2013 IL App (1st) 111604-U

FIFTH DIVISION
March 22, 2013

No. 1-11-1604

CANANWILL, INC.,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06 L 001971
	)	
T.J. ADAMS GROUP, LLC, d/b/a/ Medical Providers	)	
Risk Services,	)	Honorable
	)	Brigid Mary McGrath,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 Held: Trial court's grant of summary judgment and attorney fees to plaintiff in its breach of contract action is affirmed where the contract between the parties was not ambiguous and no genuine issue of material fact existed regarding whether defendant breached the contract or caused plaintiff's damages.

¶ 2 The trial court granted summary judgment to plaintiff Cananwill, Inc. in its breach of contract action against defendant T.J. Adams Group, LLC (T.J. Adams), doing business as Medical Providers Risk Services (MPRS). T.J. Adams appeals, arguing that the court erred in (1) granting summary judgment to Cananwill because the agreement was ambiguous and its warranties inapplicable to T.J. Adams; (2) granting

summary judgment to Cananwill because a genuine issue of material fact existed on the element of causation; and (3) awarding Cananwill the attorney fees it incurred in the state of Georgia. We affirm.

¶ 3 BACKGROUND

¶ 4 Cananwill is a company that finances insurance premiums. T.J. Adams and MPRS are insurance brokerage firms and Cananwill's clients. They had introduced hundreds of their insurance clients to Cananwill for the financing of over $50 million in casualty insurance premiums. At the time relevant here, MPRS was subsidiary of T.J. Adams and responsible for all of MPRS's premium financing activities.

¶ 5 In June 2004, Cananwill agreed to finance a $21 million life insurance premium for policies covering employees of the City of Linden, New Jersey, a client T.J. Adams had introduced to Cananwill. The City of Linden would make a $6 million down payment on the premium and Cananwill would fund the remaining $15 million.

¶ 6 On June 17, 2004, T.J. Adams executed a two-page agreement prepared by Cananwill titled "Commercial Insurance Premium Finance and Security Agreement" (the agreement). The first page of the agreement identifies "City of Linden-Union Benefits Trust and City of Linden Inc" as the insured and MPRS as the agent. It shows that Cananwill would earn $1,265,880 as the finance charge for the transaction. It identifies Security Financial as the insurance company, "01020" as the policy number, "liab" as

the type of insurance and 60 months as the term.[1]

¶ 7 The mayor of the City of Linden executed the agreement on behalf of the insured. Juergen Huellen, the chief financial officer of T.J. Adams, executed it on behalf of the "agent." Immediately above Huellen's signature is the following provision:

> "AGENT'S REPRESENTATIONS AND WARRANTIES
>
> Undersigned Agent has read the Insurance Agent's Representations and Warranties on page two and makes all such representations and warranties recited therein and agrees to be bound by the terms of this agreement."

¶ 8 Page two of the agreement consists of two sections. The second section is relevant here. It provides, in relevant part:

> "In connection with the Policies scheduled on page one, the Agent represents and warrants to CANANWILL, its successors and assigns that:
>
> * * *
>
> 4. We are the authorized policy issuing Agent of the insurance companies or the broker placing the coverage directly with the insurance company on all Policies except as indicated in the Schedule of Policies.
>
> 5. * * * this Agreement is valid and enforceable and there are no defenses to it, the scheduled Policies are in full force and effect and the premiums indicated are correct for the term of the Policies, and all other information relating to the

[1] The parties agree that these identifiers are incorrect. "01020" is a Security Financial case number, not the Security Financial policy number. The policy is a life policy, not a liability policy. The term was for the life of the participant, not 60 months.

Policies and the Insured is complete and correct. * * *

* * *

9. The Cash Down Payment and any installments due from the Insured which Agent has agreed to collect, have been collected from the Insured.

10. *** Agent shall be liable to CANANWILL for any losses, costs, damages or other expenses (including attorney's fees) incurred by CANANWILL or its assignee as a result of or in connection with any untrue or misleading representation or warranty made by Agent hereunder, or otherwise arising out of the breach by Agent of this Agreement."

¶ 9 On June 21, 2004, Cananwill wired $15 million to a "Union Benefits Trust" account at Wachovia Bank (Wachovia). Pursuant to an assurance letter received from Wachovia, Wachovia would, upon receipt of the funds from Cananwill, immediately wire them to Security Financial. In early July 2004, Cananwill discovered that there was no policy issued by or in force at Security Financial; Security Financial had not received the $15 million; and only $13 million remained in the Wachovia account. It subsequently determined that the missing $2 million had been taken from the account by Ed Dombrowski, the insurance agent allegedly coordinating the transaction on behalf of the City of Linden. Cananwill filed suit in the Northern District of Georgia against Wachovia, Dombrowski and other parties involved in the City of Linden transaction. It ultimately recovered all but $265,000 of the $15 million it had distributed under the agreement.

¶ 10 In February 2006, Cananwill filed a complaint against T.J. Adams d/b/a/ MPRS asserting breach of contract.[2] It asserted that it had fully performed under the agreement but that T.J. Adams had breached its representations and warranties in the agreement because T.J. Adams was not the authorized policy issuing agent of Security Financial, no policy had been issued and T.J. Adams had not collected the cash down payment. Cananwill sought $265,000 plus interest, costs and attorney fees.

