2012 IL App (1st) 103759-U

FIFTH DIVISION
March 30, 2012

1-10-3759

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROSPECT DEVELOPMENT, LLC, a Delaware Limited Liability Company as Assignee of Prospect Development Corp., an Illinois Corporation, Plaintiff/Appellant, and Counterdefendant/Cross-Appellee, v. CITY OF PROSPECT HEIGHTS, ILLINOIS, Defendant/Appellee, Counterplaintiff/Cross-Appellant, and Third-Party Plaintiff, v. JOHN G. WILSON, Third-Party Defendant and Cross Appellee.	)	Appeal from the Circuit Court of Cook County 05 L 00778 Honorable Lee Preston, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices J. GORDON and Howse concurred in the judgment.

O R D E R

HELD: Where manifest weight of evidence showed real estate developer substantially performed contract with municipality to develop arena but had secretly given "loans" to municipality's lawyer, the developer's reimbursement claim failed due to its unclean hands but the municipality's breach of contract claim also failed; the municipality's ancillary claim was denied due to lack of proof of any damages; and the municipality's third-party claim was rejected because its underlying claim had been rejected.

¶ 1 This appeal arises from the failure of the plaintiff arena development company and the defendant municipality to construct a 12,400-seat indoor sports and entertainment venue in

Prospect Heights, Illinois, which was to be funded by the sale of municipal tax increment financing (TIF) bonds. After seven years of efforts, the project was terminated in 2004, which the developer attributed to the city's failure to sell enough bonds and the city attributed to a lack of investor confidence in an inexperienced, incompetent developer that had been bribing the city's attorney for his influence. The parties sued each other seeking reimbursement of their expenses and other relief, but after a two-week bench trial in mid 2010, the judge rejected all of their claims. Both parties appeal, contending the judge misapplied the law and the manifest weight of the evidence.

¶ 2 The record shows the following relevant facts. Attorney Donald J. Kreger was a partner in the Chicago office of Schiff Hardin LLP, and between 1977 and 2003, he acted as general counsel for Prospect Heights.[1] Kreger had a close friendship with John G. Wilson, whom he had met when their sons were on the same ice hockey team. In the early 1990's, Wilson, who resided in Kenilworth, Illinois, wanted to develop an ice hockey arena somewhere in the north or northwest suburbs of Chicago and formed Ice Ventures for that purpose. Wilson had some experience in real estate development, but no experience developing or operating an ice hockey or sports arena. At the time, Paul Richardz was one of Prospect Heights' aldermen and was also interested in building a stadium and other facilities. Kreger introduced Wilson and Richardz to each other, and the alderman later introduced Wilson to other members of Prospect Heights' administration. In early 1994, the city council hired Wilson as a consultant to conduct a

[1] During Kreger's relationship with the municipality, he did not hold public office; and Prospect Heights did not have a corporation counsel or city attorney.

feasability study into constructing and operating a sports arena in Prospect Heights, and later that same year, Wilson recommended that the town pursue the project. In 1996, Wilson's Ice Ventures submitted a project proposal to the council, and in June 1997, his new company, Prospect Development,[2] executed a redevelopment agreement to proceed with the project.

¶ 3 Prospect Heights intended to sell TIF bonds, build the arena in what was then a blighted area, and then repay the bond holders with some of the additional sales tax revenue generated by the new venue and its infrastructure (that is, fund the project through what is known as tax increment financing rather than by selling general obligation bonds that were backed by the town's taxing powers). Between 1997 and December 2000, the developer and the municipality courted potential investors but could not sell any bonds. Finally, in 2001, the municipality sold $2.85 million worth of bonds – far less than the $43 million it needed for the arena project – and from the proceeds tendered $1.75 million to Wilson's development company. That same year, the municipality entered into a memorandum of understanding to sell $43 million worth of bonds to an English investor in 2002, however, the buyer backed out. In early 2003, the longtime mayor of Prospect Heights, Edward P. Rotchford, retired and a new mayor and city administrator took office. Although the city did not sell any more TIF bonds, it paid Wilson's development company an additional $250,000 out of the municipal TIF account. In March 2003, Prospect Development defaulted on a $25.8 million loan it used to buy about 30 acres of blighted land in Prospect Heights in the vicinity of Chicago Executive Airport (formerly

[2] Two companies went by this name: a corporation that contracted with the city assigned the contract to a limited liability company (with the approval of the city council).

known as Palwaukee Municipal Airport). The developer relinquished title to its lender in lieu of foreclosure and also lost the funds that secured the note. In 2004, the bank sold the land to an experienced real estate developer that was negotiating with Prospect Heights to take up the project. Also, the city replaced Kreger as the city attorney and declared Wilson's company to be in default of the Redevelopment Agreement, but then abandoned the arena project altogether in November 2004 when voters rejected a referendum to issue general obligation bonds instead of TIF bonds to fund the project. The city bought the land from the second developer, cleared it, and sold some of it to the nearby airport, but continues to own most of the acreage. The first real estate developer initiated this legal action in January 2005.

