2012 IL App (2d) 101184-U
No. 2-10-1184
Order filed April 19, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EAGLE HOMES, LLC,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 06-L-56
	)	
TOWN OF CORTLAND,	)	Honorable
	)	Kurt P. Klein,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment

ORDER

Held: The 2003 agreement at issue constituted a valid contract, which defendant breached. A 2006 agreement did not rescind the 2003 agreement as set forth therein, because plaintiff signed the 2006 agreement under duress. The trial court did not err in instructing the jury. Finally, the evidence supported the jury's damages award.

¶ 1 Plaintiff, Eagle Homes, LLC, filed a breach of contract claim against defendant, Town of Cortland. A jury found for Eagle, and awarded $2,133,952 in damages. Cortland moved for judgment notwithstanding the verdict, which the trial court denied. Cortland appeals. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The Town of Cortland is a small community near De Kalb. In 2002, it had a population of just over 2,000 people, and its officials were looking to expand the community. Its sanitary and wastewater treatment was provided by the De Kalb sanitary district. However, the capacity of the De Kalb system was nearly exhausted. Therefore, beginning in 2002, Cortland sought to create the sanitary capacity needed for it to continue to grow. Specifically, Cortland was soon to begin negotiations with a third party provider, Sheaffer International.

¶ 4 Eagle Homes, LLC, which is owned and operated by Ken Wisniewski, began building housing subdivisions in 1978. As of the date of the trial, it had constructed 25 subdivisions, primarily in Lake County, as well as several shopping centers and an industrial complex. In 2002, Eagle completed a subdivision in Cortland, called Heatherfield. Heatherfield hooked up to the De Kalb sanitary district. However, when Eagle presented to Cortland a concept plan for its next subdivision, Nature's Crossing, city officials told Eagle that there was insufficient sanitary capacity for the project.

¶ 5 On January 27, 2003, the Cortland Board of Trustees considered the Cortland Planning Commission's recommendation that the Nature's Crossing planned unit development (PUD) be approved. However, the Board tabled the recommendation until Cortland could resolve its sanitary capacity issue.

¶ 6 On April 14, 2003, the Board met again. It considered adopting a moratorium on all new development, pending resolution of the sanitary capacity issue. In response, Eagle's owner, Ken Wisniewski, who was present at the meeting, offered to pay $1,000,000 toward the cost of a new sanitary facility. According to Wisnieswski, the Board reacted favorably to the proposal, and it did not impose a moratorium on development.

¶ 7 A. The 2003 Agreement

¶ 8 On July 14, 2003, Cortland and Eagle entered into an agreement concerning the financing of a sanitary system and the development of Nature's Crossing. The 2003 agreement also set forth guidelines for another future Eagle development, Cornerstone Square, to be developed after Nature's Crossing. Because the 2003 agreement is central to this case, we set it forth in its near entirety:

"[Eagle and Cortland] *** hereby agree as follows:

Whereas, the Town is faced with the opportunity to expand and wants any expansion to be done in a managed and commonsense fashion; and

Whereas, in order to properly manage the growth of the Town of Cortland, it is necessary for the Town to improve and expand the sanitary sewer services provided to the current and future residents of the Town; and

Whereas, the Town currently is in negotiations with a private company [*i.e.*, Sheaffer] to provide a treatment facility for the Town of Cortland which would allow it to expand in a manner that is in the interest of its current and future residents; and

Whereas, [Eagle] is desirous of developing an approximately 150 acre parcel of land within the Town of Cortland, commonly referred to as the []("[Eagle] Parcel 1) [to be Nature's Crossing] for residential and commercial purposes ***.

