FOURTH DIVISION
December 3, 2015

No. 1-14-3302

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

EDGAR H. BACHRACH, SALLY B. ROBINSON, and BARBARA B. JAMES,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants and Cross-Appellees,	)	Cook County.
	)	
v.	)	
	)	No. 08 L 13712
BACHRACH CLOTHING HOLDING CORP.; SUN BACHRACH LLC; SUN CAPITAL PARTNERS III, Q.P., L.P.; and SUN CAPITAL PARTNERS III, L.P.;	)	The Honorable
	)	Thomas R. Mulroy,
	)	Judge Presiding.
Defendants-Appellees and Cross-Appellants,	)	

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's ruling on breach of contract claim and award of attorney's fees affirmed. Trial court did not improperly shift burden of proving that there were no outstanding debts in default, thus precluding payment on subordinated promissory note to plaintiffs, where absence of defaults was condition precedent to payment on the subordinated promissory note. Trial court did not incorrectly rely on debt that had been paid in finding that subordinated promissory note was unenforceable. Any breach of notice provision in contract was so insignificant as to not require remedy; plaintiffs had actual knowledge of debts in default. Other alleged breaches by defendants did not relieve plaintiffs of burden of proving enforceability of subordinated promissory note. On cross-appeal, defendants were not entitled to attorney fees, where individual who authorized law firm's retention was not agent of corporation that was party to contract containing fee-shifting provision, there was no evidence that corporation ratified firm's engagement, and no unjust enrichment would result if fee-shifting provision were not enforced.

¶ 2 This case arises out of a dispute over a loan that plaintiffs Edgar Bachrach, Sally Robinson, and Barbara James made to defendant Bachrach Clothing Holding Corporation (BCHC) as part of plaintiffs' sale of Bachrach Clothing, Inc. (BCI) to the private equity firm Sun Capital Partners (Sun). Plaintiffs sold BCI, their family clothing business, to Sun in exchange for cash and a $4 million promissory note called the "Subordinated Note." The Subordinated Note provided that it would have less priority than other, "Superior Debt[s]," and that BCHC's default on any Superior Debt would mean that plaintiffs would not receive payments under the Subordinated Note.

¶ 3 After the sale, BCI defaulted on other debts it had incurred and went into bankruptcy. Plaintiffs filed the instant suit, alleging that BCHC had breached the Subordinated Note by failing to pay them. Plaintiffs also named other business entities involved in Sun's acquisition of BCI, defendants Sun Bachrach, LLC (Sun Bachrach), Sun Capital Partners III, Q.P., L.P., and Sun Capital Partners III, L.P., in an attempt to pierce the corporate veil of BCHC and to collect the debt from these non-bankrupt entities.

¶ 4 After a bench trial, the trial court awarded judgment to defendants. The trial court concluded that other unpaid debts were Superior Debts in default, precluding BCHC from paying plaintiffs under the Subordinated Note. The trial court denied defendants' request for attorney fees under a fee-shifting provision of BCHC's contract with plaintiffs

¶ 5 Plaintiffs appeal, raising four issues: (1) that the trial court erred in placing the burden of proving that the Subordinated Note was not blocked by any Superior Debt on them instead of defendants; (2) that the trial court erred in concluding that a loan that had been paid off during BCI's bankruptcy proceedings blocked payments on the Subordinated Note; (3) that the trial court erred in finding that defendants had not breached the notice provision of the Subordinated

Note, which required BCHC to give plaintiffs notice of any default on a Superior Debt; and (4) that BCHC's breach of other provisions of the Subordinated Note precluded it from raising the existence of unpaid Superior Debts as a defense.

¶ 6 Defendants filed a cross-appeal, alleging that the trial court erred in concluding that BCHC had not "incurred" attorney fees under the contract because no director or officer of BCHC had hired the law firm that represented defendants.

¶ 7 We affirm the trial court's judgment for defendants. The trial court did not impermissibly shift the burden of proof, where the absence of a default on Superior Debt was a condition precedent to the enforceability of the Subordinated Note, not an affirmative defense to payment that defendants would be obliged to prove. The trial court also did not incorrectly base its judgment on a loan that had been paid off during BCI's bankruptcy; the trial court's judgment rested on the existence of other Superior Debts that remained in default, regarding which plaintiffs raise no claims of error. Plaintiffs' claim of breach regarding the lack of notice fails where there was undisputed evidence that plaintiffs had actual knowledge of BCHC's default on the Superior Debts. And defendants' alleged breaches of the Subordinate Note—other than its alleged nonpayment—did not preclude them from arguing that the Subordinated Note was unenforceable, where that argument was not an affirmative defense.

¶ 8 We also affirm the trial court's denial of defendants' claim for attorney fees, because BCHC did not "incur" attorney fees where it was not liable for those fees. Defendants failed to prove that any officer or director of BCHC, the only defendant that was party to the contract containing the fee-shifting provision, authorized the retention of defendants' law firm. And defendants failed to prove that the Sun officer who retained the firm had been cloaked in apparent authority from BCHC, or that BCHC subsequently ratified the contract. Finally,

defendants forfeited their claim that quasi-contract principles should apply to award them attorney fees. We thus affirm the trial court's judgment in all respects.

¶ 9 I. BACKGROUND

¶ 10 BCI was a men's clothing store that had been in plaintiffs' family for several generations. Beginning in 1999, plaintiff Edgar Bachrach, who had a controlling interest in BCI, began to market BCI for sale. The other plaintiffs in this case, Sally Robinson and Barbara James, had ownership interests in BCI as well, but Bachrach acted as their representative during the sale. After seeking a buyer for several years, Bachrach was connected with Sun, a private equity firm that specialized in performing leveraged buyouts of underperforming companies and turning around their performance.

¶ 11 On January 11, 2005, Sun sent Bachrach a letter of intent outlining its proposed purchase of BCI. Sun said that plaintiffs would receive $4 million in cash and another $4 million via a promissory note with an 8% interest rate. Plaintiffs would also keep a 7.5% ownership interest in BCI. The letter said that the note would be in "[s]econd lien position subject to a subordination agreement." Bachrach signed the letter of intent.

¶ 12 In an email dated February 5, 2005, several weeks before the sale was actually consummated, Bachrach acknowledged that the $4 million subordinated promissory note was risky. He estimated that if his company could be turned around, he would get "three," but if the transaction did not go well, he would get "less than two." He concluded that he thought that he could sell the note "for 2.5 million."

¶ 13 On February 10, 2005, Bachrach exchanged emails with Michael Kalb, an employee of Sun. In his email, Bachrach wrote:

> "My atty. [*sic*] *** just told me that, although Kirkland [& Ellis, defendants' attorneys at the time,] has agreed to give us a 2nd lien on all assets, they are modifying the wording to allow you to enter into an agreement with a senior lender that would prohibit any payments of interest or principal to the sub. [*sic*] debt. We feel that this makes the sub. [*sic*] debt worthless."