¶ 4 Prospect Development filed its one-count fifth amended complaint in December 2007, contending its substantial performance of the contract entitled it to specific performance in the form of reimbursement of its expenses. The developer's expenses totaled $25 million and included mortgage loan interest, the security it lost when it defaulted on the notes, various consultant fees, and administrative expenses. The city responded that the developer failed to perform and came to court with unclean hands because (a) Wilson had secretly given city attorney Kreger at least $150,000 in cash and $50,000 in stock in Ice Ventures between 1996 and 2003, and (b) Kreger had introduced Wilson "to the City as a qualified arena developer" and advocated for actions which benefitted Wilson and his companies. The city knew about the money that had secretly passed from Wilson to Kreger partly because plaintiff Prospect Development complained of the arrangement when it first filed suit. The developer alleged in the original version of its pleading:

> "25. In addition, during this time, Kreger, one of the City's Agents, approached Developer's principal Wilson on multiple occasions to 'request' a $100,000 loan in connection with a personal financial problem. In light of the close role that the City's Agents had played in the Arena Project, Wilson granted such a loan in excess of $100,000 for fear that its refusal would adversely affect the Developer's ability to complete the Arena Project."

The city construed this as an admission that Prospect Development knew the "loan" was inappropriate. Thus, in addition to alleging that breach of the Redevelopment Agreement entitled the city to recoup its project expenses (Count I), the city's amended counter-complaint against the developer also sought punitive damages for participating in Kreger's breach of fiduciary duty owed to the city (Count II), and aiding and abetting Kreger's breach of fiduciary duty (Count III). The city also filed a third-party action against Wilson individually for participating in (Count I) and aiding and abetting (Count II) Kreger's breach of his fiduciary duty. The city, however, did not sue Kreger or Schiff Hardin LLP.

¶ 5 After a bench trial, neither side could be characterized as the decisive winner. The trial judge ruled that Prospect Development established most of the elements of its equitable claim for specific performance but was entitled to no relief because Wilson engaged in "bad faith" and "clear misconduct" when he failed to disclose the secret financial relationship he had with Kreger and thus, Prospect Development had come to court with unclean hands. Nonetheless, the evidence that the developer had substantially performed all of its material obligations under the contract was also reason for the judge to reject the city's cross-allegations

of breach of contract. The judge then specified that since Kreger was not a party to the action, the judge was not making findings regarding his fiduciary duty to the city and whether that duty was breached. Even so, the city's claims that Prospect Development participated in or aided and abetted the lawyer's breach of duty failed because the city failed to prove it suffered any damages. The city's third-party action against Wilson individually failed for an entirely different reason: a third-party claim is premised upon derivative liability such as indemnification, and because the city was not found liable to the developer, procedurally it could not prevail on its third-party action. In order to address the parties' arguments, we set out the relevant trial testimony below.

¶ 6 Brian Bradley was the project manager for Prospect Development, had a master's degree in management, and was a former employee of Accenture and Anderson Consulting. Bradley testified about expenses incurred to bring the plans and contracts for construction to the point that a bond buyer would review them and propose final modifications. The package was sufficiently comprehensive and complete that the financial services company UBS PaineWebber had marketed them. There were numerous architectural drawings, a guaranteed maximum price commitment from the design-build firm Ryan Companies US, Inc., a bank's commitment to lend $22.5 million provided there were $43 million in bond sales, a commitment of $3 million from a company that managed arenas and their concessions, and $750,000 from a ticketing company. Bradley acknowledged that Illinois Department of Transportation (hereinafter IDOT) did not commit $4 million for road improvements; however, the city and the developer were both contractually required to pursue that commitment. He also disagreed with the allegation that the developer failed in its duty to secure various government permits, because there were permits to

the extent expected by a potential investor and a letter from Manhard Consulting civil engineers outlining the additional permits that would be obtained once the project was actually funded. The city was suing for certain consultant fees incurred on the project, but Bradley could not recall that ever being "an issue" between the parties, and he had never heard or received written indication that the developer breached its contract with the city as now being alleged. On cross examination, Bradley said the architectural plans had been sufficient for the design-build company to guarantee its maximum price for construction, but he acknowledged the plans were marked "preliminary" and "not for construction," rather than "final," there were "a lot of blanks" in the design/build agreement, and the agreement was not signed.

¶ 7 Dr. Bernard Mullin testified as a sports marketing consultant for Prospect Development between 1997 and April 2000 when he resigned to work for the NBA. He had reduced his usual consulting rate and received 2.5% ownership in Prospect Development. Dr. Mullin's experience included building and operating small fitness centers, health centers, and professional and academic sports arenas; increasing the revenues of professional sports teams and sports leagues; and writing a sports marketing textbook. His concept for the arena in Prospect Heights was for it to fill a niche in the suburbs and provide an alternative to downtown sports and entertainment events. The facility would be "one step down" in market size from the United Center in Chicago, seat about 12,000 people, and be the home of figure skating events, tennis events, and the best minor league franchises including ice hockey, arena football, lacrosse, indoor soccer, women's basketball, and roller hockey. This critical mass of tenants would be supplemented with bookings for concerts and family shows, because Dr. Mullin's experience told

him that even when attendance at sports events was down, prestigious entertainment bookings would help sell suites and club seating amenities. Dr. Mullin helped target appropriate tenants; took part in designing the facility for those tenants and events; called on his contacts; made sales presentations; reviewed submissions from potential concessionaires; and gave advice on ticket pricing, facility staffing, naming rights, and sponsorships. During his work on the project, which included meetings with city officials, he was never advised that the developer was in breach of contract. On cross examination, Dr. Mullin acknowledged that because of his ownership interest, he stood to profit if the developer won its lawsuit. Also, he had personally loaned Wilson $75,000, expected to be repaid when Wilson was "more liquid," and had been retained as an expert witness in Wilson's pending suit against Sears and the contractor Ryan Companies regarding an arena project in Hoffman Estates.