¶ 11 T.J. Adams denied that it was in breach of the agreement. It admitted that, as of June 17, 2004, Security Financial had not issued the policy but it claimed that a life policy would not have been issued until after the premium was paid. T.J. Adams also admitted that it had not collected the down payment but asserted it had not been requested to do so. It denied making assurances to Cananwill that Wachovia would wire the $15 million immediately to Security Financial upon receipt from Cananwill. T.J. Adams claimed that the warranties in the agreement related to a commercial insurance policy and not to the financing of a life insurance policy as contemplated in the agreement.

¶ 12 In January 2009, Cananwill filed a motion for summary judgment on its breach of contract claim. It asserted that it had met its burden to prove that T.J. Adams had breached the representations and warranties in the agreement and Cananwill was injured as a result.

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[2] Cananwill also asserted claims for fraud and negligent misrepresentation. Those claims were dismissed and are not at issue here.

¶ 13 T.J. Adams opposed the motion. It argued that it did not breach the agreement because the representations and warranties therein were inapplicable. It also argued that Dombrowski's criminal diversion and Wachovia's breach of its letter of guaranty were the intervening proximate cause of Cananwill's losses. T.J. Adams asserted that the court should allow the provisional admission of extrinsic evidence to show that the agreement was ambiguous and Cananwill waived the warranties.

¶ 14 Cananwill attached numerous exhibits in support of its motion, including the deposition of Allison Deuel, an account executive at Cananwill in 2004. Deuel testified that she had been primarily responsible for coordinating the financing of the City of Linden life insurance premium for Cananwill. She testified that William Storie from MPRS had approached her and asked whether Cananwill would be interested in financing a new type of insurance designed by Dombrowski. Deuel stated T.J. Adams was a big client of Cananwill's, MPRS was "owned" by T.J. Adams and she had worked with Storie "many, many times," speaking to him probably once a day.

¶ 15 Deuel testified that Dombrowski proposed that Cananwill finance life insurance policy premiums for employees of the City of Linden. Completion of the City of Linden transaction would be the first time either Cananwill or T.J. Adams/MPRS executed a life insurance premium financing. Cananwill was interested in the transaction and so Deuel began working with Storie on the "deal." She stated her main contact was Storie because it was "so hard" to reach Dombrowski that she mainly went through Storie in coordinating the transaction, supplemented by the occasional email from Dombrowski.

Deuel testified that MPRS was the agent for the City of Linden transaction and Dombrowski was "a consultant [for T.J. Adams] who was an ex-Aon consulting guy from Georgia." The fact that Dombrowski had worked at Aon gave Cananwill a certain comfort level given that Cananwill was owned by Aon. Many T.J. Adams executives were former Aon employees.

¶ 16 Security Financial was to be the insurer issuing the life insurance policies. Deuel understood from Michael Brooks, a vice president at Security Financial, that, per industry custom, Security Financial would not issue the life insurance policies or issue policy numbers until after it had received the premiums for the policies. Deuel, therefore, did not expect to receive a binder or policy number until after the funding was complete.

¶ 17 Deuel testified that Cananwill would typically send premium funds directly to the insurance carrier or insurance agent but, shortly before completion of the City of Linden transaction, Dombrowski informed her that Cananwill had to wire the $15 million to a trust account for the City of Linden rather than directly to the carrier or agent. Deuel independently confirmed that life insurance premiums must be paid by the entity holding the policy and, therefore, the City of Linden would have to fund the carrier directly. Deuel immediately told Dombrowski that Cananwill would not fund the transaction this way. She stated Burton Lubow, Cananwill's executive vice president of finance, told her there was "no flippin' way" Cananwill would even consider doing that.

¶ 18 Dombrowski offered to obtain a letter from Wachovia Bank providing a written

guarantee that the funds would not be diverted. On June 17, 2004, he produced a May 11, 2004, letter on Wachovia Bank letterhead stating:

> "This letter is to verify that Wachovia Bank NA will, upon receipt of funds to Union Benefit Trust account #2000014606773, wire transfer the same amount according to the following instructions:
>
> Security Financial Life Insurance Co. [address and account information]
>
> We have been authorized by the trustee to carry out these instructions."

Deuel stated that it was Cananwill's understanding from the letter that there would be an immediate transfer of the wired funds from Cananwill to Wachovia to Security Financial.

¶ 19 Deuel testified that, at that point, Cananwill had in its possession the Wachovia Bank letter, a verbal policy verification from Brooks at Security Financial, a sample policy, a resolution by the City of Linden manifesting its intent to enter the transaction and assorted other documents, all "supporting the story we heard from Mr. Dombrowski." She stated Cananwill required all of the documents before it would agree to fund the transaction. It relied on all of the documents as a package and would not have funded the transaction if any single piece had been missing. Deuel stated her and Cananwill's relationship was with Storie and she relied on what Storie told her. She did not rely on anything Dombrowski told her and required documentation to support all of his assertions.

