3d at 309) and that courts do not favor conditions precedent (*Premier Electric Construction Co.*, 276 Ill. App. 3d at 824-825), we find no condition precedent, that is, the contract is devoid of any obligation or condition precedent

that requires plaintiff to provide proof of payment on an annual basis to the Village. While there was testimony at trial regarding various reasons plaintiff may have had for not submitting proof of tax payment to the Village and requesting the reimbursement until 2010, those reasons are not germane to the issue at bar. Rather, our concern is with the obligations and rights of the parties created by the contract before us.

¶ 47 Our purpose here is to give effect to the intention of the parties, which intention we ascertain from the language of the contract. *Omnitrus Merging Corp.*, 256 Ill. App. 3d at 34. Although the Village argues that these terms are ambiguous, we find no ambiguity here. Rather, the parties to this contract, by employing the language of 5B, made their intent clear: for a period of 10 years, the Village must provide plaintiff its tax reimbursement within 30 days after receiving proof of payment of the taxes.

¶ 48 We note here that the annexation agreement does not contain specific conditional language, such as: "In the event Oak Brook Bank fails to request reimbursement of said taxes within the respective tax year for which the payment is due, the obligation of the Village to reimburse the tax for said year is extinguished." Instead, the parties to the contract agreed that the Village would pay the tax reimbursement to plaintiff within 30 days of receiving proof of payment. The parties knowingly entered into the contract, for which the Village received the annexation of the property it sought and plaintiff received sewer service, water service, emergency services, and a ten-year tax reimbursement. Had the parties agreed to a condition precedent, they should have included clear language to that effect in the contract itself. These terms are not ambiguous, and this court will not read a condition into a contract where that condition is not clear on the face of the contract itself. See *Catholic*

Charities of Archdiocese of Chicago, 318 Ill. App. 3d at 309. We find no condition precedent here.

¶ 49 We acknowledge the Village's point that funding this judicial award will be difficult for the Village, both because it is struggling financially and because of the budget and appropriation requirements of the municipality. These problems, however, while certainly a challenge, are not at issue on appeal. In the future, the Village should be mindful of the drafting of contracts such that its contractual intent is clear on the face of the contract and, additionally, should be consistently aware of its liabilities.

¶ 50 ii. The Village's Obligation to Pay

¶ 51 Next, the Village contends the trial court erred in its determination that the Village was obligated to reimburse Flag Creek. Specifically, the Village argues that it was "not contractually obligated to respond to the demand for payment or reimburse Flag Creek Development" because it had not been notified of an assignment of rights. According to the Village, pursuant to section 5 of the annexation agreement, the Village is to pay only Oak Brook Bank, and because Oak Brook Bank never submitted documentation to the Village in support of a request for reimbursement and, in fact, never requested reimbursement from the Village, the Village is not required to pay. While acknowledging that section 11 of the annexation agreement allows for successors in title, essentially the Village argues its only liability is Oak Brook Bank because it was never notified of an assignment of rights. Moreover, argues the Village, the request came from Roemmich, who was not a trust beneficiary, and not from State Bank of Countryside, trustee, successor in interest.

¶ 52 Plaintiff responds that, under Illinois law and the unique principles of a land trust, although title to the real property is in the trustee, the trustee has no duties with respect to the

management and control of the property. Rather, the beneficiaries of a land trust—and not the trustee—have the right to manage and control the property. Therefore, it was proper for Roemmich, on behalf of the beneficiaries and Flag Creek, to seek reimbursement from the Village.

¶ 53 Generally, the interpretation of a contract presents a question of law that is subject to *de novo* review. *Doornbos Heating & Air Conditioning, Inc.*, 403 Ill. App. 3d at 488. However, we review a challenge to the trial court's rulings after a bench trial using the manifest weight of the evidence standard of review. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶¶ 33, 55 ("[i]n a bench trial, it is the function of the trial judge, as the trier of fact, to weigh the evidence and make factual determinations"). "A reviewing court will not reverse a trial court's decision merely because different conclusions can be drawn; an opposite conclusion must be clearly evident." *Walker v. Ridgeview Const. Co., Inc.*, 316 Ill. App. 3d 592, 595 (2000). " 'A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 859 (2008) (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)).