¶ 8 Former Mayor Rotchford had served as mayor for 12 years and prior to that was an alderman for six years. He attributed the arena project to alderman Richardz, who was then chair of the committee for economic development. The city had been too slow to acquire land necessary to bring in the large retailers Wal-Mart and Sam's Club, so Richardz proposed erecting a large multi-sports complex, did a couple of feasability studies, started to look for financing, and met Wilson. Kreger did not announce his personal relationship with Wilson until the city council was ready to proceed with the project. Kreger said they were "hockey friends" and did not disclose any business transactions or money between them. Had the mayor known Kreger was receiving money from Wilson, the city would not have approved the project.

¶ 9 Donald J. Kreger testified that during the many years he worked for Prospect Heights,

he attended city council meetings, and prepared ordinances and resolutions, and that his law firm handled some of the city litigation, drafted bond ordinances, and handled specific bond issues. Kreger denied that his actions or inactions were intended to help Wilson or favor Wilson's company. He met Wilson in 1992 when their sons were 10 or 11 years old and playing on the same hockey team. The men became very good friends who sat together at games, had lunches together, and would quite often have dinner together with their wives. He denied the allegation that he introduced Wilson "to the City as a qualified arena developer," because he actually introduced Wilson to alderman Richardz, the alderman proposed the arena project to the other city council members and Kreger informed the council that he had "a close personal relationship" with Wilson. Also, "[m]ore than once" Kreger informed the council of his "social relationship" with Wilson and told the council "to talk to another set of attorneys if they wish." From time to time during council meetings, two or three aldermen in the minority would say "don't you have a conflict here[?]" and Kreger would respond "yes, and that's why we have special council." The council hired attorney Bruce Huvard to draft the Redevelopment Agreement and hired Kreger as bond counsel and special counsel to review the contract language about issuing bonds. When shown a 1999 letter from the city's financial officer asking whether listed expenses were eligible for TIF reimbursement, Kreger said the fax was sent to him instead of Huvard because Huvard "wasn't an expert" on the issue. At the time, the Internal Revenue Service (hereinafter IRS) had liens on Kreger's assets and he wanted to prevent the agency from levying the property, he asked Wilson for a loan and he withdrew pension funds ostensibly to buy stock in Ice Ventures in order to avoid an early withdrawal penalty, but actually Wilson gave the money right back to him so

Kreger could tender it to the IRS. Wilson also gave him other loans. Kreger never disclosed to the city that he had financial troubles and an arrangement with Wilson because the situation "was a very personal thing" and he had pride. When he testified in mid 2010, Kreger still owed money to Wilson and the IRS.

¶ 10 On cross examination, Kreger acknowledged that although Wilson gave him a series of checks between 1996 and 2001, there had never been a written loan contract or a discussion of terms of repayment or interest, and that Kreger had repaid only $18,000. Also, while the Ice Ventures redevelopment proposal was pending with the city in mid 1996, Kreger owned stock in Ice Ventures and Huvard was not be hired until late 1996. Kreger, however, never disclosed the loans or his ownership. Minutes of an executive session of the city council on June 10, 1996, indicated Kreger was there when Alderman Koeppen asked and Wilson denied that Kreger had an interest in the proposed project. Kreger recalled that he was the one who actually answered that question. Records also indicated that around this time, Kreger's wife, Victoria, and their son, Jeremy, worked for Wilson or his company. Kreger was uncertain whether Victoria was paid, but Wilson's decision to hire Jeremy as an unpaid intern was done as a favor to Kreger. These relationships were not disclosed. When asked whether Kreger believed his disclosure to the city was "complete," Kreger responded, "I believed that the disclosure was what was required. It was a close, personal relationship, which could mean a lot of things." Also, although Kreger's work was supposed to be limited to ensuring that the city's bond terms complied with the law, there were time records divulged by his law firm indicating the firm later helped acquire one of the land parcels, Kreger talked with a surveyor, Kreger met with Wilson and others, Kreger talked

with Wilson about the Illinois Development Finance Authority, Kreger talked with and received multiple faxes from Ice Ventures' attorney Ruken about outlining the redevelopment agreement, Kreger advised the city about the state's gift ban statute, and the firm worked on the "TIF construction contract." Continuing, in late 1996, Kreger recorded an all-day meeting with Ruken, several meetings with Wilson, and 8 hours with the mayor. In the first three months of 1997, he had meetings with Wilson, Ruken, and Vitt, who was one of the owners of Prospect Development, and a telephone conference with Huvard, and Kreger's notes indicated that at least part of this time was for his review of the draft of the redevelopment agreement. On April 8, 1997, Kreger reviewed eminent domain procedures and had meetings with Wilson and the mayor. Three days later Kreger received $50,000 from Wilson. Three days after that, Kreger had a conference with the mayor and the city administrator, followed by a meeting with Wilson. There were additional meetings and telephone calls with these individuals during the remainder of April and May, and a notation that the firm drafted a council resolution authorizing execution of the redevelopment agreement. When asked whether shortly after this, in June 1997, the council approved the redevelopment agreement, Kreger answered, "Yes. It was approved by the City upon recommendation of Bruce Huvard." When shown faxes from attorney Ruken regarding "labor" and the decision to terminate one of the employees of Prospect Development, Kreger said "Ruken always felt comfortable asking me questions. He *** used to forget that I was no longer his partner at a law firm." The time records also indicated Kreger's firm drafted an amendment to the redevelopment agreement, but Kreger denied that the new terms advantaged Wilson. In September 1997, Ruken faxed Kreger a "wish list draft amendment to the