¶ 20 On June 17, 2004, the City of Linden and T.J. Adams executed the agreement

prepared by Cananwill. Deuel testified that there were errors in the agreement: the policy number was wrong; the agreement was supposed to be for a universal life policy, not a "liab" policy as shown on the first page; the policy term was for the life of the participant, not "60 months" as stated in the agreement; and the policies would not be effective on June 17, 2004, as indicated in the agreement.

¶ 21 Deuel testified that Cananwill had required T.J. Adams's chief financial officer Huellen to sign the agreement on behalf of MPRS in order to represent that the down payment had indeed been collected. Deuel testified that Cananwill relied on the representations and warranties T.J. Adams made in the agreement and so had required Huellen to sign it.

¶ 22 Cananwill transferred the $15 million to the "Union Benefits" trust account at Wachovia Bank on June 21, 2004. In early July 2004, Deuel learned that there was no policy in place at Security Financial; the policy had not been "even close" to being finalized at Security Financial; Security Financial had not received the funds; and only $13 million remained in the Wachovia account. Deuel learned that Dombrowski was the trustee of the Wachovia account and had removed $2 million from the account to use for his own ends. She testified that "I think that Millennium Benefits or Ed Dombrowski or one of the other people was - was actually supposed to collect [the down payment], give it to MPRS and have them forward it to the carriers, but I don't think that that happened." Deuel concluded that Dombrowski lied about "everything" involved with the transaction.

¶ 23 Michael Brooks, a vice president at Security Financial, verified by deposition that the transaction was not close to being finalized at Security Financial. Security Financial had been concerned about the size of the transaction and so he had recommended to the broker that he look for a larger insurance firm to handle the deal. Brooks denied verifying to anyone at Cananwill that the City of Linden policy was in place and ready to be issued.

¶ 24 Juergen Huellen, the chief financial officer at T.J. Adams, testified by deposition that T.J. Adams's role in the City of Linden transaction was to introduce the people behind the deal to Cananwill. Huellen stated Storie, the president at MPRS, had told him that Cananwill would not authorize the transaction unless T.J. Adams's name was included on the premium finance agreement. Huellen was not surprised by this requirement because Cananwill had a relationship with T.J. Adams, not with Dombrowski. Huellen testified that, to his knowledge, all of the due diligence involved in the transaction was done by Deuel at Cananwill and no one from T.J. Adams/MPRS ever investigated whether there was a policy in place or the information provided by Dombrowski was correct.

¶ 25 Huellen testified that he signed the agreement when he received it. He did not think T.J. Adams would be held to the warranties in the agreement because T.J. Adams, Cananwill and Deuel knew at the time he signed the agreement that T.J. Adams was not the agent of Security Financial and that T.J. Adams would not and did not collect the down payment. He had notified Cananwill that the premium on the life

insurance policy would have to be sent directly from the insured to the insurer and, therefore, the down payment could not be sent to T.J. Adams for transmission to the insurer. Huellen testified that T.J. Adams and Cananwill knew that the agreement was for life insurance policies and that the agreement "really didn't fit financing a life insurance policy" because its terms related to the financing of a property and casualty business policy, which did not exist. Huellen stated that he did not think Cananwill would have become involved in the City of Linden transaction without the presence of T.J. Adams or would have financed the premium "without having MPRS/T.J. Adams on the contract."

¶ 26 Kent Nelson, the chief executive officer of T.J. Adams in 2004, testified by deposition that the role of T.J. Adams and MPRS in the City of Linden transaction was "strictly to obtain financing for these intermediaries [Dombrowski] that were interested in placing this life insurance." He stated that the finance agreement that Huellen signed in the City of Linden transaction was the same finance agreement that Cananwill and T.J. Adams had always used. As part of T.J. Adams's standard agreement with Cananwill, T.J. Adams's name would be included on the premium finance agreement as the agent for the insured. He knew that Cananwill would not "issue the contract without [T.J. Adams] listed as agent."

¶ 27 Nelson testified that Cananwill, through Deuel and others' discussions with Storie and Huellen, knew that the representations and warranties in the agreement did not apply to T.J. Adams in the City of Linden transaction. He asserted Cananwill knew that

T.J. Adams was not the agent for the insurer Security Financial and that T.J. Adams would not collect the down payment from the insured because the premium was for life insurance policies, not the usual liability policies. Nelson believed that Cananwill would not have become involved in the transaction without the presence of T.J. Adams, that Cananwill only entered into the transaction because of the relationship it had with T.J. Adams.

¶ 28 William Storie testified that he was the "practice leader" and manager of MPRS in 2004. He stated that he and Huellen had suggested to Cananwill that Cananwill might be interested in Dombrowski's insurance product. Storie had never met Dombrowski and was introduced to him by a producer. He testified that MPRS initially facilitated the communication flow between Dombrowski and Cananwill but then Dombrowski and Cananwill, through Deuel, moved to a more direct relationship and copied Storie on their direct conversations. Storie stated that MPRS's role in the transaction was to introduce Cananwill and Dombrowski. It had no role in reviewing the documents that Dombrowski sent to Cananwill and Cananwill neither asked nor understood MPRS to be an active participant in the transaction. If the City of Linden deal went through, MPRS stood to earn approximately $100,000 for its "work."