¶ 54 "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859. "When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859. "A ruling is against the manifest weight of the evidence

if it is arbitrary, unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evidenced from the record." *Tully v. McLean*, 409 Ill. App. 3d 659, 670 (2011). Under this standard, we offer deference to the trial court's findings of fact because it is in the "best position to observe the conduct and demeanor of the parties and the witnesses." *Tully*, 409 Ill. App. 3d at 670.

¶ 55 A land trust is statutorily defined as "any express agreement or arrangement whereof a use, confidence or trust is declared of any land, or of any charge upon land, for the use or benefit of any beneficiary, under which the title to real property, both legal and equitable, is held by a trustee, subject only to the execution of the trust, which may be enforced by the beneficiaries who have the exclusive right to manage and control the estate, to have the possession thereof, to receive the net proceeds from the rental, sale, hypothecation or other disposition thereof, and under which the interest of the beneficiary is personal property only." 765 ILCS 405/1, *et seq.* (West 2012). "The land trust is a device by which the real estate is conveyed to a trustee under an arrangement reserving to the beneficiaries the full management and control of the property. The trustee executes deeds, mortgages or otherwise deals with the property at the written direction of the beneficiaries. The beneficiaries collect rents, improve and operate the property and exercise all rights of ownership other than holding or dealing with the legal title." *Robinson v. Chicago National bank*, 32 Ill. App. 2d 55 (1961). An Illinois land trust is a form of real property ownership:

"The Illinois land trust, a unique creation of Illinois law, is in essence only a form of real property ownership. See generally H. Kenoe, *Kenoe on Land Trusts* (1981 & Supp. 1985); Haswell & Levine, *The Illinois Land Trust: A Fictional Best Seller*, 33 DePaul L. Rev. 277 (1984). A land trust is created by

the execution and recording of a deed in trust transferring all legal and equitable title to real property to a trustee. The original owner is designated as the beneficiary of the trust and retains an assignable personal property interest in the trust. A second document, the trust agreement, is contemporaneously executed and outlines the right of the beneficiary to retain absolute control over the management, use, and disposition of the property and to receive all proceeds from the property. Unlike the conventional trust in which the trustee is vested with broad powers over the management and disposition of the trust property, the land trustee may act only at the beneficiary's direction. The trust agreement is not recorded and normally is kept secret from the public.' " *FirstMerit Bank, N.A. v. Soltys*, 2015 IL App (1st) 140100, ¶ 21 (quoting *Redfield v. Continental Casualty Corp.*, 818 F. 2d 596, 607 (7th Cir. 1987)).

¶ 56 Our supreme court has held that, for all practical purposes, the beneficiary of a land trust is to be treated as the true owner of the trust property. *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 492-93 (1979). In *Chicago Title & Trust Co.*, the State of Illinois sought to recover unpaid real estate taxes on various parcels of land held in land trusts. *Chicago Title & Trust Co.*, 75 Ill. 2d at 484. It named as defendants the trustees in their individual capacities, the trustees in their capacities as trustees, and the beneficiaries of the trust. *Chicago Title & Trust Co.*, 75 Ill. 2d at 485. The court held that the trust beneficiaries were the owners of the land for purposes of the land's tax liability, despite the fact that the trustees held legal title to the property. *Chicago Title & Trust Co.*, 75 Ill. 2d at 493. In reaching that conclusion, our supreme court explained:

"In examining a land trust it is apparent that true ownership lies with the beneficiaries though title lies with the trustee. The trustee derives all of his power from the beneficiary and acts solely on the beneficiary's behalf. The beneficiary may withdraw or modify the trustee's authority at any time. (Cf. *Board of Trustees v. Board of Supervisors* (1875), 76 Ill. 184, 186-87.) Indeed, there is not a single attribute of ownership, except title, which does not rest in the beneficiary. The rights of creation, modification, management, income and termination all belong to the beneficiary. (Cf. *Wendt v. Myers* (1974), 59 Ill. 2d 246, 253, 319 N.E.2d 777.) In reality the transfer to the trustee is a formality involving a shifting of legal documents. The land trust is, in fact, a fiction which has become entrenched in the law of this State and accepted as a useful instrument in the handling of real estate transactions." *Chicago Title & Trust Co.*, 75 Ill. 2d at 492-93.