Whereas, [Eagle] will be unable to proceed with the development within Cortland until the Town has improved and expanded its ability to handle waste water through its sanitary sewer system; and

Whereas, the Town will need financial assistance to finance the improvements to the sanitary sewer system and pay for the operation of said system in order to service any future developments; and

Whereas, [Eagle] also wishes to purchase in the near future another tract of land outside of Cortland for the purposes of annexing such land to the Town for development of not more than an additional 150 acres of land adjacent to [Eagle] Parcel 1 ("[Eagle] Parcel 2") [to be Cornerstone Square]; and

Whereas, [Eagle] has determined that it is in its best interest to assist in the development of a sanitary sewer system in Cortland by agreeing to make contributions of cash and land to the Town;

It is hereby agreed by and between the parties that:

1. [Eagle] will pay to the Town of Cortland [$200,000] per year commencing in the year following the approval of a PUD for [Eagle Parcel 1]. Said payments shall continue for an additional four (4) years and are to be made at the time that [Eagle] makes applications for a building permit for [Eagle] Parcel 1 at the rate of [$4,000] per permit. Notwithstanding the above, if [Eagle] does not make 50 applications for building permits for [Eagle] parcel 1 within a year, then the balance of the [$200,000] shall be paid each year no later than the anniversary date of this Agreement as herein defined. The foregoing payments shall herein be referred to as the "Fee."

2. The Fee is in addition to the current impact and connection fees charged by the Town. In exchange for [Eagle's] agreement to pay the Fee, such impact and connection fee

shall be fixed at the rate in effect as of the date of approval of each PUD for [Eagle] Parcel 1 and [Eagle] Parcel 2 until the fifth anniversary date.

3. [Eagle] will also construct at its own cost an [18 inch] sewer line which is to run *** to the lift station to be constructed by the Town on [Eagle] Parcel 1. ***.

4. [Eagle] will also donate to the Town a plot of land on [Eagle] Parcel 1 *** to allow the construction of a lift station. ***.

5. [Concerning the possibility of excess capacity at a neighboring city's sanitary district].

6. The obligations of [Eagle] as set forth herein shall be contingent on the Town approving a PUD for [Eagle] Parcel 1 containing no less than (a) 276 single family detached lots, (b) 93 duplex lots (186 units), (c) 100 age restricted apartments, and (d) commercial uses. Approval of said PUD shall be in the sole discretion of the Town Board and in accordance with the ordinances of said Town for the approval of PUDs.

7. As part of the passage of the PUD, the Town will reserve for [Eagle's] development on [Eagle] Parcel 1 and [Eagle] Parcel 2 sufficient P.E.[1] to service such parcels.

8. Further, the Town agrees to enter into good faith negotiations with [Eagle] for the annexation and the development of [Parcel 2]. ***

9. [Financing agreement of Parcel 2].

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[1] The contract does not define "P.E." However, based on certain written correspondence between the parties, we take it to be related to, but different than, irrigation. ("Cortland is attempting to provide P.E. treatment capacity ***. P.E. is simply not the same as the need for irrigation land.")

10. *** As part of the approval of the PUD, [Eagle] agrees to post with the Town *** security in satisfactory form to the Town Attorney guaranteeing the payment of the [$200,000] per year ***.

11. *** [T]he rights and obligations created under this Agreement shall be subject to the terms of any PUD approved by the Town for the parcels referenced herein."

¶ 9 B. 2004 Cortland-Sheaffer Agreement

¶ 10 Meanwhile, Cortland had been negotiating with a third party, Sheaffer International, to design, construct, own, operate, and maintain a new sanitary treatment plant for the benefit of existing residents and new developments (particularly Nature's Crossing). Cortland and Sheaffer entered into agreement in 2004. In the 2004 Cortland-Sheaffer agreement, Sheaffer agreed to build a treatment system with a 750,000 gallon-per-day capacity. The parties planned a second phase to be completed at a later date that would double the capacity. Cortland would pay Shaeffer $600,000 per year for 20 years. Sheaffer would own the system, but, after 20 years, the Town could purchase the system for 80% of the fair market value. As to timing, the facility was to be constructed within 270 days (9 months) after Sheaffer received all necessary Illinois Environmental Protection Agency (IEPA) permits. Other contingencies included obtaining tax-exempt financing and construction and operating permits.

