No. 1-09-2515

FIFTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SCATTERED CORPORATION,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 11349
	)	
ALLIED WASTE INDUSTRIES, INC.,	)	Honorable
	)	Ronald T. Bartkowicz,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

HELD: The trial court incorrectly determined Scattered could not establish a breach of the Consent Agreement because the original Project Agreement had simply "expired" under its own terms, rather than "terminated" as required by the plain language of paragraph 1(e). The parties intent in forming paragraph 1(e) of the Consent Agreement indicates "expiration" of the original Project Agreement was contemplated as one of the ways the Project Agreement could have "terminated."

Plaintiff Scattered Corporation (Scattered) filed a breach of contract action against defendant Allied Waste Industries, Inc. (Allied), alleging Allied breached paragraph 1(e) of a "Consent and Agreement" Allied had previously entered into with Aquila Energy Capital Corporation (Aquila). The circuit court granted Allied's motion to dismiss under sections 2-619(a)(4) and (a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4), (a)(9) (West 2006)). The circuit court held dismissal under section 2-619(a)(4) was warranted because Scattered had impermissibly split its claims by not asserting that Allied had breached the provision of the Consent Agreement in an earlier-filed lawsuit against Allied. The court also dismissed Scattered's claim under section 2-619(a)(9), finding Scattered could not establish a breach of the Consent Agreement because the original Project Agreement had "expired" under its own terms, rather than "terminated" as required by the plain language of paragraph 1(e). Scattered appeals.

BACKGROUND

On December 21, 1995, Resource Technology Corporation (RTC) entered into a written agreement (the ADS Project Agreement) with American Disposal Services of Illinois (ADS, now known as Allied Waste Industries, Inc. (Allied)). The Project Agreement allowed RTC to construct and operate landfill gas-to-energy plants at

four Allied landfills, including one in Pontiac, Illinois. The agreement was for a 10-year period. It could be renewed for up to three additional 5-year terms if RTC provided timely written notice to Allied 30 days prior to the expiration date. The initial 10-year period expired on December 21, 2005.

On November 15, 1999, an involuntary petition for relief under Chapter 7 of the Bankruptcy Code was filed against RTC in the U.S. Bankruptcy Court for the Northern District of Illinois. Jay Steinberg was appointed as the Chapter 7 trustee for RTC's estate on September 21, 2005. The ADS Project Agreement remained in force and became one of the estate's assets, subject to administration and liquidation by the estate's trustee with the bankruptcy court's approval.

On April 10, 2002, Allied entered into a credit agreement with RTC to secure post-petition financing through Aquila Energy Capital Corporation (Aquila) for certain RTC construction projects, including the landfill gas-to-energy plant provided for in the ADS agreement. Allied also entered into a "Consent and Agreement" with Aquila, consenting to RTC's granting of security interests to Aquila to protect Aquila's rights under the credit agreement. The Consent Agreement allowed Aquila to substitute itself or name a designee in place of RTC under the terms of the ADS agreement if RTC defaulted. Under the Consent Agreement,

Allied was required to provide Aquila with notice of any RTC defaults under the ADS agreement and give Aquila leave to take certain actions to enforce the agreement.

In November 2005, the trustee wrote Allied's counsel requesting the deadline for renewing the ADS Project Agreement be extended from December 21 to December 31, 2005. Allied agreed to the request.

On either December 28, 2005, or January 26, 2006, Scattered purchased Aquila's rights, title, and interest in all claims against RTC acquired under the post-petition financing Aquila provided to RTC. In a subsequent motion to amend the bankruptcy court's order, Scattered alleged it purchased Aquila's rights under the Consent Agreement on January 26, 2006. On January 27 and February 2, 2006, Scattered filed a Notice of Transfer of Claim, indicating it had obtained an assignment of Aquila's rights under the loans extended to RTC and a security interest in RTC's assets on December 28, 2005.

It is undisputed that the RTC trustee failed to renew the ADS Project Agreement by December 31, 2005, in effect allowing it to expire.