Kalb replied:

> "This goes back to the discussion we had on the conference call. You should look at the language and then you and I should speak to it. Based on your description ***, it sounds like your attorney is not expressing the concept appropriately to you."

¶ 14 As part of the sale of BCI, Sun established several corporate entities. BCHC was established as a holding company with the sole purpose of owning 100% of the stock in BCI. Sun also established Sun Bachrach, which owned 92.5% of BCHC's shares. Plaintiffs, pursuant to the terms of the sale, owned the other 7.5% of BCHC's shares. In turn, Sun Bachrach was owned by Sun Capital Partners III, Q.P., L.P., and Sun Capital Partners III, L.P., subsidiary investment funds of Sun (the Sun III funds).

¶ 15 On February 15, 2005, plaintiffs executed several documents to consummate the sale of BCI. These contracts were between plaintiffs and BCHC. The first was the Stock Purchase Agreement (the SPA), which outlined the terms of the sale. The terms outlined in Sun's letter of intent were incorporated into the SPA. The SPA contained a provision regarding the manner in which notice should be provided:

> "Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given (i) when personally delivered, sent by telecopy (with hard

copy to follow); (ii) one day after sent by reputable overnight express courier (charges prepaid), or (iii) five days following mailing by certified or registered mail, postage prepaid and return receipt requested." (Emphasis in original.)

This provision also said that all notices should be sent to Bachrach's address in Chicago. The SPA also had a fee-shifting provision stating:

"Legal Fees. If any party to this Agreement seeks to enforce the terms and provisions of this Agreement, then the prevailing party in such action shall be entitled to recover from the non-prevailing party, all costs incurred in connection with such action, including without limitation reasonable fees, expenses and costs incurred at the trial court, all appellate courts and during negotiations." (Emphasis in original.)

¶ 16 BCHC also executed the $4 million promissory note that made up the second half of the purchase price. The note was titled, "Subordinated Promissory Note" (the Subordinated Note) and incorporated the terms of the SPA. The Subordinated Note had an 8% interest rate payable quarterly. If a payment was not made, then interest would accrue at 10%. The principal was due four years from the execution of the Subordinated Note. According to defendants' trial evidence, which we discuss more fully below, the relatively high interest rates of the Subordinated Note reflected the risk inherent in its being subordinate to other debt and being tied to the ultimate turnaround of the company.

¶ 17 Section 3 of the Subordinated Note dealt with its status as subordinated debt. It said that the Subordinated Note "shall be subordinate and junior in right of payment *** to all Superior Debt." "Superior Debt" was defined as any debt "of the type typically held by commercial banks, investment banks, insurance companies and other recognized lending institutions, *** whether now outstanding or hereafter created, incurred, assumed or guaranteed." Section 3(d) of the

Subordinated Note provided that plaintiffs would not be paid if a "Blockage Event" (*i.e.*, a default on Superior Debt) occurred:

> "[N]o payment of principal, interest, fees, charges or other amounts due (or past due) upon or in respect of this Note shall be made if there shall have occurred and be continuing or there would exist as a result of such a payment or distribution any default or event of default under any of the terms of any agreement relating to, or instrument evidencing, any Superior Debt, which (whether with or without notice, lapse of time or both) would permit the holder of such Superior Debt to accelerate all or any portion of such Superior Debt (collectively, the 'Blockage Events')."

The Subordinated Note required BCHC to "notify the holder of this [Subordinated] Note in writing of the occurrence of a Blockage Event on or prior to the date on which any payment is due." The Subordinated Note also provided that "[n]o present or future holder of Superior Debt shall be prejudiced in its right to enforce [Section 3 of the Subordinated Note] by any act or failure to act on the part of" BCHC. The Subordinated Note said that plaintiffs could take no action to enforce the terms of the Subordinated Note once they had received notice of a Blockage Event.

¶ 18 In order to fund the purchase, BCI borrowed approximately $2.1 million from Harris bank (the Harris I loan). Sun Bachrach—the entity which owned a majority of BCHC—also loaned $1.5 million to BCHC (the Sun Bachrach loan). BCHC executed a promissory note on February 15, 2008, acknowledging the debt. The note said that interest would be paid at 3.83%.

¶ 19 Subsequently, BCHC and BCI took out a number of loans in order to turn BCI around. On March 29, 2005, LaSalle Bank extended BCI a $20 million revolving line of credit (the LaSalle loan), which was secured by BCHC. The proceeds of this loan were used to pay off the

Harris I loan. The parties do not dispute that the LaSalle loan had first priority lien position of all of BCHC's debts.

¶ 20 On April 1, 2005, Sun Bachrach loaned BCHC approximately $1.5 million (the Sun Bachrach loan). On the same day, three investors purchased shares of BCHC stock and loaned BCHC approximately $21,000 (the coinvestor loans). BCHC executed promissory notes for each of the investors: a $4,995 note to Gary Talarico, a $750 note to Glenn Oken, and a $15,000 note to H.I.G. Sun Partners, Inc., an affiliate of another private equity firm, H.I.G. Capital. Each of these four notes had a 3.83% interest rate.

¶ 21 In July 2005, BCI borrowed another $2 million from Harris Bank (the Harris II loan). BCHC and the Sun III funds each guaranteed the Harris II loan. In December 2005, Sun Bachrach purchased the loan from Harris. It then released the guaranties of the Sun III funds—its two parent companies—but did not release BCHC's guaranty. On March 3, 2006, Sun Bachrach amended the Harris II loan by providing BCI an additional $3 million.

¶ 22 On March 17, 2006, Bachrach received an email from Gerald Woelcke, one of the directors of BCHC. Woelcke said that Sun had invested an additional $3 million in BCI "due to cash requirements of the company," which was being characterized as an equity investment. He said that this would result in plaintiffs' ownership being diluted to "less than 1%" unless plaintiffs invested more in BCI. He also informed Bachrach that BCHC had defaulted on its debts:

> "The company has *** been in default of its bank covenants since August. According to the Sellers['] note, the interest to the sellers should be accrued, not paid when in default. I wish to discuss repayment of interest as it should have been accrued by the company at 10% as opposed to being paid out at 8%."

¶ 23 On March 20, 2006, Bachrach and Woelcke had a phone conversation. According to Bachrach's notes of that phone conversation, he "asked for documentation of default."

¶ 24 On March 23, 2006, Woelcke sent Bachrach another email, again notifying Bachrach of BCHC's default on the LaSalle loan:

> "As discussed, please find attached the communications we have received from LaSalle. We have not yet received a waiver to the *** bank default and are working with the bank in that regard. As such, the September and December payments should have been accrued at the 10% rate, not paid at 8% and we request the return of those funds. Additionally, the March 31 amount owing will be accrued at 10%."

¶ 25 On June 6, 2006, BCI filed for bankruptcy. During the bankruptcy proceedings, the LaSalle loan was paid off. The Harris II loan was partially paid. BCI's other debts were not.