¶ 57

In the case at bar, the Village argues that plaintiff's right to payment of the tax reimbursements is not effective because the Village did not get notice of an "assignment" when the Oak Brook Bank parcel was transferred from one land trust to another. The village bases its argument on section 11 of the annexation agreement. Section 11, the "successors and assigns" provision, provides:

"11. SUCCESSORS AND ASSIGNS. This Agreement shall be binding upon the successors in title of the Owners and their respective successors, grantees, lessees and assigns, and upon successor Corporate Authorities of the Village and its successor municipalities. The rights and obligations of Owners under this Agreement shall be personal to owners and shall also be binding upon Owners

and any person, partnership or other entity which succeeds to Owners' interest under this Agreement. Except as specifically provided herein, this Agreement or any part thereof may be assigned by Owners without the Village's prior approval; however, any such assignment shall not be effective until the Village is provided notice thereof."

¶ 58

The Village's argument fails because the rights under the annexation agreement were never assigned, so notice of assignment was not required. What the Village refers to as an "assignment" is actually the conveyance of the parcel from one land trust to another, as occurred on January 8, 2003, when the three trust beneficiaries (David Hickey, Patricia Hickey, and Gregory Pawlowicz) entered into a different land trust agreement known as "Trust Number 03-2481 with the State Bank of Countryside, known as the State Bank of Countryside Land Trust Agreement dated January 8, 2003 and known as Trust Number 03-2481." Though the property was conveyed to a different land trust, the rights to manage and control the property for the beneficiaries did not change between the two land trusts, and the beneficiaries remained unchanged, listed as:

"Patricia Hickey – sixty (60%) percent and upon her death to David Hickey

David Hickey – twenty (20%) percent and upon his death to Patricia Hickey

Gregory Pawlowicz – twenty (20%) percent"

The beneficiaries' right to control and manage the real property did not change when the beneficiaries transferred the real property from Oak Brook Bank to State Bank of Countryside. See, *e.g.*, *Robinson v. Chicago National Bank*, 32 Ill. App. 2d 55, 58 (1961) ("The land trust is a device by which the real estate is conveyed to a trustee under an arrangement reserving to the beneficiaries the full management and control of the property.

The trustee executes deeds, mortgages or otherwise deals with the property at the written direction of the beneficiaries. The beneficiaries collect rents, improve and operate the property and exercise all rights of ownership other than holding or dealing with the legal title."). In a land trust such as the one before us, the management of the property falls to the beneficiaries. Under section 11, the beneficiaries were required to provide notice to the Village if the *beneficiaries* changed, which change never occurred. Thus, it was the beneficiaries rather than the Trustee who controlled the right to demand payment of the tax reimbursements from the Village.

¶ 62 As stated previously, the Village argues it was not obligated to "respond to the demand for payment or reimburse Flag Creek Development" when it had not been notified of any assignment of rights. We have determined that there was no assignment of rights. We now turn to the question of whether Roemmich, as a representative of the beneficiaries, could properly demand payment on behalf of the beneficiaries. In its brief on appeal, the Village acknowledges that, although it was not aware of the land trust terms, even if it had been, "pursuant to the terms of the land trust agreement with State Bank, the rights and obligations regarding reimbursement, even if construed as a right of the beneficiary of the land trust agreement, at most would be binding upon its beneficial interest holders, individuals David Hickey, Patricia Hickey, and Gregory Palowicz, not Flag Creek." Therefore, it argues, there was "no contractual obligations to make any payments to Flag Creek or no right of Flag Creek to request reimbursement from the Village."

¶ 63 Initially, it is clear from the record on appeal that the Village was aware in 1999 that David Hickey was a beneficiary of the land trust. The Village drafted the annexation

agreement, which specified that any written notice to Oak Brook Bank, as Trustee, would be provided to David Hickey at Air Design Systems' business address, stating with specificity:

"8. NOTICES. All notices, demands or other communication which any party may desire or maybe required to give to any other party shall be in writing and shall be deemed given ***

IF TO OAK BROOK BANK:c/o AIR DESIGN SYSTEMS, INC

Attn: [David] Hickey"