In March 2006, the RTC trustee entered into an agreement to sell certain estate assets to Scattered. As part of the settlement agreement, Scattered acquired the right to request

assignment of certain RTC contracts. The settlement agreement required Scattered to designate executory contracts within the RTC estate it wanted the trustee to assume and assign--rather than reject--under section 365 of the Bankruptcy Code. If the trustee refused to seek court approval to assume and assign a designated executory contract, Scattered had the right under the settlement agreement to file a motion to compel the trustee to assume and assign the designated contract. The settlement agreement provided Scattered did not have the right to designate a contract if "the estate believes in good faith that a particular designation will result in the Estate being subject to sanctions pursuant to [Bankruptcy Rule] 9011 or allegations of bad faith."

On May 12, 2006, the trustee identified all of the contracts that, despite Scattered's designation, the trustee refused to assume and assign. The trustee notified Scattered he would not move to assume the ADS agreement because the agreement had expired on December 31, 2005. Scattered filed a motion to compel the trustee to assume and assign the ADS Project Agreement, contending the agreement had not expired as a result of orders entered by the bankruptcy court continuing the time for the trustee to decide whether the estate wanted to assume certain contracts. Allied filed an objection to the motion to compel,

arguing the orders did not affect the renewal deadline for the ADS Project Agreement.

On June 13, 2006, the bankruptcy court entered an order finding its prior orders extending the time within which the trustee could assume or reject executory contracts or unexpired leases did not extend the time to renew the ADS Project Agreement itself, noting the agreement expired and terminated on December 31, 2005. Because the ADS Project Agreement had already expired, the court found the trustee could not in good faith seek to assume and assign it to Scattered under the Bankruptcy Code.

Scattered filed a motion to amend the court's order, contending the Consent Agreement--which Scattered argued constituted "newly-discovered evidence" not previously disclosed to the court--required Allied to provide notice to Aquila that the ADS Project Agreement was about to expire and allow Aquila an opportunity to renew the agreement even if RTC did not wish to do so. Scattered contended Allied's failure to provide notice prevented the expiration of the ADS Project Agreement. Scattered contended it acquired rights under the Consent Agreement when it purchased Aquila's rights as a secured lender to RTC on December 28, 2005. The court expressed skepticism that the Consent Agreement extended the time to renew the ADS Project Agreement, but, at the urging of the parties, set a briefing schedule and

allowed Allied to take discovery as to whether the Consent Agreement was newly discovered evidence.

On August 3, 2006, Scattered sent notice to Allied that RTC was in default of the Consent Agreement, and that Scattered had elected to substitute itself in place of RTC under paragraph 1(b) of the Consent Agreement. On August 4, 2006, Allied rejected Scattered's purported notices and demands, alleging Scattered had "no rights whatsoever under the ADS agreement or the Consent" in light of the bankruptcy court's order.

While the motion to amend was still pending, Scattered filed a complaint and an emergency motion for a temporary restraining order in the Circuit Court of Cook County on August 29, 2006 (case number 06 CH 17727). Scattered sought: (1) judicial declarations that the ADS agreement "is currently in existence," and that Scattered was a party to the ADS agreement under its exercise of the right to substitute under the Consent Agreement; and (2) a mandatory emergency injunction allowing it to enter onto Allied's Pontiac landfill and operate the gas collection and conversion system.

Allied filed a motion for temporary restraining order before the bankruptcy court, seeking to prevent Scattered from pursuing its allegedly duplicative litigation in the Circuit Court of Cook County. During a hearing on Allied's motion, the bankruptcy

court noted: "the impact of this consent agreement is absolutely integral to the matters that I'm being requested to decide. *** So how can you be pursuing that in state court when it's required to determine the extent of the rights that the estate has that the trustee here is seeking to assign to your client?" Prior to the bankruptcy court issuing a formal ruling on Allied's motion, Scattered withdrew its motion to reconsider. The bankruptcy court denied Allied's motion for a temporary restraining order on the ground that Scattered had withdrawn its motion for reconsideration, effectively ending the matter before the bankruptcy court. In reaching its decision, the bankruptcy court noted:

> "So you are free to argue in state court that this matter's already been determined in bankruptcy court and that it's a final issue. *** I have made a determination that it's terminated. The trustee has no right to assume it or assign it."