¶ 26 Plaintiffs filed the instant action on December 11, 2008. Count I of the complaint alleged that BCHC had breached the Subordinated Note by failing to make any payments despite the fact that the Subordinated Note was enforceable. The remaining counts of the complaint sought to pierce the corporate veil of BCHC in order to lay blame for the breach on Sun Bachrach and the Sun III funds. (Presumably, this is because BCHC, whose only asset was BCI's stock, had nothing of value once BCI went bankrupt.) On June 26, 2009, while the complaint was pending, the Delaware Secretary of State revoked BCHC's corporate charter for failing to pay taxes.

¶ 27 A bench trial was held on plaintiff's complaint on May 5 and May 9, 2014. Bachrach testified on plaintiffs' behalf. Bachrach testified that, during negotiations over the sale of BCI, he thought that Sun would be purchasing BCI. He testified that he never would have sold BCI to BCHC as "a stand-alone company" and that he only agreed to sell BCI to BCHC because he thought it was "backed by Sun ***."

¶ 28 Bachrach said that he understood the term "subordinated," as used in the Subordinated Note, meant that it would be "subordinate to certain other obligations." But he thought that it would only be subordinated to money that BCHC borrowed from a bank, not the Sun Bachrach loan or the coinvestor loans. He later learned that BCHC was claiming that the defaults on the Sun Bachrach loan and the coinvestor loans were Blockage Events preventing plaintiffs from being paid. On cross-examination, he acknowledged that Superior Debt could be debt "of the type" issued by a bank, and that a debt did not necessarily have to be issued by a bank to be considered Superior Debt. He recognized that the LaSalle loan, before it had been paid off, was Superior Debt.

¶ 29 On cross-examination, Bachrach also acknowledged that he had received Woelcke's email regarding the fact that BCHC had defaulted on the LaSalle loan.

¶ 30 Kevin Calhoun, the chief financial officer of Sun, testified for defendants. Calhoun listed BCHC's debts in descending order of priority as: (1) the LaSalle loan; (2) the Harris II loan; (3) the Sun Bachrach loan; (4) the coinvestor loans; and (5) the Subordinated Note. Calhoun conceded that the LaSalle loan had been paid off and that defendants were not asserting that the LaSalle loan was a Blockage Event. He also said that the Harris II loan had been partially paid in bankruptcy proceedings and that it was still collectible senior debt in the bankruptcy court.

¶ 31 Calhoun testified that Sun had lost approximately $5 million due to BCI's failure.

¶ 32 Calhoun testified that, after Sun Bachrach assumed the Harris II loan, it chose to release the guaranties of the Sun III funds, but not the guaranty of BCHC, because these entities had different ownership structures. Whereas Sun Bachrach was 100% owned by the Sun III funds, BCHC was not. BCHC had coinvestors that owned portions of its stock, so, if Sun Bachrach had released BCHC's guaranty, "these parties would basically get an elevated position in the structure

with no cost, and it just didn't make sense to do that." He denied that the BCHC guaranty was not released just so that Sun could claim that a Blockage Event precluded it from paying plaintiffs under the Subordinated Note.

¶ 33 The parties submitted competing expert reports on issues relating to piercing the corporate veil and on whether the Sun Bachrach loans, the coinvestor loans, or the Harris II loans could be considered debt "of the type" typically held by a recognized financial institution. In one of the reports submitted by defendants, the expert opined that the 8% interest rate on the Subordinated Note demonstrated a high level of risk due to its subordinated status and that an 8% interest rate was equivalent to the interest rate on junk bonds. This expert also noted that the other debts owed by BCHC each had 3.83% interest rates, which suggested that they were less risky investments.

¶ 34 The trial court entered judgment for defendants on June 6, 2014. In the trial court's written order, it found that the payment of the Subordinated Note was "contingent on BCI turning its performance around." Because of the risk that it would never be paid, the Subordinated Note had a higher interest rate than other loans.

¶ 35 The court recounted the history of the debts that BCHC had incurred, including the Sun Bachrach loan, the coinvestor loans, and the Harris II loan. The court found that, "[w]hen the LaSalle Loan went into default in March of 2006, it triggered an Event of Default as to both the Sun Bach[rach loan] and the co-investor [loans] because of BCHC's guarantee of the LaSalle loan."

¶ 36 In describing the parties' positions, the trial court wrote, "Defendants contend there are unpaid superior debts to plaintiffs' Subordinated Promissory Note including, the $1.5 million Sun

Bach [loan]; the co-investor [loans]; and *** BCHC's guaranty of the Harris II Loan." The trial court then entered judgment for defendants:

> "After hearing the testimony of Bachrach and Calhoun, reviewing the evidence, including the exhibits, designated depositions, and expert reports and depositions submitted by the parties, the Court finds defendants' witnesses to be credible and believable. Based on the evidence and on the credibility of the witnesses the Court further finds that plaintiffs were sophisticated investors who, with their many advisors, thoroughly negotiated, understood and agreed to the terms and conditions of the sale. The Court finds that based on the credibility of the defense witnesses and on the evidence, plaintiffs failed to carry their burden of proof on their claim for breach of contract."

¶ 37 The trial court did not expressly state which of the defaulted debts it considered to be Blockage Events. In light of its judgment on the breach-of-contract count, the trial court declined to render judgment on the piercing-the-corporate veil counts.

¶ 38 After trial, defendants sought to collect BCHC's attorney fees pursuant to the fee-shifting provision of the SPA. The trial court awarded defendants the fees. But plaintiffs filed a motion to reconsider that issue, arguing that BCHC had not "incurred" attorney fees under the fee-shifting provision because no officer, director, or employee of BCHC had authorized the retention of Baker & McKenzie, the law firm that represented defendants at trial.

¶ 39 At the hearing on plaintiffs' motion to reconsider, defendants introduced a letter of engagement, dated November 13, 2013, from Baker & McKenzie that read, "This letter confirms our agreement that this Firm will represent [BCHC], Sun Bachrach ***, [and the Sun III funds] in connection with the *** litigation." The letter was signed by Michael McConvery, Sun's vice president of finance, on behalf of each defendant.

¶ 40 McConvery testified at the hearing. He said that, as part of his job duties with Sun, he had signed retention letters for law firms representing Sun's affiliates in the past. Sun's in-house counsel, which ran the litigation of any Sun entity, forwarded Baker & McKenzie's engagement letter for him to sign. He testified that he signed the letter because he knew that BCHC "needed to be defended" and that Baker & McKenzie had been doing the legal work for defendants.

¶ 41 Although McConvery was a vice president of BCHC in the past, he had resigned from that position. He had no position with BCHC in 2013; the only director of BCHC since 2007 was an individual named T. Scott King. McConvery conceded that no one at BCHC authorized him to sign Baker & McKenzie's engagement letter. McConvery also acknowledged that BCHC had its corporate charter revoked in 2009 and that it only existed for purposes of this lawsuit. McConvery said that the Sun III funds paid Baker & McKenzie's bills.