redevelopment agreement," with the remark "I have not sent this to Bruce Huvard yet." Kreger's time records indicated that on the same day he received the wish list, he spent 3.25 hours in a conference at city hall. Fax records indicated Kreger was at the developer's office when his administrative assistant transmitted a draft of a first amendment to the redevelopment agreement. On December 17, 1997, Wilson faxed Kreger a letter he had received from Huvard the day before, and Wilson's fax cover page included his note, "Does this mean the City wants completely out of the redevelopment agreement?". The time records for October 1994 indicated Wilson and Kreger met with prospective underwriters to find out how to make the bonds marketable, in November 1994 Kreger went to Springfield to try to get state and federal funding to widen the roads near the arena site, and in February 1997 Kreger helped interview underwriters at city hall.

¶ 11 Darlene Ahlstedt testified that she was elected to a 10-year aldermanic post about two months before the redevelopment agreement was executed in June 1997. Ahlstedt, one other alderman, some of the city staff, Kreger, the developer, and some of the developer's consultants formed a redevelopment team which met monthly to address the project's progress. The project failed because of division in the council, not because of any breach by the developer. Kreger was described as "bond counsel" but he advised the city on other aspects of the project. On cross examination by Prospect Heights, Ahlstedt said Kreger and the city administrator ran the redevelopment team meetings, Kreger consistently encouraged the council to stick with the project because eventually it would work out, and if Ahlstedt had known Wilson "had provided money" to Kreger she would not have had wanted the city to do any further business with Wilson

or his companies.

¶ 12 John G. "Jack" Wilson testified that prior to forming Prospect Development he gained experience in residential, suburban, downtown commercial and office high rise development projects in Chicago, Evanston, and southern Michigan. The signed Redevelopment Agreement required the developer to obtain financing and equity commitments to pay for and ensure completion of the work after taking into account the proceeds derived from TIF bonds. Wilson fulfilled this obligation by obtaining a $3 million commitment from a stadium concessionaire, a $750,000 commitment from a ticket vendor, a $22.5 million construction loan commitment provided the city sold $43 million worth of bonds, and a guaranteed maximum price commitment from the design-build firm Ryan Companies, and he did other things required by the contract. Prospect Heights was contractually obligated to reimburse the developer for certain project costs, and the developer was seeking $13 million in TIF eligible expenses, including an engineering analysis, a pedestrian study, a cladding wind load study, a structural wind load study, a roof snow loading assessment, architectural fees, rent, salaries, and so forth. There had been a small, $2.85 million bond sale in March 2001, but these funds were applied to interest that was accumulating against the city as it waited for more TIF revenues. It was not until after that the city suggested the developer had failed to perform its contractual obligations and, in fact, the parties executed an operating agreement indicating all the respective obligations and covenants of the redevelopment agreement had been fully performed and were being supplemented by the operating agreement. Everything that could be done on the project had been completed and all that remained was funding and construction. For instance, UBS Paine Webber and the

developer's attorneys advised that the design-build contract should not be signed until the bond closing because it would give the buyers an opportunity to review and revise terms to their liking. Wilson discussed this with Huvard and Kreger who agreed that the contract should not be signed. As for his association with Kreger, Wilson testified that they became close friends when their sons were on the same hockey team and traveled to tournaments in the United States and Canada. Wilson saw a need for an ice rink or arena where kids could practice and play, so he formed Ice Ventures, and his idea eventually became an arena in Prospect Heights. Wilson first loaned Kreger $10,000 in 1996 so he could pay his son's college tuition before payday, Wilson wrote Kreger a $50,000 check in 1997 simply because Kreger invested that amount in Ice Ventures in order to withdraw those funds from his pension plan and pay them directly to the IRS, and Wilson lent Kreger other funds in 1999, 2000, and 2001. Wilson did not get involved in the details, but he knew Kreger had problems with his taxes. Wilson expected Kreger to repay him as soon as he was able. Wilson did not request any special favors of attorney Kreger or consider the funds to be bribes. When asked, "Did you ever give these loans out of fear that Mr. Kreger's financial situation could jeopardize the arena project?, Wilson responded, "My fear was that if he lost his job, there could be a delay because he was very instrumental and important in the arena project." Wilson heard Kreger announce his conflict of interest on several occasions and considered the relationship to be "common knowledge" in Prospect Heights.

¶ 13 On cross examination, Wilson testified that he had no previous experience determining the feasability of a sports arena prior to being hired by the city in 1994. Kreger's "recusal" meant he was not supposed to discuss "any subjects relating to the arena project" with

Wilson or his development staff, and was not supposed to prepare the redevelopment agreement. Nonetheless, Kreger reviewed the developer's requested reimbursements and advised one of the developer's staff "some of the items would be difficult to get through" and that a $2.892 million "development management fee" would "probably be okay *** but we would have to call it something different." In June 2003, when it was apparent the arena would not be built but Wilson seemed to be negotiating a favorable resolution with his lender, he wrote directly to Kreger, "With that good news in mind and for several other reasons it is important to bring our affairs up to date regarding the Redevelopment Agreement" and an attached accounting of TIF reimburseable expenses had been "carefully and painstakingly compiled *** in anticipation of this request to bring this relationship current." Wilson acknowledged that at his deposition, he did not mention Kreger's pension plan withdrawal or problems with the IRS and had simply said he gave Kreger $50,000 to buy out Kreger's interest in Ice Ventures. Prospect Development's business records included handwritten notes about corporate ownership as of August 1996 indicating, "Kreger issued 240,527 shares (founder's interest)," and "Founder's Stock" consisted of "51% [Wilson]," 24.5% JV," and 24.5% [Kreger]." Wilson had given the city administrator a list of Ice Ventures' shareholders and officers in April 1997 which omitted Kreger.