Following a hearing, Judge Palmer in the Circuit Court of Cook County denied Scattered's emergency motion for a temporary restraining order, noting it had "a serious question as to how this case can proceed in the face of a Judge's order that says that Scattered doesn't have any rights because the contract

doesn't exist anymore."

Allied then moved to dismiss Scattered's complaint. On October 13, 2006, Judge Palmer granted Allied's motion to dismiss pursuant to sections 2-619(a)(3) and (a)(4) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3), (4) (West 2006)), finding: "It's the same set of operative facts. It's the same proceeding. It's the same transaction." On October 30, 2009, we reversed the circuit court's dismissal and remanded the cause for further proceedings in *Scattered Corporation v. American Disposal Services of Illinois, Inc.*, No. 1-07-0672 (October 30, 2009)(unpublished order under Supreme Court Rule 23) (*Scattered I*).

On May 15, 2008, while the appeal in case number 06 CH 17727 was still pending before this court, the U.S. Circuit Court of Appeals for the Seventh Circuit affirmed the bankruptcy court's denial of Scattered's motion to compel the RTC trustee to assume and assign the Project Agreement. On June 27, 2008, Scattered made a written demand that Allied enter into a replacement Project Agreement with Scattered or its designee, as allegedly required under the terms of paragraph 1(e) of the Consent Agreement. On July 16, 2008, Allied wrote back to Scattered refusing to do so.

On October 14, 2008, Scattered filed its breach of contract

action in the circuit court (case number 08 L 11349), alleging paragraph 1(e) of the Consent Agreement required Allied to enter into a new Project Agreement with Scattered after the bankruptcy court held the original Project Agreement had "expired" and "terminated." On November 21, 2008, Allied moved to reassign the case to Judge Palmer. Because no related case was pending before Judge Palmer at that time the request was made, the presiding judge of the Law Division denied Allied's motion.

On March 9, 2009, Allied filed a combined section 2-615 and 2-619 motion to dismiss Scattered's complaint. In its section 2-619 motion, Allied alleged *res judicata* barred Scattered's case because Scattered could have, but failed to, raise the breach of contract claim against Allied in the RTC bankruptcy proceeding. Allied also alleged that because the RTC trustee had simply allowed the original Project Agreement to "expire" by its own terms, the Project Agreement was never "terminated," as required to trigger paragraph 1(e) of the Consent Agreement. In its section 2-615 motion, Allied alleged that even if paragraph 1(e) had become operative through the Project Agreement's expiration, the requirement that Allied enter into a new agreement with "substantially the same terms" as the original Project Agreement was unenforceably vague.

Following a hearing on August 26, 2009, the circuit court

held Scattered's complaint should not be dismissed on *res judicata* grounds. However, the court held the doctrine of "claim splitting" warranted dismissal of Scattered's breach of contract claim. The court explained that Scattered could have demanded Allied enter into a new contract immediately after the bankruptcy court's decision. Instead, Scattered "chose to proceed in a piecemeal way" by first arguing to Judge Palmer the Consent Agreement had not expired, and then filing a breach of contract claim under paragraph 1(e) only after Judge Palmer dismissed the initial suit.

The circuit court noted that even if it was incorrect in its claim-splitting analysis, however, the complaint should still be dismissed under section 2-619(a)(9). The court noted paragraph 1(e) of the Consent Agreement never became operative because the original Project Agreement had "expired" by its own terms, rather than "terminated" as a result of the bankruptcy or insolvency proceeding as required by paragraph 1(e). The court held "the trustee's decision to not renew the Project Agreement did not result in its termination." The circuit court did not address the merits of Allied's section 2-615 motion. Scattered appeals.

ANALYSIS

I. Expiration vs. Termination of the Project Agreement

Scattered contends the circuit court erred in determining

the original Project Agreement merely "expired" by its own terms, rather than "terminated" under the meaning of paragraph 1(e) of the Consent Agreement, during the underlying RTC bankruptcy proceeding. Specifically, Scattered contends nothing in Illinois law concretely suggests the terms "expire" and "terminate" are considered mutually exclusive. Scattered suggests the trustee's decision to allow the original Project Agreement to expire is simply one of the ways the Consent Agreement contemplated as a termination of the Project Agreement under paragraph 1(e)'s terms.