¶ 42 The trial court granted plaintiffs' motion to reconsider the original award of attorney fees. The court wrote that, "in order to hire Baker & McKenzie, the person signing their name to the engagement letter on behalf of BCHC must have had the authority to make business decisions and to legally bind BCHC for the fees and costs that would be billed by Baker & McKenzie." The court found that there was no evidence that Sun's in-house counsel had authority to bind BCHC or that Sun's in-house counsel could delegate that authority to McConvery. The trial court observed no evidence that McConvery "had any authority to sign the engagement letter on behalf of BCHC." The court concluded, "Since there was no valid engagement agreement between Baker & McKenzie and BCHC, BCHC could not have incurred any fees from Baker & McKenzie." The court vacated its award of attorney fees for BCHC.

¶ 43 Plaintiffs appeal the trial court's judgment on their breach-of-contract claim. Defendants cross-appeal on the issue of BCHC's attorney fees.

¶ 44 II. ANALYSIS

¶ 45 We first address the issues raised in plaintiffs appeal from the trial court's judgment in defendants' favor. We then turn to the attorney-fees issue raised in defendants' cross-appeal.

¶ 46 A. The Burden of Proving the Existence of a "Blockage Event"

¶ 47 Plaintiffs first claim that the trial court committed reversible error in placing the burden of proving the absence of a "Blockage Event" on them. According to plaintiffs, the existence of a Blockage Event as defined by the Subordinated Note was an affirmative defense that defendants were required to prove. Defendants note that plaintiff bore the burden of proving that defendants failed to pay the Subordinated Note and that "the absence of Superior Debt in default is a condition precedent to plaintiffs' payment on the Subordinated Note."

¶ 48 To resolve this issue, we must interpret the provisions of the Subordinated Note. When interpreting the provisions of a contract, our primary goal is to give effect to the parties' intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). We look first to the language of the contract itself to determine the parties' intent. *Id.* We interpret the contract as a whole, reading each of its provisions in light of one another. *Id.* We apply *de novo* review. *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011).

¶ 49 The parties' dispute centers on the language in the Subordinated Note regarding plaintiff's right to be paid when BCHC had defaulted on "Superior Debt." According to the Subordinated Note, if BCHC defaulted on its Superior Debt, plaintiffs would not be paid until the Superior Debt had been paid. Such a default was referred to as a "Blockage Event." The parties' dispute whether defendants were required to prove the existence of a Blockage Event as an affirmative defense, or whether plaintiffs were required to prove the absence of a Blockage Event as a condition precedent to their right to be paid.

¶ 50 Neither plaintiffs nor defendants cite any case law interpreting a promissory note with similar language as the Subordinated Note. Instead, the cases they cite simply stand for the general propositions that a defendant bears the burden of proving its affirmative defenses (*Pascal P. Paddock, Inc. v. Glennon*, 32 Ill. 2d 51, 54 (1964); *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 438-39 (2010)) and that a plaintiff in a breach-of-contract action must prove that the contract is enforceable (*Vandevier v. Mulay Plastics, Inc.*, 135 Ill. App. 3d 787, 791 (1985)).

¶ 51 Nor have we uncovered any Illinois precedent addressing the burden of proof in a case involving a subordinated promissory note. But we find the Fifth Circuit Court of Appeals' decision in *Mullins v. TestAmerica, Inc.*, 564 F.3d 386 (5th Cir. 2009), to be persuasive. In *Mullins*, the plaintiffs sold the assets of their company to TestAmerica for cash and a promissory note. *Id.* at 390. The note was " 'subordinated and subject in right of payment to the prior payment by [TestAmerica] in full of all of [TestAmerica's] debt facilities.' " *Id.* at 391. After TestAmerica failed to pay the plaintiffs, they filed a breach-of-contract suit. *Id.* at 393, 395. At trial, the district court instructed the jury that TestAmerica had the burden of proving that the plaintiffs' note was subordinate to the other creditors "because it deemed the issue of subordination to be an affirmative defense." *Id.* at 410-11.

¶ 52 On appeal, the Fifth Circuit found that the district court erred in instructing the jury that subordination was an affirmative defense because proving the absence of unpaid " 'debt facilities' " was a condition precedent to the enforcement of the note. *Id.* at 412-13. The court began by noting that an affirmative defense does not take on the fact that a contract has been breached, it "assert[s] other, independent facts as a basis for negating liability." *Id.* at 411. But the enforceability of the plaintiffs' note hinged on whether or not TestAmerica's outstanding debt

was a " 'debt facility' " that would be senior to the note. *Id.* Because TestAmerica attempted to negate the plaintiffs' claim of breach by "directly attacking the factual assertion that TestAmerica was required to pay," TestAmerica's claim that the note was subordinated was not an affirmative defense. *Id.* at 412.

¶ 53 Instead, the court determined that language making payment of the note " 'subject to' " payment of TestAmerica's other debt facilities was a condition precedent to TestAmerica's duty to pay the plaintiffs. *Id.* Because the plaintiffs had no right to be paid before TestAmerica had paid off its other debt facilities, the court interpreted the payment of those debt facilities as a condition precedent to the enforcement of the note. *Id.* Thus, the court concluded, the plaintiffs bore the burden of proving whether or not the condition had been satisfied. *Id.*

¶ 54 Like TestAmerica's claim in *Mullins*, defendants in this case alleged that BCHC was not obliged to pay plaintiffs under the Subordinated Note because there was Superior Debt that was in default. This assertion went directly to the facts in plaintiffs' breach of contract claim, including that the Subordinated Note was enforceable and that plaintiffs were entitled to payment. Thus, like the court in *Mullins*, we conclude that defendants were not raising the presence of a Blockage Event as an affirmative defense. Rather, they sought to refute the enforceability of the Subordinated Note, which plaintiffs bore the burden of proving.

¶ 55 Moreover, like the note in *Mullins*, the language of the Subordinated Note conditioned plaintiffs' right to be paid on the absence of any default on any Superior Debt. The Subordinated Note said that, when any Superior Debt went into default, "the holders of Superior Debt shall be entitled to receive payment in full in cash on all Superior Debt before the holder of this Note is entitled to receive any payment," and that "no payment of principal, interest, fees, charges or other amounts due (or past due) upon or in respect of this Note shall be made if" any Superior

Debt was in default. Indeed, section 3(i) of the Subordinated Note further provided that, from and after the date of any Blockage Event, the holder of the Note, Bachrach, "shall not take or continue any action, or exercise or continue any rights, remedies or powers under the terms of this Note … unless and until the Superior Debt shall have been fully and finally paid … and satisfied." Like the provisions of the note in *Mullins*, plaintiffs' right to payment in this case—its right to enforce the Note at all—depended on the absence of a Blockage Event. If a Blockage Event existed, plaintiffs could not seek to enforce the Subordinated Note against BCHC.

¶ 56 Thus, in order to prove that the Subordinated Note was enforceable, plaintiff had to show that there was no Blockage Event. That is, plaintiff bore the burden of proving the absence of a Blockage Event at trial. The trial court did not impermissibly shift the burden of proof to plaintiffs.