¶ 14 Cris Papierniak, a professional licensed civil engineer and director of public works for the Village of Cary, Illinois, was employed by Prospect Heights between 1996 and 2004, as a civil engineer and later as the director of public works. Papierniak participated in redevelopment team meetings and was familiar with the arena design plans. He testified that the developer failed to obtain final plans from its architects or engineers; final approval from the city, final

approval from the Federal Aviation Administration, the go-ahead from the Metropolitan Water Reclamation District, roadwork permits from IDOT, or sewer and water permits from the Illinois Environmental Protection Agency (IEPA).

¶ 15 On cross-examination, however, Papierniak acknowledged having no prior experience as a public works director, the city hired a planning specialist to help it through the large development project, and the planning consultant participated in the redevelopment meetings. Papierniak did not recall that the design-build plans were sufficiently complete for the contractor to have committed to a guaranteed maximum price and that IDOT would not commit to road improvements until the arena project was fully funded. Papierniak also did not recall that the developer hired a civil engineering firm with considerable experience in permit applications for arena and other municipal improvements, the firm prepared a detailed plan for what permits would be needed and when they should be sought, and the firm obtained permits from the IEPA, ComEd, and Ameritech. The city had given merely preliminary rather than final approval to the construction plans, but Papierniak did not realize that until the bond purchaser gave approval, there would be no final plans to submit to the city. Meeting minutes indicating the city was preparing to close on the big bond sale in 2002 did not suggest that Papierniak was contemporaneously complaining about a lack of permits or any breach by the developer or that he criticized the civil engineering firm which had outlined the timeline for obtaining permits in the future. Also, when a new city administrator took office in early 2003, Papierniak talked with him about the arena project but did not suggest that the developer was in breach.

¶ 16 Bruce Huvard testified that he joined Altheimer & Gray in 1983 as an associate

attorney when Kreger was a partner, that Huvard became a partner in 1988, and that Huvard left the firm in 1996. Kreger was perhaps 18 years older than Huvard and was friends with Huvard's mentors. On Kreger's recommendation, the city administrator telephoned Huvard in 1996 about working as special counsel on the arena project because Kreger and Wilson were "personally acquainted," knew each other "in a social context," and some members of city council believed there was a conflict or perception of a conflict of interest. Kreger told Huvard the friendship with Wilson was "not a real conflict," because it "wasn't that deep a friendship, it wasn't much of a relationship, but that he [Kreger] had bowed to the pressures of the City Council." The council "decided that maybe having another attorney to be a second set of eyes and to concentrate on the economic details of the redevelopment agreement would be helpful" while Kreger remained "fully operative in all of his normal realms of responsibility as corporation counsel." No one instructed Huvard to exclude Kreger from any aspect of the project and he was not excluded. In fact, Kreger suggested issues that needed to be addressed in the redevelopment agreement and how they should be addressed. Huvard was invited to three, four, or maybe five city council meetings; and Kreger attended all the meetings. Huvard completed the redevelopment agreement in June 1997 and was surprised when Ruken gave him an amendment which had been prepared in September 1997. Huvard was surprised because no one told him that an amendment was needed or was being drafted. Ruken called to explain the "genesis" of the amendment because he did not want Huvard "to feel left out" of an upcoming discussion of the city council and Ruken said "it would [not] harm the City if this was adopted." Huvard considered the contract changes to be material, such as requiring the city to use eminent domain, and he had some concerns which

he expressed to then-city administrator, Kenneth Bonder. Bonder explained that "there had been some back channel conversations going on" because the developer "had been very upset about paying for the City's consultants" and they would see what the city council decided to do with the amendment. Huvard attended the council meeting when the amendment was passed. Kreger was there too and Huvard did not express any concerns to the council. Huvard observed that when pre- or post-meetings of the redevelopment team were convened without the developer "so we [could] discuss things on our side," Kreger would take part. When shown a "wish list draft amendment of the redevelopment agreement" from Ruken to Kreger dated December 3, 1997, Huvard said he was unaware anyone had discussed a second amendment. Huvard knew that Wilson complained to Kreger that the city was not "productively advanc[ing] the arena project" and that Wilson assigned blame to the city for his decision to dismiss his own staff, but Huvard responded to this criticism by reminding Wilson of the obligations on both sides of the contract, pointing out that the "principal cause of any lack of progress" was the developer's failure to be adequately capitalized to make cash offers to property owners, and noting that the developer would not be reimbursed until there were bond proceeds. On a couple of occasions, Huvard recommended putting the developer on notice that there were problems with its performance, but Kreger thought the developer should be given more time and he did not share Huvard's "apprehension that the developer here was not up to the task." Huvard did not agree with the developer's claims for reimbursement in the form of interest notes, shortfall notes, or cash from the TIF fund.