¶ 29 Storie testified that, "from the very beginning," the intention was that Cananwill would pay the insurer directly but it subsequently determined that the payment had to come from the owner of the policy, the City of Linden. Deuel told Storie that Cananwill agreed to send the funds to the City of Linden's trust account at Wachovia Bank "as

along as" Cananwill received a letter from Wachovia Bank stating that the funds would go "no place else except to the insurance company." Storie testified that Cananwill "would not do the deal without the letter and the assurance from Wachovia." He stated that, "[b]ased on the reliance of that letter, then Cananwill went ahead with the process."

¶ 30 Storie testified that all of the information regarding the transaction was between Cananwill and Dombrowski. He stated that, based on that correspondence, Cananwill "knew exactly" that the premium finance agreement did not reflect "what was really going on." He stated that MPRS made no representations to Cananwill about whether the down payment for the premium had been paid because any relevant correspondence regarding such was between Dombrowski and Cananwill, not MPRS and Cananwill. Storie testified that it was Dombrowski's responsibility to make sure the down payment had been made by the City of Linden and it was not expected that MPRS was to supervise Dombrowski throughout the deal. The process would be: Cananwill requested information, Storie requested it from Dombrowski and Dombrowski sent it to Cananwill. Storie understood that Cananwill would not "do anything without the premium finance agreement."

¶ 31 William Sparer, the general counsel for Cananwill, testified that Cananwill had concerns about sending the $15 million premium to Wachovia Bank rather than directly to Security Financial, the insurance carrier. He stated Cananwill relied on the letter from Wachovia Bank and would not have sent the funds to Wachovia without the letter.

Sparer testified that collection of the down payment was an important requirement in Cananwill's typical financing transaction because it represented part of Cananwill's collateral for the loan. Cananwill typically relied on the "producer's" representation that it had collected the down payment.

¶ 32 The court granted summary judgment to Cananwill on its breach of contract claim. It rejected the provisional admission of evidence approach and applied the four corners rule of contract construction. It held that the agreement was not ambiguous and there was no genuine issue of material fact regarding whether T.J. Adams breached the agreement.

¶ 33 T.J. Adams filed a motion to reconsider. The court denied the motion. It found that there was "no genuine issue of material fact that [Dombrowski] was an agent at the time he absconded with [the] funds." It also found that the Wachovia letter "can raise a genuine issue of material fact as to an intervening cause" in the case. It then held:

> However, I do believe that this contract is broad enough, these warranties in this contract are broad enough that those losses are covered, these breach - - these losses, even, even though there's a genuine issue of material fact as to intervening cause, with the Wachovia Bank letter."

The court found "[t]he warranty is so broad in this, that they, they are telling Cananwill that they may be liable for any losses, damages or other expenses incurred by Cananwill as a result of, in connection with, or otherwise arising out of a breach by the agent of this agreement." The court stated that the breach that gave rise to Cananwill's

losses was T.J. Adams's failure to have the down payment "in place" at the time it warranted that it had been collected .

¶ 34 The court continued the case for a hearing on Cananwill's request for attorney fees. On May 5, 2011, the court awarded Cananwill $265,000 for the unrecovered loan proceeds, $193,511.97 for its attorney fees in the Illinois litigation and $114,461.21 for its attorney fees in the Georgia litigation. On June 3, 2011, T.J. Adams filed a timely notice of appeal from the court's grant of summary judgment on the breach of contract count and its award of the Georgia attorney fees.

¶ 35 ANALYSIS

¶ 36 T.J. Adams makes three arguments on appeal. It argues that the court erred in (1) granting summary judgment to Cananwill because the agreement was ambiguous and its warranties inapplicable to T.J. Adams; (2) granting summary judgment to Cananwill because a genuine issue of material fact existed on the element of causation; and (3) awarding Cananwill attorney fees incurred in the Georgia litigation.

¶ 37 1. Ambiguity

¶ 38 T.J. Adams argues that the court erred in granting summary judgment to Cananwill because the agreement imposed "impossible warranties" relative to a "non-existent policy" and these "ambiguities" in the agreement raised a question of fact that precluded entry of summary judgment.

¶ 39 A drastic means of disposing of litigation, a motion for summary judgment should be granted only when the right of the moving party is clear and free from doubt. *Mashal*

v. City of Chicago, 2012 IL 112341, ¶ 49. It is granted only when the pleadings, depositions, and admissions on file, together with any affidavits, construed strictly against the movant and liberally in favor of the opponent of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). We review the trial court's ruling on a motion summary judgment *de novo*. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003).

¶ 40 In order to support a common law breach of contract action, a plaintiff must allege and prove that: (1) a valid and enforceable contract exists; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resulting injury to the plaintiff. *Catania v. Local 4250/5050 of Communications Workers of America*, 359 Ill. App. 3d 718, 724 (2005). Pursuant to the "four corners" rule of contract interpretation, a written agreement " 'must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)).

¶ 41 In applying the four corners rule, the court first looks to the language of the agreement alone. *Air Safety, Inc.*, 185 Ill. 2d at 462. If the language is clear and facially unambiguous, the court then interprets the agreement as a matter of law as written, without the use of parol evidence. *Air Safety, Inc.*, 185 Ill. 2d at 462. We

review the court's construction of an unambiguous agreement *de novo*. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 684 (2009). Construction of a clear and unambiguous contract is a matter of law appropriate for summary judgment. *USG Interiors, Inc. v. Commercial and Architectural Products, Inc.*, 241 Ill. App. 3d 944, 947 (1993).