¶ 57 B. Whether Plaintiffs Proved There Was No "Blockage Event"

¶ 58 Next, we turn to plaintiffs' claim that the trial court erred in finding that plaintiffs had not proved their breach-of-contract claim because a Blockage Event had occurred, halting BCHC's obligation to pay plaintiffs under the Subordinated Note. As we discussed above, according to the Subordinated Note, plaintiffs had no right to receive any payment of principal or interest while a Blockage Event was in effect.

¶ 59 Plaintiffs claim that the trial court erred in concluding that BCHC's default on the LaSalle loan was a Blockage Event. Plaintiffs note that LaSalle had been fully paid via BCI's bankruptcy proceedings before plaintiffs filed their suit. And, according to plaintiffs, "[t]he LaSalle Loan is the only Superior Debt that the circuit court found to be a Blockage Event."

¶ 60 Defendants agree that BCHC's default on the LaSalle loan was not a Blockage Event because it had been paid. But, defendants claim, five other Superior Debts were in default and

blocked plaintiffs' right to be paid: the Sun Bachrach loan, the three coinvestor loans, and the Harris II loan.

¶ 61 Plaintiffs do not argue that the Sun Bachrach loan, the three coinvestor loans, or the Harris II loan were not Superior Debt under the terms of the Subordinated Note. Nor do they contend that the trial court erred in finding that these loans were superior to the Subordinated Note. Consequently, plaintiffs have forfeited these arguments. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (2010) (party forfeits arguments not raised on appeal). Because these other loans were indisputably Superior Debt and indisputably unpaid, we could affirm the trial court's judgment without any consideration of the LaSalle loan. See *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009) ("[W]e may affirm the judgment of the trial court on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct.").

¶ 62 In any event, while the trial court may not have expressly stated which defaulted loans it found to be Blockage Events, it is clear that the LaSalle loan did not factor into the trial court's judgment. The court described defendants' argument as follows:

> "Defendants argue that plaintiffs['] Subordinated *** Note was only payable if *** the superior debts related to the leveraged buyout and subsequent financing of Bachrach companies were paid first. Defendants assert that none of these events occurred and therefore the Subordinated Promissory Note is not due and owning [*sic*] and defendants did not breach the parties' agreement. Defendants contend there are unpaid superior debts to plaintiffs' Subordinated Promissory Note including, *the $1.5 million Sun Bach[rach] Note; the co-investor notes; and the BCHC's guaranty of the Harris II Loan*." (Emphasis added.)

This was the argument that the trial court accepted, not an argument that the LaSalle loan was in default. Thus, the trial court found that BCHC's default on these loans were the Blockage Events preventing plaintiffs from collecting on the Subordinated Note, not BCHC's default on the LaSalle loan.

¶ 63 Other findings by the trial court support this conclusion. The court found that the Subordinated Note was the only debt instrument "that use[d] the word 'subordinated' on its face." With respect to the coinvestor loans, the court found that, unlike the Subordinated Note, none of them "carr[ied] the term 'subordinate.' " And the court found that, "[w]hen the LaSalle Loan went into default in March of 2006, it triggered an Event of Default as to both the Sun Bach[rach loan] and the co-investor [loans] because of BCHC's guarantee of the LaSalle Loan." Taking these findings together, the court recognized that the Sun Bachrach loan, the coinvestors loans, and the Harris II loan were superior to the Subordinated Note, and that BCHC defaulted on those Superior Debts when it defaulted on the LaSalle loan.

¶ 64 Notably, the court made no mention of the default on the LaSalle loan as a Blockage Event. And it had good reason to ignore that loan—there was barely any evidence regarding the LaSalle loan at trial because both parties knew it had been paid off. Rather, most of plaintiffs' evidence at trial regarding the loans focused on whether or not the Sun Bachrach loan, the coinvestor loans, and the Harris II loans qualified as Superior Debt under the terms of the Subordinated Note. But, as we noted above, plaintiffs do not raise that argument on appeal, and they thus forfeit any argument that the other debts were *not* Superior Debts.

¶ 65 C. Notice of a "Blockage Event"

¶ 66 Next, plaintiffs assert that the Sun Bachrach, coinvestor, and Harris II loans could not be considered as Blockage Events because BCHC failed to provide plaintiffs with adequate notice

of BCHC's default on those loans. Plaintiffs recognize that Woelcke emailed Bachrach about the LaSalle loan going into default, but claim that this was insufficient notice under the terms of the SPA, which required written notice to be mailed to Bachrach's address in Chicago. And plaintiffs claim that, because they only received notice of the default on the LaSalle loan, once that loan was paid off in bankruptcy, no other Blockage Events prevented them from being paid. Defendants note that Bachrach was actually aware of the default and that any failure to mail the notice to the address in the SPA was an insignificant breach.

¶ 67 The facts regarding the delivery of notice are not in dispute. We must simply interpret the language of the SPA and Subordinated Note to determine whether the email satisfied the notice provision of the SPA. We apply *de novo* review to this question. *Carr*, 241 Ill. 2d at 20.

¶ 68 The failure to perform any term of a contract, no matter how minor, constitutes a breach for which the non-performing party is liable. *Pacini v. Regopoulos*, 281 Ill. App. 3d 274, 279 (1996). But under the doctrine of *de minimis non curat lex* (meaning, " 'the law does not concern itself with trifles' " (*People ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 225 n.3 (2006)), a breach causing only slight harm does not give rise to a remedy. *Id.*; see also *Pacini*, 281 Ill. App. 3d at 279 (" 'If a contractor's failure of performance causes such slight harm that the courts will give no remedy therefor, *** it is proper to say that there has been no breach of duty.' " (quoting 4 Corbin, A., Corbin on Contracts § 946, at 813 (1951)).

¶ 69 The Subordinated Note required that BCHC "notify [Bachrach] in writing of the occurrence of a Blockage Event on or prior to the date on which any payment is due." The Subordinated Note did not further specify how such notice should be delivered. The Subordinated Note incorporated the terms of the SPA into it, and the SPA provided that "notices, demands and communications to" Bachrach "shall be sent to" his Chicago address. Thus, it is

clear that defendants did not comply with the terms of the SPA when they only gave notice of the default via email.

¶ 70 But it is equally clear that Bachrach had actual notice of the default on the LaSalle loan. At trial, Bachrach conceded that he had received Woelcke's email informing him of the default in March 2006. And, because the LaSalle loan had the highest priority of any of BCHC's loans, it had to be paid off before BCHC could pay any of its other debts, including the Subordinated Note. Thus, when Bachrach learned that the LaSalle loan was in default, he knew that plaintiffs would not be paid under the Subordinated Note. In other words, he was given actual notice of a Blockage Event.

¶ 71 In light of Bachrach's actual knowledge, we find that the breach of the SPA's notice provision was so insignificant that the doctrine of *de minimis non curat lex* applies. At the risk of stating the obvious, the notice provision of the SPA was designed to make plaintiffs aware of the fact that, once the Superior Debt was in default, they would not be receiving regular payments under the Subordinated Note. It is uncontested that plaintiffs were made aware of this fact when Bachrach received Woelcke's email. Plaintiffs pointed to no actual harm they suffered by receiving written notice via email rather than physical mail delivered to Bachrach's address.