¶ 17 On cross-examination by the developer's attorney, Huvard disagreed with the

suggestion that if he had concerns about the first amendment he would have communicated them directly to the city council, because he understood that he was supposed to work exclusively with the city administrator unless invited to a council meeting or a particular presentation. Although meeting minutes indicated Huvard was present when the council approved the first amendment, the city administrator had said Huvard should only answer questions that were directly posed to him. Huvard abided by these instructions because the administrator understood Huvard's concerns, the council was very polarized about the arena, the council meetings had "degenerated into a kind of circus atmosphere at times," and Huvard "wouldn't have attempted to try and undo something that was on the agenda for passage." Huvard acknowledged that he drafted a property acquisition letter and real estate agreement with respect to four properties needed for the arena project, however, he testified that his contract "was not preferred by the developer or by Don Kreger," so the offers were made on a form drafted by Kreger's law firm. Huvard acknowledged drafting a ground lease, sublease, and operating agreement, that the operating agreement stated the developer and the city had kept their covenants and obligations under the redevelopment agreement, and that he intended for the parties to waive any claim of default or breach up to this period of time. Huvard sought Kreger's advice on many occasions when he was negotiating with the developer, Huvard believed at that time that Kreger was still trying to serve the interests of the City when he disagreed with Huvard on certain points.

¶ 18 Rodney M. Pace had lived in Prospect Heights for the past 20 years, was elected its mayor upon Rotchford's retirement in 2003, and served in that capacity for about five years. While he was mayor-elect, he was invited to the mayor's office to meet with Rotchford, Kreger,

and Wilson, at which point Wilson took over the conversation and asked Pace to "make Mr. Wilson whole for the expenses that he *** and his family had into the arena." After Pace was sworn in, he and the city council received a memo from the new city administrator saying " 'Don Kreger and I *** are recommending that $250,000 be reimbursed at this time in order to help keep the project moving forward' " and in May 2003, these funds were turned over. In the summer of 2003, Pace and the new city administrator had a meeting with Kreger to inquire into his relationship with Wilson. Pace was considering replacing Kreger as city attorney and moving him into a special counsel position on the arena project because he was familiar with the project and it would be more cost effective to keep him involved instead of having someone else come up to speed. The meeting was called because Pace wanted to address rumors that Kreger was "tied to the arena in some way," so he specifically asked Kreger if he had any monetary relationship with Wilson, and Kreger said "no." After that, Pace asked Kreger several times whether the developer was in default and should be terminated, but Kreger always asked to give the developer more time to find investors. Pace heard from a constituent rather than Kreger that the developer's lender had taken back the land, and when asked about it, Kreger said technically it was not foreclosed upon. If Pace had known when he took office that Kreger was getting money from Wilson, Pace would have "instantly" recommended that City Council terminate any relationship it had with Wilson and his companies.

¶ 19 On cross-examination, Pace acknowledged that his deposition testimony indicated Rotchford asked Pace to make Wilson whole for his expenditures on the arena, however, Pace testified that his deposition answer was about a different meeting than the introductory meeting

that Kreger ran. Pace acknowledged knowing nothing about the arena project before he took office and subsequently relying on the information he received from an attorney, the city administrator, and Kreger. Throughout Pace's tenure, the TIF district was generating revenue. It did not seem that Kreger opposed the city's talks with the more experienced developer in 2003, because there was an email from the city administrator to Pace saying "Don [Kreger] and I don't have a problem with this from a legal or strategic standpoint." City Council voted to negotiate exclusively with the new developer five or six months before it officially terminated Wilson and his company from the project. The developers initially tried to work out a joint arrangement to complete the project. The city offered Wilson a settlement before terminating the contract.

¶ 20 Irwin Lyons was a certified public accountant and had been auditing the city's accounts since 1995. Lyons testified that the TIF district was bringing in revenue, but when offset against the City's expenses, the City needed $10 million from the developer to be made whole. On cross examination, Lyons said the TIF district would be in effect for 23 years after it was established in 1997 and its revenue could be applied to any TIF expenses, and that after regaining the land, the City sold some of it to the nearby airport, but that transaction was not reflected in the trial exhibits.

¶ 21 Bruce A. Morris was the city's long-term chief of the police and had also held the dual role of city administrator for about 10 months between 1999 or 2000 and 2001 or 2002. As the chief of police, Morris attended redevelopment meetings and gave his input on traffic flow and security measures at the arena. Morris trusted Kreger and relied on his knowledge about the arena development, and although Morris was never on the city council, if Morris had known

Wilson was giving Kreger money or other consideration, then Morris would have insisted that the City terminate its business relationship with Wilson and his companies.

¶ 22 Appellant Prospect Development first contends there was insufficient evidence of bad faith to support the application of the doctrine of unclean hands. Furthermore, it contends, the personal friendship was disclosed and proper safeguards were put in to place. Wilson had no duty to disclose his financial relationship with Kreger because he was neither a fiduciary nor in a position of influence or superiority over the city, and the trial judge cited no legal theory which supported imposing a duty of disclosure on Wilson. Also, Kreger had an attorney-client/fiduciary relationship with the city, Kreger is the only culpable party, Kreger and his firm should bear the liability, and it is inequitable to deprive the shareholders of Prospect Development of their recovery.