¶ 11 C. Change of Plans: The 2003 Agreement is Abandoned in Favor of the 2006 SSA Agreement

¶ 12 At the time of the 2004 Sheaffer-Cortland contract, there were more than 20 developers looking to build in Cortland. However, the 750,000 gallon system would first serve Eagle (as the only developer who contracted to contribute to financing), and the other developers would have to

wait until phase II, when the capacity was increased to 1.5 million gallons per day. According to Eagle, this would place it in an advantageous position to sell homes as compared to other developers.

¶ 13 During 2004 and 2005, Sheaffer's CFO, Robert Cochrane, met with Cortland, Eagle, and other developers to discuss sanitary treatment capacity. Through these discussions, it became clear that the 750,000 gallon-per-day system would be insufficient to meet the needs of *all* contemplated development. This much was clear given that even the initial 2004 Sheaffer-Cortland agreement contemplated two phases of construction, ultimately working up to the 1.5 million gallon capacity. However, as Cochrane testified at trial, Sheaffer was willing to re-work its 2004 agreement.

¶ 14 Around this time, Cortland's *new* mayor, Seyller (elected after the formation of the 2003 agreement), hired attorney Stewart Diamond to find an alternate method by which the larger, 1.5 million gallon system could be financed in a single phase of construction. Diamond concluded that a special service area (SSA) tax was "the only feasible way" to finance the project. Under the SSA tax, developers would agree to pay a tax for each parcel developed, and these SSA tax levies would fund the sanitary system. From Cortland's perspective, the SSA financing plan had the advantage of allowing Cortland to own the wastewater facility, saving Cortland millions of dollars, as compared to the 2004 Cortland-Sheaffer agreement, which left ownership with Sheaffer. According to Seyller, the idea to change the plan from the smaller, 750,000 gallon facility (financed as set forth in the 2003 agreement, completed in two phases, and owned by Sheaffer) to the larger, 1.5 million gallon facility (financed with SSA taxes, completed in one phase, and owned by Cortland) came from the group of developers, including Eagle.

¶ 15 On May 23, 2005, Seyller presided over a Board meeting wherein Cochrane reported that Sheaffer had not locked down financing for the 750,000 gallon system because discussions began

to focus on completing a 1.5 million gallon system in a single phase. Sheaffer was already designing the larger facility, which was designed to begin accepting waste before it was fully completed. However, Sheaffer reported that it had financing proposals in place. It finalized all permit-related submissions and anticipated receiving the final IEPA permit within three weeks. Sheaffer represented that it planned to begin construction on the new waste-water treatment plant in August 2005.

¶ 16 Also at the May 2005 Board meeting, the Board approved the PUD for Nature's Crossing. The May 2005 PUD in pertinent part:

> "SECTION ONE: That the Final Development Plan for the first phase of development of the Planned Residential Development commonly known as the Nature's Crossing Unit 1 *** be, and it is, hereby approved [subject to certain conditions not at issue on appeal]."

¶ 17 After the passage of the May 2005 PUD, Eagle borrowed approximately $3 million and began to construct Nature's Crossing. Eagle constructed mass grading and installed project infrastructure (onsite and offsite sanitary sewer installations). This included the 18-inch sewer line required by the 2003 agreement (paragraph 3). Eagle also began marketing Nature's Crossings homes, which required the construction of an onsite marketing trailer. Eagle anticipated that the sales of its homes would coincide with the completion of the Sheaffer sanitary facility. Wisniewski testified that, even after attending the developer meetings wherein the need for greater capacity was discussed, he still "assumed" that Cortland was going to build the 750,000 gallon system.

¶ 18 In April or May of 2005, Eagle's attorney died, and it retained a new attorney, Charles Cronauer, to represent it in regard to the Cortland development. Between August 2005 and January

2006, Eagle, through its written correspondence to Cortland, did *not* object to the larger 1.5 million gallon facility. Rather, it expressed a reluctance to pay both the $1,000,000 required by the 2003 agreement *and* the SSA tax necessary to support the 1.5 million gallon facility in a single construction phase. In an October 12, 2005, letter of intent from Eagle to Cortland, Eagle stated:

> "Assuming that a reasonable, feasible amount is determined from the SSA levy amount per unit, Eagle[]-Nature's Crossing [] intends to permit 525 units in the Nature's Crossing subdivision to be subject to an imposition of an SSA for the purposes of funding the sanitary treatment facility ***."