¶ 72 Moreover, it is unclear exactly what relief plaintiffs sought due to this breach. The Subordinated Note expressly provided that no acts of BCHC could prejudice any Superior Debt holder's right to enforce the Superior Debt over the Subordinated Note. Nothing in the Subordinated Note or the SPA indicates that the failure to deliver adequate notice would strip the Subordinated Note of its subordinated status and give the Subordinated Note priority over other debts. To the contrary, the Subordinated Note provides no consequences for the failure to deliver

timely notice. Thus, we conclude that any breach of the SPA's notice provision was so insignificant that no remedy is required.

¶ 73 We find support for our conclusion in *Rogers v. Balsley*, 240 Ill. App. 3d 1005 (1993). In *Rogers*, the plaintiffs and the defendant entered into a real estate contract that was contingent on the defendant's ability to obtain financing. *Id.* at 1006-07. The contract provided that, if the defendant could not obtain financing, the defendant had to notify the plaintiffs within a certain period of time. *Id.* The contract also said that, if the defendant did not give proper notice, " '*it shall be conclusively presumed that [the defendant] has such [financing] or will purchase [the] property without mortgage financing*.' " (Emphasis in original.) *Id.* at 1007. The contract said that notice should be sent to the plaintiffs' home address. *Id.* Ultimately, the defendant failed to secure financing and sent a letter canceling the contract to the plaintiffs' attorney. *Id.* The plaintiffs' attorney responded with a letter acknowledging receipt of the defendant's letter and threatening to sue for breach of the contract. *Id.* The trial court entered summary judgment for the plaintiffs, finding that the defendant breached the contract by failing to send notice to the plaintiffs' home address. *Id.* at 1009.

¶ 74 On appeal, this court acknowledged that the defendant "technically breached the contract," but we rejected the notion that this breach was material. *Id.* at 1011. Noting that the purpose of the notice provision was to ensure that the plaintiffs would be made aware of the defendant's inability to obtain financing, we found that the letter to the plaintiffs' attorney accomplished that purpose. *Id.*

¶ 75 Like the plaintiffs in *Rogers*, plaintiffs in this case were undoubtedly aware of the existence of a Blockage Event preventing the Subordinated Note from being paid. The purpose

of the notice provision in the Subordinated Note was to let plaintiffs know that they would not be receiving their scheduled payment. That purpose was achieved by Woelcke's email to Bachrach.

¶ 76 Moreover, unlike the contract in *Rogers*, which provided that the defendant would be required to go through with the deal without financing if she failed to comply with the notice provision, neither the SPA nor the Subordinated Note provide any consequences for BCHC's failure to give plaintiffs notice. Thus, plaintiffs' claim of breach is even weaker than the plaintiffs' in *Rogers*. If providing notice to Bachrach's Chicago address had been as critical as plaintiffs suggest, it is more likely that the Subordinated Note or the SPA would have provided consequences for the failure to adhere to the notice provision like the contract in *Rogers*.

¶ 77 Plaintiffs argue that the notice provision was important because it would make plaintiffs aware of any default and give them an opportunity to pay off BCHC's smaller debts in order to make it more likely that they would receive the $4 million owed them under the Subordinated Note. Plaintiffs point out that the coinvestor loans only totaled $21,000, so it would make sense for them to pay those debts off in order to make it more likely that they could collect on the $4 million Subordinated Note.

¶ 78 Initially, we note that the total amount of debt superior to the Subordinated Note was far more than $21,000; the Sun Bachrach loan alone was $1.5 million. Thus, plaintiffs' argument that they would have simply paid off the higher-priority debts is not as strong as they make it out to be.

¶ 79 More importantly, regardless of whether plaintiffs had a right to pay off Superior Debts, plaintiffs have failed to explain how Woelcke's email impacted any such right. As Bachrach testified, he knew of BCHC's default on the LaSalle loan and that this default would mean that plaintiffs would not receive their interest payments under the Subordinated Note. Because the

LaSalle loan was the highest-priority debt, all of BCHC's other debts were necessarily in default as well. Thus, plaintiffs were well aware of the existence of a Blockage Event and could have attempted to pay off any smaller debts had they so desired. But there is no indication that they ever did so.

¶ 80 The cases plaintiffs cite, *Dragon Construction v. Parkway Bank & Trust*, 287 Ill. App. 3d 29 (1997), and *Fidelity National Title Insurance Co. v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201 (2007), are distinguishable. In *Dragon Construction*, the party's failure to provide timely notice under the provisions of the contract prevented the other party from exercising its right to select a new contractor for a construction project. *Dragon Construction*, 287 Ill. App. 3d at 34. Likewise, in *Fidelity National Title Insurance*, the failure to deliver timely notice prevented a member of a partnership from exercising its right of first refusal and to appoint an appraiser to value its interest in the partnership. *Fidelity National Title Insurance*, 386 Ill. App. 3d at 216. Here, plaintiffs have identified no right that they were precluded from exercising due to defendants giving them notice via email rather than physical mail. Plaintiffs had ample opportunity to assess the impact of BCHC's default on the Superior Debts and to pay off any of those debts. We conclude that any breach of the SPA's notice provisions was trivial, and that the doctrine of *de minimis non curat lex* provides plaintiffs no relief from such a breach.

¶ 81 D. Whether Other Breaches Precluded Defendants from Raising a Blockage Event

¶ 82 Finally, plaintiffs argue that, because BCHC breached the Subordinated Note in ways other than failing to repay plaintiffs, defendants cannot use the Blockage Event terms of the contract to avoid paying plaintiffs. Plaintiffs argue that BCHC breached the Subordinated Note by failing to provide plaintiffs with notice of all of the Blockage Events, failing to provide plaintiffs with a security agreement, and misrepresenting BCHC's financial wherewithal.

According to plaintiffs, because of these breaches, defendants "could not rely on the Blockage Event terms of the [Subordinated] Note *** to avoid [BCHC's] obligations to" them.

¶ 83 Plaintiffs are correct that, as a general matter, "a party seeking to enforce the contract has the burden of proving that he has substantially complied with all the material terms of the agreement," and that "[a] party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract." *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 599 (1987). This principle applies when a party breaches a contract and then tries to use a provision of that contract as an affirmative defense. See, *e.g.*, *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 455-56 (2003) (defendant could not bar plaintiff's retaliatory-discharge claim by asserting affirmative defense of settlement where defendant breached terms of settlement).