¶ 42 If the court finds that the language of the agreement is susceptible to more than one reasonable meaning, then an ambiguity exists and parol evidence may be admitted to assist in resolving the ambiguity. *Air Safety, Inc.*, 185 Ill. 2d at 462-63; *Chatham Corp. v. Dann Insurance*, 351 Ill. App. 3d 353, 358 (2004). "[T]he mere fact that the parties disagree as to the meaning of a term does not make that term ambiguous." *William Blair and Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). Whether a contract is ambiguous is a question of law that we review *de novo*. *Lease Management Equipment Corp.,* 392 Ill. App. 3d at 684. When the language of a contract is ambiguous, its meaning must be determined through a consideration of extrinsic evidence and summary judgment is, therefore, inappropriate. *William Blair and Co., LLC*, 358 Ill. App. 3d at 334.

¶ 43 It is uncontested that an agreement existed between the parties, Cananwill performed under the agreement and T.J. Adams did not perform under the warranties in the agreement. T.J. Adams argues, however, that a genuine issue of material fact exists regarding whether T.J. Adams breached those warranties. It asserts that the agreement is ambiguous and, therefore, a question of fact exists regarding the effect of

the ambiguity and entry of summary judgment is precluded. T.J. Adams asserts that (a) the agreement was facially ambiguous and its warranties were inapplicable to T.J. Adams; and (b) the court erred in failing to allow the provisional admission of extrinsic evidence to show that the agreement was ambiguous and the warranties inapplicable.

¶ 44 (a) Facial Ambiguity

¶ 45 T.J. Adams argues that the agreement is ambiguous on its face. It asserts that the front page of the agreement contains incorrect labels for the insurance policy to be funded, a policy that did not exist, and that the agreement is, therefore, facially ambiguous. The front page labeled the policy to be funded as a liability policy with a 60-month term and policy number 01020. The parties agree that the City of Linden policy was actually a life insurance policy with a life-of-the-participant term and a yet-to-be-determined policy number. We add that the front page of the agreement shows only a single policy to be funded but the funding was actually for a number of policies, one for each covered employee of the City of Linden.

¶ 46 T.J. Adams asserts that, even if the City of Linden transaction had been consummated, a strict four-corners review of the agreement would not have allowed enforcement of the actual policy funded because such a policy did not exist. It posits, therefore, that the agreement is ambiguous because it contains three obvious mistakes in identifying the policy and, without some resort to extrinsic evidence, Cananwill could not have enforced its rights under the agreement.

¶ 47 We disagree. First, T.J. Adams' hypothetical fails as the transaction was not

consummated and this action does not involve an attempt by Cananwill to enforce the actual policy funded. This action involves an instance where there was a failure to cause the policy to be issued, a portion of the premium was stolen, and Cananwill suffered a loss which they claim was the result of T.J. Adams breach of warranties.

¶ 48 Second, the policy number, the policy type, the policy term, and the number of policies are certainly discrepancies. However, these discrepancies are not material to the issues before the trial court. The fact that the identification or labeling of the underlying insurance policy is incorrect does not make the agreement facially ambiguous. On their face, the agreement and its warranties are entirely clear. There is nothing within the four corners of the agreement that shows that the underlying policy does not exist or that the warranties could not apply to that policy. The agreement is not capable of being understood in more than one way and it is, therefore, not facially ambiguous.

¶ 49 (b) Provisional Admission of Extrinsic Evidence

¶ 50 T.J. Adams also argues that the provisional admission of extrinsic evidence would have shown ambiguities in the premium finance agreement and the trial court erred in refusing to allow the provisional admission approach. T.J. Adams asserts that provisionally admitted evidence would have shown that Cananwill, through its account representative Alison Deuel, knew that it would have been impossible for T.J. Adams to execute the warranties in the agreement.

¶ 51 T.J. Adams points to the following testimony to show that Cananwill was

knowingly attempting to impose liability on T.J. Adams for legal fictions:

1. Deuel's testimony that she knew the policy had not been issued and she did not expect it to be issued shows that Cananwill knew that the warranty that "the polices are in full force" was false.

2. Deuel's testimony that Dombrowski was charged with collecting the down payment, not T.J. Adams, shows that Cananwill knew that the warranty that "[t]he Cash Down Payment and any installments due from the Insured which Agent has agreed to collect, have been collected from the Insured" was false.

T.J. Adams argues that provisional admission of this evidence would have shown that the allegedly breached warranties were ambiguous as applied to the transaction because, at the time Huellen executed the agreement, both Cananwill and T.J. Adams knew that the context of the agreement was different from the terms of the agreement.