¶ 64 Additionally, David Hickey personally reviewed and agreed to the annexation agreement. Mayor Nowaczyk, who was a Village trustee at the time of the annexation agreement, testified at trial that he knew David Hickey was involved with the property and that his businesses were on the property to be annexed. In the same vein, when Roemmich, as the beneficiaries' representative, sought payment of the tax reimbursements in 2010, the Village knew that David Hickey was part of the land trust. Around the same time, Roemmich, as the beneficiaries' express agent, had sought renewal of the 6B tax incentive. On December 4, 2009, Roemmich sent a letter to Murray, Village Administrator, requesting the Village support a resolution on behalf of Flag Creek and Cross Tread Industries for the renewal and extension of the 6B tax incentive on the property. The letter was written on Cross Tread Industries letterhead and signed: "Clark Roemmich, Cross Treads Industries, Inc." The letter itself identified Flag Creek as the owner of the property and Cross Tread as the lessee of the property. Murray then corresponded with Roemmich regarding the property.

¶ 65 Eventually, Roemmich, on behalf of the beneficiaries and Flag Creek, requested payment of the tax reimbursement from the Village. The Village's position that it did not know who Clark Roemmich was or whom he represented is disingenuous.

¶ 66 The Village discussed the 6B extension requests at a board meeting in December 2009, as well as at two board meetings in January 2010. According to Murray, the Village board discussed both the tax reimbursement and the 6B tax incentive issues at a January 28, 2010, executive session, as well. At that point, it was clear to the Village board that an issue existed regarding Roemmich's request for payment of the tax reimbursements based on the annexation agreement. The January 28, 2010, Village board meeting minutes also reflect that the Village knew David Hickey's company, Air Design, was a party to the 6B request, which Roemmich had been pursuing:

"Motion by Trustee Bartik, second by Trustee Imbarrato to approve Ordinance # 2010-O-5 to permit Air Design to extend their 6B tax status, with the contingency that Attorney McGrath and Administrator work out all the details prior to the signing of the ordinance and a letter of support. They Air Design will have to provide the original agreement. *** Motion Carried."

¶ 67 When the trial court entered judgment in favor of plaintiff and against the Village, it noted:

"THE COURT: [T]his was a bench trial, I heard testimony, exhibits were admitted into evidence, there were some stipulations, I reviewed the case law and heard arguments.

In making my judgment, I've reviewed my notes, reviewed exhibits, most importantly, I judged the credibility of the witnesses, I've determined the weight

to be given to the witnesses, I considered the witnesses' ability and opportunity to observe their memory, manner, interest, bias, qualifications, experience.

I considered all of the evidence without regard to who produced it, I've considered facts that were proven by the evidence or reasonable inferences drawn from the evidence. I've used my commonsense gained from my experiences in life when appropriate in evaluating what I saw and heard. I don't base my decisions on speculation, prejudice, or sympathy."

¶ 68 We are cognizant that "[a] reviewing court will not reverse a trial court's decision merely because different conclusions can be drawn; an opposite conclusion must be clearly evident." *Walker*, 316 Ill. App. 3d at 595. In a case such as the one at bar, where the testimony is conflicting, we also know "the trier of fact *** was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859. Here, we find the trial court's decision is not against the manifest weight of the evidence where there was no assignment of rights, and the beneficiaries' representative properly requested the reimbursement and provided proof of tax payments as required by section 5 of the annexation agreement.

¶ 69 We note that the Village argues for the first time in its reply brief that judgment should have been granted in its favor because, where plaintiff trustee argues it had no right to control the property, it must follow that it is not the proper plaintiff for this cause. An argument raised for the first time on appeal in the reply brief need not be addressed by this court. "[A]n appellant's arguments must be made in the appellant's opening brief and cannot be raised for the first time in the appellate court by a reply brief." *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29 (citing Ill. S.Ct. R. 341(h) (eff. July 1, 2008) ("Points not

argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.")) Accordingly, we will not address this new argument.

¶ 70 iii. Waiver

¶ 71 Next, the Village argues that the trial court erred in finding plaintiff did not waive its contractual rights to the tax reimbursement. Specifically, the Village argues that plaintiff waived its contractual right to the tax reimbursement where plaintiff intentionally failed to submit its proof of payments of the tax bills until 2010. The Village argues:

"David Hickey, a beneficiary of the trust, negotiated the terms of the [Annexation] Agreement with the Village and reviewed the agreement after it was negotiated. The failure to request reimbursement for taxes under Section 5B of the Annexation Agreement was intentional and was due to the difficulties incurred obtaining water and sewer from the Village. In fact, David Hickey thought the reimbursement was not important enough to pursue during the period 2001-2009. Nothing, however, was preventing Hickey from pursuing reimbursement once the water and sewers were installed. Only when the Village did not approve of the 6b tax incentive renewal with Cook County, did the reimbursement become important and David Hickey requested Roemmich to submit the requests for reimbursement. Intentionally failing to seek reimbursement for nine years after the first reimbursement should have been requested and then doing so only after the Village did not consent to the renewal of the 6b incentive is conduct inconsistent with an intent to enforce its rights under the contract. As such, the right to reimbursement of taxes was waived."