¶ 23 The doctrine of unclean hands is an affirmative defense that precludes a party who has engaged in misconduct, fraud, or bad faith directed at the defendant in connection with the matter being litigated from receiving any relief from a court of equity. *Long v. Kemper Life Insurance Co.*, 196 Ill. App. 3d 216, 218-19, 553 N.E.2d 439, 441 (1990. The doctrine is not concerned with the effect of the conduct as much as it is with the intent with which the acts were performed. *Jaffee Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 140, 456 N.E.2d 224, 228 (1983). Whether the doctrine should be applied is left to the sound discretion of the trial court. *Long*, 196 Ill. App. 3d at 219, 553 N.E.2d at 441. An abuse of discretion occurs when no reasonable person would adopt the same view as the trial court. *McGill v. Garza*, 378 Ill. App. 3d 73, 75, 881 N.E.2d 419, 422 (2007) (abuse of discretion occurs when a ruling is

arbitrary or unreasonable and no reasonable person would reach the same conclusion).

¶ 24 The manifest weight of the evidence supports the trial court's findings that Wilson, a principal of Prospect Development, committed misconduct and acted in bad faith when he engaged in a secret financial relationship with attorney Kreger while doing business with Kreger's client, Prospect Heights. The record indicates that Wilson gave Kreger eight separate "loans" between December 19, 1996 and October 22, 2001 totaling $151,000, there was no contemporaneous record such as a notation on the checks or execution of promissory notes indicating the funds were in fact loans, the terms of these loans were never established orally or in writing, Wilson simply assumed he would get the funds back "when he [Kreger] was able," and Wilson had returned only $18,000. The record also indicates that for a period of time, Kreger had a sizeable interest (24.5% founder's stock) in Wilson's Ice Ventures and that Ice Ventures helped start the arena project. It is also undisputed that Wilson hired Kreger's wife and son for a period of time. Even if the wife was uncompensated, Kreger understood that Wilson hired the son as a "favor" to Kreger.

¶ 25 Wilson and Kreger denied that the checks were bribes and offered an explanation for the Ice Ventures stock purchase, but the trial judge did not have to accept their version as true. The judge was able to observe them while testifying, and could determine their credibility and weigh all of the evidence before concluding that the transactions were inappropriate and should have been disclosed. *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1013, 738 N.E.2d 524, 534 (2000) (the trial judge's findings are given great deference because the judge is able to view and evaluate witness testimony, and is therefore in

the best position to determine credibility); *United States v. Holzer*, 816 F.2d 304, 308 (1987), reversed on other grounds (characterizing so called "loans" as "thinly disguised bribes").

¶ 26 Furthermore, Wilson knew that the checks he gave Kreger may have created a conflict of interest or at least the appearance of impropriety. In the original pleading filed in January 2005, Prospect Development complained that Wilson gave Kreger money because Wilson thought that if he did not, the arena project would stall or end. Specifically, it was alleged:

> "25. In addition, during this time, Kreger, one of the City's Agents, approached Developer's principal Wilson on multiple occasions to 'request' a $100,000 loan in connection with a personal financial problem. In light of the close role that the City's Agents had played in the Arena Project, Wilson granted such a loan in excess of $100,000 for fear that its refusal would adversely affect the Developer's ability to complete the Arena Project."

Wilson also testified that he gave Kreger the money because Kreger "was very instrumental and important in the arena project."

¶ 27 Despite the considerable and increasing financial ties between the two men, the only relationship that was disclosed to Prospect Heights was that the Wilson and Kreger children had been on the same ice hockey team and that the men were on friendly terms.

¶ 28 While Kreger had an interest in Wilson's company and owed Wilson money, Kreger suggested which attorney should be brought in as special counsel to avoid the appearance of any conflict of interest. The attorney was Kreger's former associate and was never informed of the

true extent of the Wilson-Kreger relationship. In fact, the younger attorney recalled Kreger telling him there was "wasn't much of a relationship, but that he [Kreger] had bowed to the pressures of the City Council." Therefore, as the younger attorney worked on the project, he took Kreger's input and frequently consulted with him as if they still had an associate-partner relationship. Meanwhile, Kreger was, among other things, performing legal work that affected the pace of the city's redevelopment efforts, he was considering the developer's "wish list draft amendment of the redevelopment agreement," he was coaching Wilson's employee on how to describe expenses so that the city council would consider them TIF reimbursement eligible, he was helping in the efforts to market the bonds, and he was advocating that the city keep the unfruitful project going with Wilson in control.

¶ 29 Thus, the record indicates that Wilson's company began doing business with Prospect Heights while the city did not have a completely independent attorney and Wilson's company was kept on the arena project and incurred the expenses sought in this case while the city did not have a completely independent attorney. As the trial judge noted, all of the individuals involved wanted the project to be successful and thus shared a common goal. However, Mayor Rotchford testified that if he had known about the money passing from Wilson to Kreger, the project would not have been approved, and Alderman Ahlstedt testified that she would have wanted to terminate all contacts with Wilson and his companies. In reality, the city officials might have concluded the financial relationship was insufficient reason to cease doing business with Wilson or his companies. What is certain, however, is that the city was deprived of the opportunity to insulate Kreger from all aspects of the arena project, to retain completely

unbiased and disinterested bond counsel, or to work with an arena developer that had no financial ties to Wilson or his companies. The record indicates Wilson's failure to disclose his business and financial ties with Kreger amounted to misconduct or bad faith.