¶ 52 Courts apply the "four corners" rule in determining whether an ambiguity exists and look to the language of the agreement alone. *Air Safety, Inc.*, 185 Ill. 2d at 462-63; *Lease Management Equipment Corp.* 392 Ill. App. 3d at 685. However, as T.J. Adams points out, some appellate courts have applied or cited to the “provisional admission” approach to contract interpretation when deciding whether the language of a contract is ambiguous. *Lease Management Equipment Corp.* 392 Ill. App. 3d at 686 (citing *Air Safety, Inc.*, 185 Ill. 2d at 463 (citing several Illinois appellate court decisions); *River's Edge Homeowners' Association v. City of Naperville*, 353 Ill. App. 3d 874, 878 (2004) (also citing several appellate court decisions)); see also *Bright Horizons Children's*

Centers, LLC v. Riverway Midwest II, LLC, 403 Ill. App. 3d 234, 247 (2010) (quoting *Fleet Business Credit, LLC v. Enterasys Networks, Inc.*, 352 Ill. App. 3d 456, 470 (2004) ("A court may consider extrinsic evidence provisionally, however, for the limited purpose of determining whether an ambiguity exists")).

¶ 53 Under the provisional admission approach, even though an agreement is facially unambiguous, a party is allowed to present parol evidence to the court for the purpose of showing the existence of an ambiguity which can be found only by looking beyond the clear language of the agreement. *Air Safety, Inc.*, 185 Ill. 2d at 463. Under this approach, "an extrinsic ambiguity exists 'when someone who knows the context of the contract would know if the contract actually means something other than what it seems to mean.' " *Air Safety, Inc.*, 185 Ill. 2d at 463 (quoting *Ahsan v. Eagle, Inc.*, 287 Ill. App. 3d 788, 790 (1997)). If, after provisional review of the parol evidence, the trial court finds that an " 'extrinsic ambiguity' " exists, then the parol evidence is admitted to aid the trier of fact in resolving the ambiguity. *Air Safety, Inc.*, 185 Ill. 2d at 463 (quoting *Ahsan*, 287 Ill. App. 3d at 791).

¶ 54 We decline to follow the cases that apply the provisional admission approach to contract interpretation. As stated succinctly in *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678 (2009), "the supreme court's declaration of the 'four corners rule' has never been reversed or modified. [Citations.] Therefore, the 'four corners rule' remains binding precedent and the trial courts in these cases were confined by that rule." *Lease Management Equipment Corp.,* 392 Ill. App. 3d at 686

(citing *Air Safety, Inc.,* 185 Ill. 2d at 464).

¶ 55 In *Air Safety, Inc. v. Teachers Realty Corp.,* 185 Ill. 2d 457 (1999), our supreme court stated that it "has never formally adopted the provisional admission approach." *Air Safety, Inc.*, 185 Ill. 2d at 464. The court "declined" to do so in the case before it because the contract at issue contained an explicit integration clause. *Air Safety, Inc.*, 185 Ill. 2d at 464. It further "expressly decline[d] to rule on whether the provisional admission approach may be applied to interpret a contract which does not contain an integration clause until such a case is squarely before the court." *Air Safety, Inc.*, 185 Ill. 2d at 464, fn1.[3] Our high court reasoned that:

> " 'When parties sign a memorandum expressing all the terms essential to a complete agreement[,] they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing.' " *Air Safety, Inc.*, 185 Ill. 2d at 464 (quoting *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 106 (1921)).

Accordingly, given that the supreme court has never formally adopted the provisional admission approach and expressly declined to adopt it in *Air Safety, Inc.*, "the 'four

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[3] The parties disagree over whether the integration clause on the second page of the agreement applies to T.J. Adams. It does not. This paragraph clearly applies only to the "insured" (City of Linden) and not to the "agent" (T.J. Adams).

corners rule' remains binding precedent." *Lease Management Equipment Corp.,* 392 Ill. App. 3d at 686. The trial court did not err in refusing to allow T.J. Adams to use the provisional admission approach to demonstrate ambiguity in the agreement.

¶ 56 Further, even had the court allowed T.J. Adams to use the provisional admission approach, the extrinsic evidence would have only shown that the warranties were false, not ambiguous. In this regard, we find that T.J. Adams' attempt to utilize this approach would be a misapplication of its principles. As noted, the purpose of this approach is to establish the existence of an extrinsic ambiguity. "[A]n extrinsic ambiguity exists 'when someone who knows the context of the contract would know if the contract actually means something other than what it seems to mean.' " *Air Safety, Inc.*, 185 Ill. 2d at 463 (quoting *Ahsan*, 287 Ill. App. 3d at 790). Here the purpose of the extrinsic evidence is not to show the existence of an ambiguity but rather to show that, although these warranties were made, there was no intent to abide by them.

¶ 57 T.J. Adams asserts no alternative meaning for the warranties in question. It merely asserts that, although agreed to, the warranties simply did not apply. This is not a defense to breach of contract but rather more evidence of a knowing breach. Such evidence would possibly be relevant to a claim for rescission or reformation as a result of a mutual mistake, claims which were not before the trial court. See *Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008, ¶ 39 ("a contract may be rescinded or reformed by an injured party on the basis of [mutual] mistake"). However, that is not to say that such claims would have much traction as Cananwill argues that there was no

mistake and that the warranties were important to them. Cananwill's general counsel, William Sparer, testified that collection of the down payment was an important requirement in Cananwill's typical financing transaction because it represented part of Cananwill's collateral for the loan and Cananwill relied on the producer/agent's representation that the down payment had been collected.