Initially, we note the circuit court also dismissed Scattered's claim under section 2-619(a)(4) of the Code, finding Scattered had impermissibly split its claims by not asserting in an earlier-filed suit that Allied had breached paragraph 1(e) of the Consent Agreement. Following the circuit court's dismissal, however, we reversed Judge Palmer's dismissal of the earlier-filed suit in *Scattered I* and remanded the cause for further proceedings consistent with our order. As a result of our decision in *Scattered I*, Allied has elected not to seek affirmance of the circuit court's decision under section 2-619(a)(4) of the Code. Accordingly, we reverse that portion of the circuit court's order.

A section 2-619(a)(9) motion to dismiss admits the legal

sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claims. 735 ILCS 5/2-619(a)(9) (West 2008); *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). The question on review is whether a genuine issue of material fact precludes dismissal or whether dismissal is proper as a matter of law. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 613 (2007).

We review a circuit court's judgment on a section 2-619 motion to dismiss *de novo*. *Valdovinos*, 394 Ill. App. 3d at 18.

It is undisputed that the RTC trustee appointed by the bankruptcy court failed to renew the original ADS Project Agreement by December 31, 2005, in effect allowing it to expire by its own terms. Accordingly, the central issue in this case revolves around whether the parties intended an "expiration" of the Project Agreement to be encompassed within the term "terminated" as used in paragraph 1(e) of the Consent Agreement.

Paragraph 1(e) of the Consent Agreement specifically provides that:

> "In the event that the Project Agreement is terminated as a result of any bankruptcy or insolvency proceeding affecting RTC, the Consenting Party will, at the option of Aquila, enter into a new agreement with a

party designated by Aquila having terms substantially the same as the terms of the Project Agreement."

The primary objective in interpreting a contract is to give effect to the intent of the parties. *Hensley Construction, L.L.C. v. Pulte Home Corporation*, 399 Ill. App. 3d 184, 192 (2010). This court must construe the meaning of a contract by looking at the actual words used and cannot interpret the contract in a way contrary to the plain and obvious meaning of those words. *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1990), citing *Johnstowne Centre Partnership v. Chin*, 99 Ill. 2d 284, 287 (1983). If a contract is clear and unambiguous, a reviewing court must enforce the contract as written and without resort to extrinsic matters. *Hensley Construction, L.L.C.*, 399 Ill. App. 3d at 192; *J.M. Beals Enterprises, Inc.*, 194 Ill. App. 3d at 748. We may not add provisions to an unambiguous contract even if such provisions would make the contract more equitable. *J.M. Beals Enterprises, Inc.*, 194 Ill. App. 3d at 748.

The term "terminated" is not specifically defined anywhere within paragraph 1(e) or within the other provisions of the Consent Agreement.

However, a contract term is not rendered ambiguous simply

because the parties disagree on its meaning (*Reynolds v. Coleman*, 173 Ill. App. 3d 585 (1988)), or because the term is undefined in the contract (*Chapman v. Engel*, 372 Ill. App. 3d 84, 88 (2007)). If an undefined term has a " 'plain, ordinary, and popular meaning,' " there is no ambiguity and the term should be enforced as written. *Chapman*, 372 Ill. App. 3d at 88, quoting *Hunt v. Farmers Insurance Exchange*, 357 Ill. App. 3d 1076, 1079 (2005). In the absence of any ambiguity, a court must treat the language in a contract as a matter of law and construe the contract according to its language, not according to constructions the parties place on the language. *J.M. Beals Enterprises, Inc.*, 194 Ill. App. 3d at 748.

The plain, ordinary, and popular meaning of the word "expiration," as defined by Black's Law Dictionary, is: "A coming to an end; esp., a formal termination on a closing date <expiration of the insurance policy>. -- expire, *vb.*" Black's Law Dictionary 600 (7th ed. 1999). "Termination" is defined as:

> "1. The act of ending something <termination of the partnership by winding up its affairs>.
>
> *termination of conditional contract.* The act of putting an end to all unperformed portions of a conditional contract.

> *termination of employment.* The complete severance of an employer-employee relationship.
>
> 2. The end of something in time or existence; conclusion or discontinuance <the insurance policy's termination left the doctor without liability coverage>. -- terminate, *vb.*" Black's Law Dictionary 1482-83 (7th ed. 1999).