¶ 84 But, as we explained above, defendants did not raise an affirmative defense in this case. Rather, it was plaintiffs' burden to prove that no Blockage Events existed. Plaintiffs cannot shirk their burden of proving that they were entitled to be paid simply by alleging that defendants breached the contract in other ways that have nothing to do with the presence or absence of a Blockage Event. Nor do we find merit in plaintiffs' claims of a contract breach. We have already rejected their claim of breach regarding notice of the Blockage Event. As for the claims that defendant BCHC did not enter into a security agreement with plaintiffs—that BCI did so, rather than BCHC—and that defendants misrepresented their financial wherewithal, we agree with the trial court that plaintiff is hard-pressed to assign error to these supposed breaches when plaintiffs accepted the deal, including the security agreement as written. Plaintiffs, having (in the trial court's finding) "engaged and consulted attorneys and accountants to advise them and direct them during the negotiation of this complex leveraged buyout," having "negotiated numerous

documents and agreements which were incorporated in the 684-page 'deal book' which contained all the terms of this sophisticated and intricate deal," having had "the opportunity to ask questions and receive answers concerning the terms and conditions" and "full access to such other information concerning [Sun and its subsidiaries]," thus "chose to go forward knowing the risks and the parameters in the hope of a reward." Thus, the principle cited by plaintiffs has no place here. Having rejected plaintiffs' claims of error, we affirm the trial court's judgment in favor of defendants.[1]

¶ 85 D. Attorney Fees

¶ 86 Having rejected plaintiffs' claims of error regarding the trial court's judgment, we now turn to defendants' cross-appeal on the issue of whether they were entitled to attorney fees under the SPA's fee-shifting provision. Generally, parties to a lawsuit pay their own attorney fees, regardless of who wins. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572 (2000). But parties to a contract may require the losing party to a contractual dispute to pay the winning party's attorney fees. *Chapman v. Engel*, 372 Ill. App. 3d 84, 87 (2007). We strictly construe such fee-shifting provisions. *Id.* The burden of proof falls on the party seeking attorney's fees pursuant to a contractual fee-shifting provision. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987).

---

[1] Defendants also argue that plaintiffs are judicially and collaterally estopped from proceeding with their arguments before this court, because in the bankruptcy proceeding, plaintiffs actually argued *against* the enforceability of the Subordinated Note because of the presence of a "Blockage Event"—namely the outstanding Sun Bacharach loan—after BCI's creditors' committee accused plaintiffs of improper monetary transfer at the time of sale. In light of our disposition, we need not reach this issue.

¶ 87 The SPA's fee-shifting provision provided that, in any action to enforce it, the prevailing party was entitled to all "reasonable fees *** incurred at the trial court, all appellate courts and during negotiations." The Subordinated Note incorporated the provisions of the SPA.

¶ 88 It is undisputed that the fee-shifting provision, in general, would allow BCHC to recover the attorney fees it incurred in enforcing the Subordinated Note. The dispute here centers on whether BCHC "incurred" any attorney fees under that provision.

¶ 89 Defendants concede that the question of whether BCHC "incurred" attorney fees under the SPA depends on whether BCHC was liable for those fees. But defendants argue that, while Michael McConvery, the Sun executive who signed Baker & McKenzie's retention letter, lacked the actual authority to bind BCHC to the payment of Baker & McKenzie's fees because he had resigned from his post as an officer of BCHC when Baker & McKenzie was retained, he had the apparent authority to bind BCHC. Defendants also argue that, even if McConvery did not bind BCHC, BCHC ratified Baker & McKenzie's retention by benefiting from the legal services it provided. Finally, defendants claim that, even absent a contract between BCHC and Baker & McKenzie, BCHC incurred legal fees via quasi-contract.

¶ 90 At the outset, we note that, throughout this litigation, BCHC was a defunct corporation. It was in bankruptcy and existed solely for purposes of this lawsuit. BCHC had no assets and literally nothing to lose in this case. Instead, it was the entities controlling BCHC—the other defendants in this case—that stood to lose anything if plaintiffs succeeded in establishing a breach of contract and then in piercing the corporate veil to reach the other defendants' assets. With this in mind, we turn to defendants' arguments.

¶ 91 1. Apparent Authority

¶ 92 Under the doctrine of apparent authority, a principal (BCHC) will be bound by a contract entered into by its agent (McConvery) when the principal has "appear[ed] to give" the agent the authority to make the contract with a third party (Baker & McKenzie). *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). The party attempting to establish an agent's apparent authority must show three things: (1) that "the principal consented to or knowingly acquiesced in the agent's exercise of authority"; (2) that, "based on the actions of the principal and agent, the third party reasonably concluded that the agent had authority to act on the principal['s] behalf"; and (3) that "the third party justifiably relied on the agent's apparent authority to his detriment." *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 895 (2010). "In establishing apparent authority, it is critical to find some words or conduct by the principal that could reasonably indicate consent." *Id.* at 896. But a principal's silence may be construed as consent "if the principal knowingly allows another to act for him as his agent." *Id.*

¶ 93 The party seeking to establish an agency relationship—in this case, defendants—bears the burden of proving it by a preponderance of the evidence. *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill. App. 3d 126, 134 (2001). The existence of an agency relationship is a question of fact. *Id.* at 135. And where, as in this case, the trial court heard live testimony regarding the alleged agency relationship, we will reverse the trial court's findings only if they are against the manifest weight of the evidence. *Id.*

¶ 94 Here, defendants' claim that McConvery acted with apparent authority fails, because they presented no evidence that BCHC took any actions that would lead Baker & McKenzie to believe that it had given McConvery authority to act on BCHC's behalf. At the time that Sun retained Baker & McKenzie, the only director of BCHC was T. Scott King. Plaintiffs did not present any evidence that King made any statements or undertook any acts that would lead Baker

& McKenzie to reasonably conclude that McConvery could act on BCHC's behalf. Nor was there any evidence that King knowingly permitted McConvery to approve Baker & McKenzie's retention.

¶ 95 Defendants note that McConvery regularly signed attorney engagement letters on behalf of Sun's affiliates at the direction of Sun's in-house legal team. But McConvery's actions as an officer of Sun could not be construed as actions on BCHC's behalf where he had resigned from his position with BCHC. Defendants cite no authority for the proposition that, because of the common practices of a parent company, an officer of the parent company may possess apparent authority to act on behalf of a subsidiary corporation. While defendants cite *Carriage Realty Partnership v. All-Tech Auto Automotive, Inc.*, Del. Ch., No. CIV. A. 18440, Strine, V.C., (Nov. 27, 2001) (Mem. Op.), *available at* 2001 WL 1526301, *6-*7, in that case, the agent had apparent authority as the company's president, sole director and shareholder. Thus, it is not similar to this case, where McConvery had no involvement with BCHC once he resigned from his position with BCHC. The trial court's finding of lack of authority was not against the manifest weight of the evidence.

¶ 96 2. Ratification

¶ 97 Next, defendants contend that, even if McConvery acted without authority, BCHC ratified the retention of Baker & McKenzie. A principal may ratify an unauthorized transaction when it "learns of [the] transaction, then retains the benefits of the transaction or takes a position inconsistent with nonaffirmation." *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 858 (1998). For ratification to occur, the principal must "have full knowledge of the facts and the choice to either accept or reject the benefit of the transaction." *Amcore Bank, Inc.*, 326 Ill. App. 3d at 140.