In fact, in January 2006, Eagle signed an application for the establishment of an SSA. It was not until February 2006 when Eagle's attorney, Cronauer, told Cortland's attorney, Diamond, that Eagle might not sign the actual SSA agreement.

¶ 19 On February 3, 2006, Diamond wrote Cronauer a letter, "informing" Cronauer why Eagle should sign the SSA. In the letter, Diamond conceded that Eagle might have a cause of action for breach of the 2003 agreement if Cortland chose to finance the project with an SSA without Eagle's consent. However, Diamond warned that Cortland did not have deep pockets and admonished Eagle of its financially precarious position and of its dependance on Cortland's good favor to continue with development. The letter stated in part:

> "Any financial offer made by [Eagle] was conditioned upon the original Scheaffer contract which, it appears, will not go forward. At best, your withdrawal from the SSA will leave your client with a lawsuit. In addition, any lawsuit against [Cortland] will not be against a governmental entity with any significant cash reserves. ***

> On the other hand, *** [Eagle] appears poised to participate in a multi-Developer financed system [*i.e.*, the 2006 SSA agreement] ***. If not, it might be somewhat hard to explain to your lender why you are considering not participating in an SSA, which will allow you to almost immediately begin building homes and selling them on Nature's Crossing parcel.
>
> *** [As to the development of Cornerstone Square], I can only suggest we [continue discussion] if we are assured, ***, by you and [Eagle], that you intend to proceed with the SSA.***.
>
> Frankly, if we do not have that assurance, we may need to consider other alternatives, including, perhaps, proceeding with the SSA without [Eagle's] full consent."

¶ 20 Diamond conceded at trial that the February 3, 2006, letter gave Eagle only two options: join the SSA or sue. Likewise, Wisniewski understood the letter to effectively take the 2003 agreement "off the table." Cronauer testified that Diamond had been making statements similar to those set forth in the February 3, 2006, letter for some time. Cronauer understood that, based Cortland's stance, Nature's Crossing would not have sanitary service without abandoning the 2003 agreement and becoming a member of the SSA.

¶ 21 According to Cronauer, given the choice between joining the SSA or suing, Eagle proceeded to negotiate terms of the SSA. Eagle was able to secure certain favorable terms through the negotiation process, such as the receipt of 52 occupancy permits in advance of the facility's completion and a refund not to exceed $1,500 per residential unit if proceeds of the SSA bonds were underutilized. During the course of negotiations, Diamond sent Cronauer another letter, dated March 16, 2006. In that letter, Diamond told Cronauer that it would be financially advantageous for Eagle

to participate in the SSA. Cronauer wrote back the next day, stating, "I wanted to clarify one of the statements in your March 16, 2006[,] letter regarding the costs to my client for participation in the SSA. The attached PDF file establishes that [Eagle's] participation in the SSA will cost it $2,225,025 *more* than it would [under the previous financing arrangement]." (Emphasis added.) Cronauer's PDF attachment based the $2,225,025 figure on an approximate $2,000 cost-differential per residential unit between the SSA plan and the prior plan under the 2003 agreement.

¶ 22 On March 27, 2006, Eagle signed the 2006 SSA agreement. The 2006 SSA agreement brought Cornerstone Square back "on the table." However, the SSA agreement financed the sanitary project with SSA bonds, which required a principal payment of $8,500 per residential unit, rather than $200,000 per year over five years. The 2006 SSA agreement involved many developers; the portion involving Eagle stated:

"***

Whereas, the Nature's Crossing development has been approved by the Town as a [PUD] ***.

***

Whereas, *** utility services will be funded by the proceeds of a bond issue to be financed by the imposition of Special Service Areas [SSA's] ***.

Whereas, [Eagle] wishes to avail itself to the Town's utility services by permitting the imposition of the [SSA] on the Nature's Crossing subdivision.

Whereas, [Eagle] also has an interest in a parcel of property known as the Hudgins property [to be Cornerstone Square], not yet annexed to the Town ***.