"Terminate" is defined as: "1. To put an end to; to bring an end. 2. To end; to conclude." Black's Law Dictionary 1482 (7th ed. 1999).

In light of the similarities between the definitions of "expiration" and "termination," we find it is clear that the terms can have substantially the same plain, ordinary, and popular meaning in at least some contexts. See *Chapman*, 372 Ill. App. 3d at 88 ("In light of the similarities between the definitions of "default" and "breach of contract," we find the terms have substantially the same meaning in this case.")

Notwithstanding, Allied contends Illinois law has consistently drawn a legal distinction between agreements "expiring" and those "terminating." Allied also contends that if the parties had contemplated a new Project Agreement upon the

"expiration" of the original agreement, they could have specifically included that term in paragraph 1(e)'s plain language.

In support of its contentions that the terms "termination" and "expiration" were not intended by the parties to be interchangeable here, Allied cities *Stuart v. Hamilton*, 66 Ill. 253 (1872), and *Weil v. Centralia Service & Oil Co.*, 320 Ill. App. 397 (1943). Because every contract is presumed to incorporate existing law, Allied contends the above-cited cases indicate the circuit court was correct in determining the terms expiration and termination were not intended to be synonymous for purposes of paragraph 1(e) of the Consent Agreement. See *First National Bank of La Grange v. Mid-States Engineering and Sales, Inc.*, 103 Ill. App. 3d 572, 574 (1981) ("every contract is presumed to incorporate existing law.")

In *Weill*, the court noted statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *Weill*, 320 Ill. App. at 401. With that principle in mind, the court held "[t]he word 'terminate,' employed in connection with a lease, connotes a conclusion and severance of the relationship of landlord and tenant *prior to the*

expiration of the term of the lease by the efflux of time." (Emphasis added.) *Weill*, 320 Ill. App. at 401, citing *Stuart v. Hamilton*, 66 Ill. 253, 255 (1872).

In *Stuart*, the appellant contended the trial court erred in rendering a judgment for more than a reasonable rent of the premises for the time that they were "held over" after notice. The appellant argued that even if it were admitted that the evidence showed that there was a wilful holding over, the second section of the Revised Statutes, entitled "Landlord and Tenant," only applied to a wilful holding over after the lease *expired* from the efflux of time. Because the appellee had terminated the lease from an alleged breach of covenant not to assign, the appellant argued no more than reasonable rent for use and occupancy could be recovered. Our supreme court agreed, noting the statute specifically used the term "expiration," not "termination." *Stuart*, 66 Ill. at 253. The court held that "[h]ad a different meaning been intended, it seems to us that the General Assembly would have used other more explicit language." *Stuart*, 66 Ill. at 253. The court noted the legislature could have said that where the term "shall terminate by any means," and the tenant shall hold over, he shall pay double rent. The court recognized the legislature chose not to do so, and, accordingly, to hold that "the landlord may terminate the lease, and bring the

term to an end, and then recover, would seem to be a forced construction of the language employed." *Stuart*, 66 Ill. 2d at 253 ("If interpreted according to their usual and popular meaning, the words seem to exclude the idea that penalty of double rent would follow a forfeiture of the lease accompanied with holding over.")

Although Allied recognizes both *Weill* and *Stuart* addressed the legal interchangeability of the terms "expired" and "terminated" only within the limited context of landlord-tenant leases and statues, Allied contends other jurisdictions have repeatedly relied on both *Weill* and *Stuart* in other contexts in order to determine the terms are not legally interchangeable concepts when interpreting Illinois law. See, *e.g. Perfection Oil Co. v. Saam*, 264 F. 2d 835 (8th Cir. 1959).

In *Perfection Oil*, the plaintiff purchased the defendant's bulk oil plant in Illinois an entered into a five-year written contract with the defendant, leasing the bulk of the plant to defendant and employing him as the plaintiff's distributor in Illinois. Both the plaintiff and the defendant carried out the terms of the contract until it expired. Thereafter, the defendant continued in the plaintiff's employment for a time without any definite extension of the contract. When the defendant advised the plaintiff that he was leaving his

employment and intended to open a new bulk oil plant in the same town, the plaintiff filed an action to enjoin the defendant on the ground that he was in violation of a restrictive provision in the defendant's employment contract. The restrictive provision at issue prevented the defendant from competing with the plaintiff within a radius of 10 miles for a period of 5 years "following the termination of this contract." *Perfection Oil Co.*, 264 F. 2d at 836.