¶ 58 Accordingly, we find the agreement was not ambiguous. No question of material fact exists regarding whether T.J. Adams breached the agreement.

¶ 59 2. Causation

¶ 60 T.J. Adams next argues that the court erred in granting summary judgment to Cananwill because a genuine issue of material fact exists regarding whether T.J. Adams's breach of the warranties was the cause of Cananwill's damages. The trial court granted summary judgment to Cananwill on the basis that "these warranties in this contract are broad enough that those losses are covered *** even though there's a genuine issue of material fact as to the intervening cause[] with the Wachovia letter." The court explained that "[t]he [liability] warranty is so broad in this, that they are telling Cananwill that they may be liable for any losses, damages or other expenses incurred by Cananwill as a result of, in connection with, or otherwise arising out of a breach by the agent of this agreement." It identified T.J. Adams's breach of the warranty that it had collected the down payment as the breach which gave rise to Cananwill's losses.

¶ 61 T.J. Adams asserts that the court issued inconsistent rulings when it granted summary judgment to Cananwill despite having found that Wachovia Bank's breach of

the assurance letter created a question of fact as to an intervening cause of Cananwill's loss. It claims the court's broad interpretation of the liability warranty improperly wrote causation out of the agreement and took the question of causation away from the jury. T.J. Adams also asserts that Cananwill failed to carry its burden to show that, without the two wholly-unexpected intervening actions by Wachovia and Dombrowski, T.J. Adams's breach of the warranties standing alone would have resulted in the damages suffered.

¶ 62 The court's rulings were not inconsistent nor did it write the causation element out of the agreement. Wachovia's breach of its assurance letter may have been, as the court found, an arguable cause of Cananwill's damages. However, as required by the liability provision in the agreement, the evidence shows that Cananwill's damages were incurred as a result of T.J. Adams' false representations and warranties and arose out of T.J. Adams's breach of the agreement and there is no question of material fact on this issue.

¶ 63 The liability warranty in the agreement provides that:

> "Agent [T.J. Adams] shall be liable to CANANWILL for any losses, costs, damages or other expenses (including attorney's fees) incurred by CANANWILL or its assignee as a result of or in connection with any untrue or misleading representation or warranty made by Agent hereunder, or otherwise arising out of the breach by Agent of this Agreement. "

This warranty is clear and unambiguous. Courts will enforce a clear and unambiguous

contract provision as written. *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1990).

¶ 64 As the trial court noted, the liability warranty is very broad. The warranty does not, however, mandate that damages are automatically recoverable every time there is a breach of the agreement. Instead, it requires that a causal relationship exist between a breach of the agreement and Cananwill's damages. In order to recover damages under the warranty, Cananwill would have to show that it either (a) incurred the damages "as a result of or in connection with any untrue or misleading representation or warranty made by [T.J. Adams under the agreement]" or (b) its damages "otherwise [arose] out of" T.J. Adams's breach of the agreement. The court clearly recognized the necessity for this causal relationship and did not write causation out of the agreement.

¶ 65 There is no question that Cananwill's damages were the result of and arose out of T.J. Adams's breach of the down payment warranty. The very purpose of the warranties was to avoid this very type of scam occurring. The existence of a substantial down payment by the City of Linden was required by Cananwill in order to be assured that this was an actual transaction and not a fraud prior to wiring millions of dollars. Deuel's testimony shows that Cananwill had not blindly relied on any of Dombrowski's assertions. Instead, besides having required and relied on a myriad of documents to support Dombrowski's "story," it also required and relied on the representations and warranties T.J. Adams made in the agreement. Deuel testified that Cananwill had, therefore, required T.J. Adams' chief financial officer Huellen to sign the agreement in

order to represent that the down payment had been collected. As Kent Nelson, T.J. Adams' chief executive officer admitted, Cananwill would not have funded the transaction without T.J. Adams' presence on the agreement.

¶ 66 Additionally, if T.J. Adams had even attempted to comply with the warranty, if it had attempted to verify that the down payment had been collected, whether by T.J. Adams or Dombrowski or someone else, it would have discovered that the transaction was not legitimate. It then would not have executed the agreement and Cananwill would not have sent the funds.

¶ 67 As a result, T.J. Adams' argument that Cananwill did not establish the foreseeablity component of a causation analysis must fail. It asserts Cananwill produced nothing to show that either party expected Wachovia's breach or Dombrowski's theft and that, without evidence that the parties foresaw these actions, summary judgment was improper. Our supreme court has held that recoverable damages in a breach of contract action are those which either (1) "naturally and generally result from a breach" or (2), if the damages were "the consequence of special or unusual circumstances, *** were within the reasonable contemplation of [both] parties" at the time they made the contract. *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 318 (1987) (citing *Hadley v. Baxendale*, 9 Ex. 341, 354 (1854)). "Damages are not recoverable for loss that the breaching party did not have reason to foresee as a probable result of the breach when the contract was made." *Talerico v. Olivarri*, 343 Ill. App. 3d 128, 132 (2003) (citing Restatement (Second) of

Contracts § 351, at 135 (1981)).