When ratification occurs, it is as though the transaction was authorized from the outset. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 14-15 (2004).

¶ 98 Whether ratification occurred is a question of fact. *Swader v. Golden Rule Insurance Co.*, 203 Ill. App. 3d 697, 705 (1990). Thus, we will not reverse the trial court's judgment unless it was against the manifest weight of the evidence. *Amcore Bank*, 326 Ill. App. 3d at 135. A finding is against the manifest weight of the evidence when the opposite conclusion is apparent, or when the finding is unreasonable, arbitrary, or not based on the evidence. *Id.*

¶ 99 At the hearing on the question of attorney fees, defendants presented no evidence that any director, officer, or employee of BCHC had knowledge of the retention of Baker & McKenzie. King, the sole director of BCHC at the time McConvery signed the retention letter, did not testify. As McConvery testified, BCHC would not have received any bills for Baker & McKenzie's services because the Sun III funds were paying the bills.

¶ 100 Nor did McConvery testify that he, or anyone else, told any of BCHC's agents about the litigation. McConvery did suggest that King, as an employee of Sun, would have known that Sun's in-house counsel handles the retention of outside counsel, testifying that "[e]verybody at Sun Capital knows our in-house counsel manages these processes," and that "[e]verybody at Sun Capital would get an e-mail whenever there is a situation like this reminding everybody of the document retention policy, not to destroy anything, and that putting everybody on notice that they are managing this process for this company." But McConvery did not testify that the employees of Sun, including King, would receive notice of what law firm Sun's in-house counsel had chosen to defend an affiliated company. Nor did he say that King, or any other agent of BCHC for that matter, received any email notifications regarding this case. This limited evidence does not persuade us that BCHC had full knowledge of Baker & McKenzie's representation.

¶ 101 We acknowledge that the length of time that Baker & McKenzie served as BCHC's counsel would suggest that someone at BCHC was aware of the fact that Baker & McKenzie had been retained to represent BCHC. But ratification may be inferred by the principal's long-term acquiescence to a contract only if the principal has received notice of the contract. See *Stathis*, 295 Ill. App. 3d at 858 ("Ratification may *** be inferred from *** long-term acquiescence, *after notice*, in the benefits of an allegedly unauthorized transaction." (Emphasis added.)); *Athanas v. City of Lake Forest*, 276 Ill. App. 3d 48, 57 (1995) (same). As we explained above, defendants failed to present any evidence that anyone with authority to act on BCHC's behalf ever learned of Baker & McKenzie's representation.

¶ 102 We find support for this conclusion in *Stathis*, where we found that the plaintiff ratified a contract by knowing of its terms and accepting payments under the contract. *Stathis*, 295 Ill. App. 3d at 858. The plaintiff owned a controlling interest in a partnership. *Id.* at 848. His son entered into an agreement with the defendants to take over the partnership. *Id.* The plaintiff filed suit, alleging that the defendants had converted his interest in the partnership by entering into an unauthorized contract with his son. *Id.* at 849. On appeal, we held that the son had actual and apparent authority to enter into the contract. *Id.* at 856-58. We also noted that, even if the son lacked such authority, the plaintiff ratified the contract. *Id.* at 858. The evidence showed that the plaintiff had reviewed the agreement, had never expressed any dissatisfaction with its terms, and had accepted payments the defendants made pursuant to the contract. *Id.* While we noted that "[a]cceptance of these payments alone did not constitute ratification of the agreement," we found that the plaintiff's "earlier knowledge of the terms of the agreement, combined with undisputed evidence that he did not indicate to anyone *** that [his son] was not authorized to execute it, supports the conclusion that ratification took place." *Id.*

¶ 103 Unlike *Stathis*, there was no evidence in this case that anyone at BCHC learned of Baker & McKenzie's retention. There was no evidence that, having gained such knowledge, anyone at BCHC acquiesced to that firm's representation. And, unlike *Stathis*, there was no indication that BCHC benefited in any real sense from Baker & McKenzie's defense. Since 2009, BCHC had been a defunct corporation that existed solely for the purpose of this lawsuit. Plaintiffs could not hope to collect anything from BCHC, and BCHC had nothing to lose. By contrast, the other Sun entities that were defendants in this case did have something to lose. Thus, it was in Sun's best interest to defend against the breach of contract claim so that the trial court would not have occasion to pass judgment on plaintiff's veil-piercing claims and potentially expose other Sun entities to liability. We reject defendants' ratification argument and find that the trial court's ruling on attorney's fees was not against the manifest weight of the evidence.

¶ 104 3. Quasi-Contract

¶ 105 Finally, defendants claim that BCHC incurred Baker & McKenzie's fees because, even if there was no contract between BCHC and Baker & McKenzie, BCHC would be liable for Baker & McKenzie's fees under the doctrine of quasi-contract. Plaintiffs claim that defendants forfeited this issue by failing to raise it in the trial court.

¶ 106 It is well settled that a party forfeits issues it does not raise in the trial court; issues may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). A party may not raise a claim regarding attorney fees for the first time on appeal. See, *e.g.*, *Gent v. Collinsville Volkswagen, Inc.*, 116 Ill. App. 3d 496, 505 (1983). Nor can a party assert a theory of quasi-contract for the first time on appeal. See, *e.g.*, *Benjamin E. Sherman & Son, Inc. v. Lynn*, 38 Ill. App. 3d 569, 572 (1976).

¶ 107 Defendants did not raise their quasi-contract argument in the trial court. Their response to plaintiffs' motion to reconsider the award of attorney fees does not make any mention of quasi-contract, and plaintiffs' counsel did not make such an argument at the hearing on the motion to reconsider. Consequently, defendants have forfeited their quasi-contract argument. It would be unfair to consider the merits of this argument for the first time on appeal, when defendants had no opportunity to respond to it in the trial court, where they could have presented evidence to rebut it.

¶ 108 Moreover, we note that, even if we were to consider the merits, we would regard this claim with skepticism. A "quasi-contract" is a contract imposed by a court to remedy the fact that another has been unjustly enriched. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 500 (2001). "The prevention of unjustness is the fundamental aspect of the doctrine of quasi-contracts." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9 (2004). Here, McConvery testified that Sun paid all of Baker & McKenzie's attorney fees throughout the litigation. At the point Baker & McKenzie had been retained, BCHC was a bankrupt, defunct corporation. We see no reason why Baker & McKenzie would have an expectation that it would be paid for its legal services through BCHC's contract with plaintiffs. And BCHC did not, in fact, pay any legal fees; the Sun III funds did. We see no injustice that would require the imposition of a quasi-contract, in any event.

¶ 109 III. CONCLUSION

¶ 110 For the reasons stated above, we affirm the trial court's judgment in favor of defendants on plaintiff's breach-of-contract claims. We also affirm the trial court's denial of attorney fees for defendants.

¶ 111 Affirmed.