The trial court agreed with the defendant's position that the restrictive provision was only operative if the contract was terminated prior to the expiration of the five-year term. The trial court found that under Illinois law, " 'a distinction is made between the meaning ascribed to the word 'termination' and to the word 'expiration.' Under the law the word 'terminate' does not encompass within its scope the ending of an agreement by the expiration of its fixed term.' " *Perfection Oil Co.*, 264 F. 2d at 837. The appellate court noted support for the trial court's decision was found in both *Stuart* and *Weill*. The appellate court also noted that other jurisdictions have generally recognized a distinction between "expiration" and "termination" in the landlord-tenant context. *Perfection Oil Co.*, 264 F. 2d at 837-38 (citing cases).

However, the appellate court went on to note "[t]he

instruments involved in the cases just cited differ materially in form and purpose from the contract we are considering." *Perfection Oil Co.*, 264 F. 2d at 838. Although the appellate court recognized *Weill* and *Stuart* "at the least afforded substantial support" for the trial court's determination that the terms "termination" and "expiration" are not synonymous under Illinois law, the court noted it agreed "with the plaintiff's contention that the word 'termination' has no fixed legal meaning and is not a word of art in the law." *Perfection Oil Co.*, 264 F. 2d at 838. Because it seemed quite clear based on the contract as a whole that the term "termination" was intended to be used in a narrow sense in the restrictive provision, the appellate court held "terminate" was intended to mean cancelling or abrogating the contract *before* its expiration. (Emphasis added.) *Perfection Oil Co.*, 264 F. 2d at 839. Finding the plaintiff had failed to meet his burden to demonstrate the trial court misconceived or misapplied Illinois law, the appellate court found the trial court's conclusion permissible and affirmed the judgment in the defendant's favor. *Perfection Oil Co.*, 264 F. 2d at 840. See also *Piedmont Interstate Fair Association v. City of Spartanburg*, 264 S.E.2d 926, 927-28 (S.C. 1980) (citing *Perfection Oil* and *Weill* for support, South Carolina's supreme court held "[t]he word terminate, employed in connection with a

lease, connotes a conclusion and severance of the relationship of landlord and tenant prior to the expiration of the term by the efflux of time." The court also noted there was "no language anywhere in the lease to suggest that the assets of respondent would become the property of appellant upon the natural expiration of the agreement.")

While we recognize *Perfection Oil* relied heavily on *Weill* and *Stuart* to find the terms "termination" and "expiration" were not synonymous in the specific agreement before it, we also agree with the court's conclusion that the word "termination" has no fixed legal meaning and is generally not to be considered a word of art in Illinois law. Although both *Weiss* and *Stuart* clearly stand for the proposition that the terms "expiration" and "termination" *can* be legally incompatible concepts in *certain* contexts or agreements, we note those cases were only asked to consider the terms' meanings within the limited context of the specific landlord-tenant leases and statutes at issue before them. No Illinois court has ever conclusively held the legal concept of "termination" is always incompatible with the legal concept of "expiration" as a matter of law when used in any contractual agreement. We decline Allied's invitation to do so here.

Accordingly, we find we must focus our analysis on the

parties' intent in forming the Consent Agreement in order to determine whether the term "terminated" was apparently used in the "broad sense" in paragraph 1(e), which would include the expiration of the original Project Agreement, or in the "narrow sense," which would exclude an expiration of the agreement. See *Perfection Oil Co.*, 264 F.2d at 839.

" '[B]ecause words derive their meaning[s] from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others.' " *Intersport, Inc. v. National Collegiate Athletic Association*, 381 Ill. App. 3d 312, 319 (2008), quoting *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The court must also place itself in the position of the parties at the time they entered into the agreement. *Intersport, Inc.*, 381 Ill. App. 3d at 319. The parties' intent is not to be determined solely from detached portions of a contract or from any clause or provision standing by itself. *Gallagher*, 226 Ill. 2d at 232. "To that end, the language in the contract may be enlarged or limited by the attendant circumstances of the contract and its purpose." *Intersport, Inc.*, 381 Ill. App. 3d at 319.