***

Whereas, [Eagle] wishes to provide for utility service to [Cornerstone Square] upon annexation to the Town; and

Whereas, the Town and [Eagle] entered into [the 2003 agreement] regarding the development of [Nature's Crossing] and [Cornerstone Square];

NOW THEREFORE, ***, Town and [Eagle] agree as follows:

***

3. In order to *** supply *** sanitary sewage and potable water to [Nature's Crossing], *** [Eagle] consents to the creation of a SSA that includes the subject property *** and to levy an annual tax in an amount which will support the issuance of bonds, which *** will require a principal payment of [$8,500] per residential unit. [Eagle] will *** pre-pay the [$8,500] special tax *** at the time a residential building permit is issued. ***.

4. In addition, [Eagle] shall pay the fee for a water meter and for inspection services relating to the sewer and water connections. *** [Eagle] shall also pay [$500] per residential unit *** for the purchase of irrigation land ***.

***

9. This Agreement is intended to permit the issuance of bonds to finance the utility improvements. *** If *** there are surplus funds available from bond proceeds ***, the Town shall use such surplus funds to proportionally redeem bonds outstanding for all [SSA's] ***, but in no greater amount than [$1,500] per residential unit.

***

12. The Town shall reserve capacity in its sewage treatment system for [Cornerstone Square], [pending annexation]. ***.

13. *This Agreement supersedes and replaces any and all other agreements, including, without limitation, [the 2003 agreement] between the parties, for the provision of utility service in the Nature's Crossing and Cornerstone Square developments*." (Emphasis added.)

¶ 23 Wisniewski signed the SSA agreement. He testified that he understood that the bonds could have been issued with less than *all* of the owners' and developers' signatures, but he signed it because ensuring the issuance of the bonds could accelerate the construction of the facility by 60 days. After the parties signed the 2006 SSA agreement, Cortland issued $23,845,000 in SSA bonds to finance the system.

¶ 24 D. Lawsuit

¶ 25 Approximately three months later, on July 13, 2006, Eagle filed a complaint for breach of the 2003 agreement. As a defense, Cortland stated that the 2006 SSA agreement rescinded the 2003 agreement. Eagle replied that it entered into the 2006 SSA agreement under duress, and, therefore, it was still entitled to pursue its claim for breach of the 2003 agreement.

¶ 26 i. Motion *in Limine* to Limit Evidence on Damages

¶ 27 On January 15, 2010, Eagle disclosed to Cortland the anticipated testimony of its expert witness, Jeffrey Newman. Newman calculated Eagle's alleged damages based on: (1) a cost-differential theory; and (2) a lost-profits theory. Under the cost-differential theory, Newman asserted that financing the sanitary system under the 2006 SSA agreement cost Eagle $2,000 more per home than under the 2003 agreement. Damages under this theory were $68,000 (34 homes sold x $2,000). Under the lost-profits theory, Newman asserted that, absent a breach of the 2003 agreement, the sanitary system would have been in place sooner, and Eagle would have been able to sell more homes before the market dried up in 2007. Newman opined that Eagle would have been able to sell

175 homes (rather than 34), at a profit of up to $20,000 each. This would lead to well over $1 million in damages (175 - 34 = 141, and 141 x $20,000 = $2.82 million, minus the $1 million they no longer had to spend under the 2003 agreement's financing plan = $1.82 million).

¶ 28 On July 16, 2010, Cortland moved to limit evidence on damages. Specifically, Cortland sought to exclude evidence on the lost-profits theory. Cortland argued that Eagle did not disclose its lost-profit theory in its *complaint*. With reference to damages, Eagle's complaint had stated:

> "56. As a result of Cortland's breach as alleged, Eagle has suffered damages represented by, among other things, *increased cost of sanitary sewer and wastewater treatment services for its Nature's Crossing Development*.

Cortland noted that paragraph 56, as emphasized above, specifically referenced only the cost-differential theory, not the lost-profits theory.