¶ 30 Prospect Development has not cited any authority supporting its suggestion that the unclean hands doctrine is applied only when the plaintiff and defendant in a case stood in a fiduciary relationship. The unclean hands doctrine prevents a plaintiff – any plaintiff – who has engaged in misconduct, fraud, or bad faith directed at the defendant in connection with the matter being litigated from receiving any relief from a court of equity. *Long*, 196 Ill. App. 3d at 219, 553 N.E.2d at 441; *Edens View Realty & Investment, Inc. v. Heritage Enterprises, Inc.*, 87 Ill. App. 3d 480, 408 N.E.2d 1069 (1980) (it is fundamental that a party seeking equitable relief must come to court with clean hands and cannot take advantage of his own wrong). In *Long*, for instance, a husband and wife stated in their application for life insurance that he did not suffer from any disease or impairment and was not taking any medication, even though he had been twice diagnosed with a pulmonary disorder which caused lameness and was on prescription medication for this condition. *Long*, 196 Ill. App. 3d at 217-18, 553 N.E.2d at 439-40. More than a year after issuing the policy, the insurer rescinded the coverage and refunded the couple's $100,000 premium. *Long*, 196 Ill. App. 3d at 217-18, 553 N.E.2d at 439-40. The couple sued, alleging the insurer unjustly retained interest accruing on the $100,000 premium. *Long*, 196 Ill. App. 3d at 217-18, 553 N.E.2d at 439-40. The circuit court ruled, however, that the couple's unclean hands barred them recovering interest, and was affirmed on appeal. *Long*, 196 Ill. App. 3d 216, 553 N.E.2d 439. In another case, an elder brother failed to tell his sister that she would

forfeit her portion of their father's estate if she married before the age of 21. *In re Estate of Feinberg*, 235 Ill. 2d 256, 274-76, 919 N.E.2d 888, 899-900 (2000), quoting *Shackelford v. Hall*, 19 Ill. 2d 212, 215-18 (1857). The brother was the executor of the estate and familiar with the terms of the devise. *Feinberg*, 235 Ill. 2d at 274-76, 919 N.E.2d at 899-900. When the sister married just four months before her 21st birthday, the elder brother went to court to enforce the forfeiture and to claim a larger share of the estate. *Feinberg*, 235 Ill. 2d at 274-76, 919 N.E.2d at 899-900. In its discretion, however, the court refused to enforce the forfeiture language, in part because of the brother's unclean hands. *Feinberg*, 235 Ill. 2d at 274-76, 919 N.E.2d at 899-900. The record here shows that considerable assets passed from Wilson to Kreger and that Wilson affirmatively denied when questioned by the city council that the relationship was anything but a casual friendship. These transgressions occurred when Prospect Development was courting and contracting Prospect Heights and incurring the expenses it now sues for. It was not an abuse of discretion for the trial judge to apply the doctrine of unclean hands in this instance. See *McGill*, 378 Ill. App. 3d at 75, 881 N.E.2d at 422 (abuse of discretion occurs when a ruling is arbitrary or unreasonable and no reasonable person would reach the same conclusion). We reject Prospect Development's argument for reversal.

¶ 31 On cross-appeal, the municipality contends the court's rejection of its breach of contract claim was against the manifest weight of the evidence, the court had adequate evidence to determine whether Kreger breached a fiduciary duty to Prospect Heights, and that rejecting the third party claim for procedural reasons was error. We do not find these arguments persuasive.

¶ 32 First, as set out above, the manifest weight of the evidence supports the conclusion

that Prospect Development substantially performed its contractual obligations. See *Kel-Keef Enterprises*, 316 Ill. App. 3d at 1012, 738 N.E.2d at 534 (whether a party has breached is a question of fact, a finding of breach or lack of breach will not be disturbed unless it is contrary to the manifest weight of the evidence). Although some of the arena contracts and plans were marked "preliminary" instead of "final," the design-build commitment was unsigned, and not all of the governmental permits were obtained, more than one witness testified without contradiction that the developer's work was comprehensive and the documents were brought to the point that would be expected by a bond buyer. There was no suggestion that Prospect Development was in breach until after the city had repeatedly failed to sell bonds and hoped to salvage the project by bringing in a second developer. The manifest weight of evidence indicates Prospect Development stood ready, willing, and able to proceed with arena construction as soon as the bonds were sold. We find that the court properly rejected the city's breach of contract claim.

¶ 33 Second, the city's claims against Prospect Development for participating in and aiding and abetting Kreger's breach of duty were properly rejected because there was insufficient evidence of the damage prong of this tort claim. Again, the evidence showed that all of the parties involved wanted the project to be successful and they worked to make that happen. There was only speculative testimony from the former mayor, former alderman, and police chief/former city administrator that the city would not have contracted with Prospect Development or would have terminated the contract due to Wilson's undisclosed ties to Kreger. There was insufficient testimony and documentary evidence to support the conclusion that Prospect Heights was damaged to the tune of $10 million due to its involvement with Prospect Development. The

court ruled correctly.

¶ 34 Finally, the third-party claims against Wilson individually of "Participation in a Breach of Fiduciary Duty" and "Aiding and Abetting a Breach of Fiduciary Duty" fail because Prospect Heights was found not liable to Prospect Development on the claim seeking specific performance of the reimbursement terms, Prospect Heights owes no damages to the developer, and Prospect Heights does not need to be indemnified by Wilson through the third-party action. *Kerschner v. Weiss & Co.*, 282 Ill. App. 3d 497, 502 (1996) (indicating a third-party action depends on the success of the underlying action). The third-party claim was properly rejected on procedural grounds.

¶ 35 For these reasons, the judgement of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.