Our reading of the Consent Agreement as a whole suggests the parties intended the word "terminated" as used in paragraph 1(e) of the Consent Agreement to encompass a broad sense of the term,

which would include the Project Agreement's expiration during the pendency of the RTC bankruptcy proceeding. While paragraph 1(e) is silent with regard to what constitutes a termination, the Consent Agreement read as a whole makes clear its central purpose was to provide Aquila with substantial protection for the loan it made to RTC in order for RTC to construct and operate the project outlined in the original Project Agreement. Reading the term "terminated" broadly to encompass a voluntary termination of the agreement on RTC's part by the lapse of time is consistent with such a purpose.

For example, the parties' intent to provide Aquila or its assignee with rather broad protection under the Consent Agreement is reflected by paragraph 1(c), entitled "Right to Cure," which broadly defines a "default" by RTC to include the nonperformance of any of its obligations under the Project Agreement,

> "or upon the occurrence or nonoccurrence of any event or condition under the Project Agreement and/or one or more of the Ancillary Agreements which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable the Consenting Party to terminate or suspend its obligations or exercise any other right or

> remedy under the Project Agreement or under applicable law."

RTC's decision to simply allow the Project Agreement to expire at the end of the initial 10-year project term, rather than exercising its option to extend the agreement for another 5-year term, would seem to fall under the rather broad definition of "default" ("nonoccurrence of any event or condition") used in paragraph 1(c).

The rather strict protections for Aquila built into the Consent are also evident in paragraph 4(g), entitled "Termination," which notes:

> "The Consenting Party's obligations hereunder are absolute and unconditional, and the Consenting Party has no right, and shall have no right, to terminate this Consent *or to be released, relieved or discharged from any obligation or liability hereunder until all Loans and all other obligations under the Credit Agreement have been indefeasibly satisfied in full*, notice of which shall be provided to Aquila when all such obligations have been satisfied." (Emphasis added.)

Moreover, while the Consent Agreement is silent on the issue

of what constitutes an actual termination, the terms of the Project Agreement itself provide support for our conclusion that the parties intended the word "terminated" to be interpreted broadly to include an "expiration."

Paragraph 4(a) of the Project Agreement, entitled "Term," provides:

> "(a) The initial term of this Agreement shall commence on the Effective Date and shall expire on the date ten (10) years after the Effective Date, or on such earlier occurrence of a Termination Event or other date on which this Agreement is terminated in accordance with its provisions. The Contractor [RTC] shall have the right to extend the term of this Agreement for up to three (3) consecutive periods of five (5) years each following the expiration of the initial 10-year period, provided that this Agreement has not been terminated by either party prior to such extension."

Paragraph 4(b), however, outlines certain steps RTC was required to undertake in order to return the project area to its original condition "[w]ithin ninety (90) days *after termination*

of this Agreement by lapse of time or otherwise as provided in paragraph 4(a) of this Agreement." (Emphasis added.)

Although paragraph 4(a) contemplates termination as potentially occurring through a separate "Termination Event" distinct from an "expiration" of the agreement, paragraph 4(b) also clearly notes "termination" of the Project Agreement can occur through a "lapse of time," which would obviously include "expiration" of the agreement. The above provision indicates that when the original ADS Project Agreement was created, the parties did not envision such a narrow use for the word "terminated" as Allied now advocates for here. The word "termination" as used by the parties in the Project Agreement was obviously intended to include termination of the agreement by an expiration of time.

To the extent Allied contends the provisions of the Project Agreement should not factor into our analysis of the Consent Agreement's use of the term "terminated," we note it is a fundamental principle of contract law that "an instrument may incorporate all or part of another instrument by reference." *Provident Federal Savings & Loan Ass'n v. Realty Centre, Ltd.*, 97 Ill. 2d 187, 192-93 (1983). "Contracts which specifically incorporate other documents by reference are to be construed as a whole with those other documents." *Kirschenbaum v. Northwestern*

University, 312 Ill. App. 3d 1017, 1029 (1999). However, the reference must demonstrate "an intention to incorporate the document and make it part of the contract." *Arneson v. Board of Trustees*, 210 Ill. App. 3d 844, 849-50 (1991).