¶ 72 "Waiver is an equitable principle invoked to further the interests of justice whenever a party initially relinquishes a known right or acts in such a manner as to warrant an inference of such relinquishment." *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 219 (2008). Waiver can be express or implied, arising from acts, words, conduct, or knowledge. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993). Whether a party has waived its rights is a question of fact, and a reviewing court will not disturb a trial court's finding unless that finding is contrary to the manifest weight of the evidence. *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 105 (1991).

¶ 73 As determined above, section 5B requires the Village, over a period of 10 years, to provide plaintiff its tax reimbursement within 30 days after receiving proof of payment of said property taxes. Therefore, the Village's argument that David Hickey's conduct was "inconsistent with an intent to enforce its rights under the contract" is unavailing. The argument is premised on the erroneous presumption that the beneficiaries were required to request payment of the tax reimbursement each tax year for ten years. As determined above, however, this interpretation of the contract is inconsistent with the plain language of the contract. That David Hickey or another beneficiary did not request the tax reimbursement each and every year—which they were not required to do under the contract—certainly does not show they had no "intent to enforce" their rights under the contract. The Village's waiver argument is unavailing.

¶ 74 iv. The Statute of Limitations

¶ 75 Finally, the Village contends the trial court erred in determining the lawsuit was not barred by the statute of limitations. The Village relies on section 11-15.1-4 of the Illinois Municipal Code, which provides, in pertinent part:

"A lawsuit to enforce and compel performance of the [annexation] agreement must be filed within the effective term of the agreement or within 5 years from the date the cause of action accrued, whichever time is later." 65 ILCS 5/11-15.1-4 (West 2012).

According to the Village, because plaintiff could have demanded payment from the Village in 2001, but failed to do so, the lawsuit should have been filed within five years from 2001, that is, by 2006. In the alternative, the Village argues that, at the latest, the lawsuit should have been filed in 2010, which was the effective term of the agreement with respect to the reimbursements due under section 5B. Because the suit was not filed until 2011, argues the Village, it is barred by the statute of limitations. We disagree.

¶ 76 First, we have found herein that plaintiff was not required to request reimbursement each year. Therefore, the effective date of 2001 presented by the Village is inaccurate. Rather, the Village was obligated to pay the tax reimbursement 30 days from the time the request and proof of payment was submitted. Plaintiff submitted the request and proof in letters dated March 26, 2010, and the Village failed to pay the reimbursement. A breach of contract cause of action accrues at the time of the breach. *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (2001). Therefore, the breach occurred in 2010. Plaintiff properly filed this lawsuit in November 2011, within the 5 year statute of limitations period from the date of accrual of the breach of contract claim.

¶ 77 We also reject the Village's alternative argument that the lawsuit should have been filed by 2010, which was the "effective term" of the agreement. Initially, we disagree with the Village's interpretation that the "effective term" of section 5B is 10 years. In fact, the plain language of section 5B does not limit the term to 10 years. While it contemplates a tax

reimbursement of 10 years' worth of taxes, it does not actually require that the reimbursement be made within 10 years. Rather, the language states:

B. The Village shall pay the amount agreed to in Paragraph A above annually for said ten (10) year period within thirty (30) days of receipt of evidence from Indian Head or Oak Brook Bank of the payment of the second installment real estate tax bill for the respective year for which the payment is due."

¶ 78 The Village is required to pay the tax reimbursement, whether it be 1 year's worth or up to 10 years' worth, within 30 days of receiving demand and proof of tax payment. The Village could have inserted explicit "effective term" language into section 5 when it drafted the annexation agreement, but it failed to do so. There is no 10-year limitation in section 5B, and the Village's "effective term" argument is unavailing.

¶ 79 III. CONCLUSION

¶ 80 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 81 Affirmed.