¶ 68 The losses here were entirely foreseeable. As stated above, T.J. Adams's execution of the warranty established the legitimacy of the transaction, without which Cananwill would not have wired the funds. As the purpose of the warranty was to avoid this type of scam, it was certainly foreseeable that a violation of the warranty could lead to the very fraudulent loss it sought to avoid. To hold that the damage the warranty sought to protect against was not foreseeable would render the warranty worthless. It is not always the case that the intervention of a criminal act sought to be protected against is not foreseeable. *Orrico v. Beverly Bank*, 109 Ill. App. 3d 102, 107 (1982) ("The intervening criminal act of a third party does not relieve the first negligent actor of liability if the intervention was or should have been foreseen by the first actor even though the precise injury was not foreseeable").

¶ 69 There is no question of material fact regarding whether T.J. Adams's breach of the warranty caused Cananwill's damages. The court's grant of summary judgment to Cananwill on its breach of contract count is affirmed.

¶ 70 3. Georgia Attorney Fees

¶ 71 T.J. Adams lastly argues that the court erred in awarding Cananwill $114,461.12 in attorney fees for its prosecution of the Georgia federal court action against Wachovia Bank and Dombrowski. T.J. Adams asserts that the necessary connection between a breach and damages is missing here because the Georgia attorney fees were neither expended defensively or in response to any T.J. Adams action nor offensively to

recover for T.J. Adams's breach of warranty. T.J. Adams also points out that Cananwill's Georgia complaint did not mention that T.J. Adams's alleged misrepresentation or breach of the agreement caused the losses, Cananwill had dropped its claim for attorneys fees in the Georgia action and Cananwill "oddly" chose to settle short with Wachovia and Dombrowski. It argues that T.J. Adams should not have to bear the cost of Cananwill's abandoned pursuit of attorney fees in the Georgia action.

¶ 72 Generally, attorney fees cannot be recovered absent specific statutory or contractual authority. *National Wrecking Co. v. Coleman*, 139 Ill. App. 3d 979, 982 (1985). Where there is a contract provision for the award of attorney fees, the circuit court will enforce the provision, awarding reasonable attorney fees according to the specifications of the contract. *Brzozowski v. Northern Trust Co.*, 248 Ill. App. 3d 95, 103 (1993). The court has the discretion to determine the reasonableness of attorney fees pursuant to contractual provisions and we will not reverse the court's award of attorney fees absent a clear abuse of that discretion. *Brzozowski,* 248 Ill. App. 3d at 103.

¶ 73 A plaintiff may also recover for attorney fees in actions for wrongful acts which require litigation with third parties. *National Wrecking Co.*, 139 Ill. App. 3d at 982.

> " '[W]here the wrongful acts of a defendant involve the plaintiff in litigation with third parties or place him in such relation with others as to make it necessary to incur expense to protect his interest, the plaintiff can then recover damages

> against such wrongdoer, measured by the reasonable expenses of such litigation, including attorney fees.' " *National Wrecking Co.*, 139 Ill. App. 3d at 982 (quoting *Ritter v. Ritter*, 381 Ill. 549, 554 (1943)).

The plaintiff can recover for attorney fees incurred in actions which it initiated against third parties if the claimed fees were the " 'natural consequence' " of the alleged tort. *National Wrecking Co.*, 139 Ill. App. 3d at 983. Such recovery is not premised on whether the attorney fees were incurred offensively or defensively. *National Wrecking Co.*, 139 Ill. App. 3d at 983.

¶ 74 The attorney fees Cananwill incurred in prosecuting the Georgia action were the natural result of and, as required by the liability clause in the finance agreement, arose out of T.J. Adams's breach of the agreement. As we previously determined, T.J. Adams's failure to comply with the warranties and representations in the agreement caused Cananwill's damages. Had T.J. Adams not made the representations and warranties by executing the agreement, Cananwill would not have sent the funds to Wachovia Bank. Had Wachovia Bank never received the funds, Dombrowski could not have misappropriated $2 million of those funds and Wachovia would not have been led by Dombrowski to dishonor its assurance letter. Cananwill filed the Georgia suit against third parties in an attempt to recoup the $2 million that was misappropriated as a result of T.J. Adams's execution of the untrue warranties. The Georgia suit would not have been necessary if T.J. Adams had not made the representations and warranties upon which Cananwill relied when it wired the $15 million to Wachovia Bank.

¶ 75 Notwithstanding T.J. Adams's assertion to the contrary, Cananwill did not need to allege in its Georgia complaint that T.J. Adams caused the loss Cananwill sought to recover. It was sufficient that T.J. Adams's wrongful acts necessitated Cananwill's pursuit of litigation against third parties Wachovia Bank and Dombrowski in order to protect its interest in the misappropriated $2 million. *National Wrecking Co.*, 139 Ill. App. 3d at 982-83.

¶ 76 The trial court did not err in awarding Cananwill the attorney fees it incurred in the Georgia action.

¶ 77 Conclusion

¶ 78 For the reasons stated above, we affirm the trial court's grant of summary judgment to Cananwill on the breach of contract claim and its award of the attorney fees incurred by Cananwill in the Georgia litigation.

¶ 79 Affirmed.