As Scattered notes, the parties make numerous references to the Project Agreement and its terms throughout the Consent Agreement. Paragraph 4(g) of the Consent Agreement, entitled "Performance under Assigned Agreement," specifically provides: "The Consenting Party [Allied] shall perform and comply with all material terms and provisions of the Project Agreement to be performed or complied with by it and shall maintain the Project Agreement in full force and effect in accordance with its terms."

Paragraph 1(a) of the Consent Agreement also provides: "The Consenting Party *** acknowledges the right, but not the obligation of Aquila's rights and remedies under the Aquila Security Agreement, to make all demands, give all notices, take all actions and exercise all rights of RTC in accordance with the Project Agreement, and agrees that in such event the Consenting Party shall continue to perform its obligation under the Project Agreement."

The above-noted references to the Project Agreement in the Consent Agreement demonstrate a clear intention to incorporate the Project Agreement's terms and conditions and make them part

of the Consent Agreement itself. See *Wright v. Mr. Quick, Inc.*, 109 Ill. 2d 236, 240 (1985) ("All that is required is an expression by the parties' intent to incorporate those terms.")

After carefully considering the parties' intent in forming the Consent Agreement, we find the word "terminated" as used by the parties in paragraph 1(e) of the Consent Agreement can reasonably be interpreted to encompass an "expiration"--or in other words a termination "by lapse of time"--of the Project Agreement "as a result of any bankruptcy or insolvency proceeding affecting RTC." Such an interpretation is clearly consistent with the plain, ordinary, and popular meanings of the words "expiration" and "terminated." See *Chapman*, 372 Ill. App. 3d at 88. Accordingly, we find the trial court erred in granting Allied's section 2-619(a)(9) motion to dismiss Scattered's breach of contract claim.

II. Unenforceability of Paragraph 1(e)'s Terms

Allied contends that even if paragraph 1(e) of the Consent Agreement was triggered in this case, dismissal of Scattered's claim was still warranted under section 2-615 of the Code. Specifically, Allied contends paragraphs 1(e)'s language requiring Allied to enter into a new Project Agreement on "terms substantially the same as the terms of the [original] Project Agreement" was unduly vague and unenforceable since there was no

objective way to ascertain what those terms should be.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2008); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). In reviewing the sufficiency of a complaint, we construe the complaint's allegations in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005). We also accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Beretta U.S.A Corp.*, 213 Ill. 2d at 364. A claim should not be dismissed unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recovery. *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004).

We review a circuit court's judgment on a section 2-615 motion to dismiss *de novo*. *Chandler v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 349 (2003).

Although we recognize the circuit court did not rule on the merits of Allied's section 2-615 motion, we note we may also affirm the court's decision on any basis supported by the record, regardless of whether the circuit court relied on that ground when it made its decision. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

Although the parties may have manifested an intent to make a contract, a valid contract will not have been formed if the agreement is either unduly uncertain or indefinite. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29 (1991). In order to be enforceable, a contract must be "so definite and certain in all of its terms that a court can require the specific thing contracted for to be done." *Morey v. Hoffman*, 12 Ill. 2d 125, 130 (1957). However, a contract need not provide for every collateral matter or possible future contingency that might arise in regard to the transaction. *Morey*, 12 Ill. 2d at 130. A contract is "sufficiently and ceratin to be enforceable if the court is enable from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to." *Morey*, 12 Ill. 2d at 130.

Although the "substantially the same" language used in paragraph 1(e) of the Consent Agreement certainly does not provide for every collateral matter or possible future contingency that might arise if a new Project Agreement is formed, we find the language used in paragraph 1(e), as a whole, is sufficiently certain and enforceable enough that a court would be able to ascertain what the parties have agreed to. See *Morey*, 12 Ill. 2d at 130. Accordingly, we find Allied's contention that

paragraph 1(e) is unduly vague and unenforceable is without merit.

CONCLUSION

We reverse the circuit court's judgment dismissing Scattered's breach of contract claim and remand the cause for further proceedings consistent with this order.

Reversed and remanded.