¶ 29 On August 2, 2010, the trial court heard argument on the motion. Cortland argued that it was not aware of any documentation supporting Eagle's lost-profits theory until January 2010. Cortland argued that Eagle should have, but did not, plead the precise length of the delay caused by the breach. Cortland stated that Eagle should have amended its complaint to so state. If Eagle had done so, Cortland would have moved to reopen discovery.

¶ 30 In response, Eagle disagreed that Cortland did not receive documentation in a timely manner:

> "Every single stitch of paper that he indicated he didn't have as to what costs were per home, *what profits were per home*, everything he indicated he didn't have, he's got. The theory of damages that we're intending to proceed on *** has been fully developed with a timely, expert disclosure, [and] depositions conducted by defendant." (Emphasis added.)

Eagle stated that Cortland was essentially challenging the sufficiency of the pleadings, albeit through a motion *in limine*. Eagle stated:

> "We alleged in the complaint four years ago that we suffered damages as a result of the breach. ***. Did we plead the evidence that supported that? No. But at that point in time, the evidence was still developing."

Elaborating on the "developing evidence," Eagle explained that, when it filed its complaint in 2006, it had anticipated that its cost-differential theory would lead to much more than $68,000 in damages. Because the housing market had not yet collapsed, Eagle anticipated that it would sell all 500 plus of its homes (not just 34, or, even if development had proceeded under the 2003 agreement, 175). Therefore, in 2006, Eagle anticipated its cost-differential damages to be over $2 million ($2,000 cost differential per home x over 500 homes). However, due to the 2007 housing market crash, the lost-profit theory (based on an anticipated profit of nearly $20,000 per home) ended up being more worthy of pursuit at trial.

¶ 31 In ruling, the trial court re-read the complaint and found it to be adequate. The court denied the motion *in limine*.

¶ 32 ii. The Verdict and Posttrial Proceedings

¶ 33 The trial court denied two of Cortlands proposed instructions, Nos. 7 and 11. Number 7 set forth the three requirements of a contract: offer, acceptance, and consideration. Number 11 instructed the jury that, in order to find a breach, it was required to find that Cortland was obligated to "build a particular type and size of sewer system *by a date certain* under the 2003 Agreement."

¶ 34 The jury found that Cortland breached the 2003 agreement and awarded Eagle $2,133,952

in damages, essentially subscribing to Eagle's theory on damages. Eagle's chart damages calculations, Exhibit 2, read as follows (with some changes for formatting purposes):

Year	Expected Sales under 2003 Agmt.	Exptd. Profit	Actual Sales	Actual Profit	2003 Fee	Cost Dif.	Actual Damages	With Interest
2005	50	$1 mil.	0	0	0	0	$1 mil.	$1.126 mil.
2006	70	$1.4 mil.	0	0	($200k)	0	$1.2 mil.	$1.308 mil.
2007	55	$1.1 mil.	34	($680k)	($200k)	$68k	$288k	$303k
2008	0	0	0	0	($200k)	0	($200k)	($203k)
2009	0	0	0	0	($200k)	0	($200k)	($200k)
2010	0	0	0	0	($200k)	0	($200k)	($200k)
TOTAL	175	$3.5 mil.	34	($680k)	($1 mil.)	$68k	$1.888 mil.	$2,133,952

¶ 35 Cortland then moved for judgment notwithstanding the verdict (JNOV), which the trial court denied. This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Cortland presents five arguments on appeal: (1) the 2003 agreement was not a valid contract because it (a) lacked consideration, (b) illegally contracted away police power, and (c) violated the municipal code; (2) the evidence was insufficient to support the jury's finding that Eagle entered into the 2006 SSA agreement under duress; (3) the trial court erred in denying Cortland's motion for a directed verdict because there was no breach of the 2003 agreement; (4) there were three errors

concerning damages: (a) Eagle should not have been allowed to introduce evidence on lost profits where it (allegedly) failed to so plead, (b) Eagle cannot claim damages for lost profits because, at the time the parties entered into the 2003 agreement, the parties could not have reasonably contemplated that a 2007 housing market crash would impact profits, and, (c) even if Eagle was entitled to damages for lost profits, Eagle did not establish its lost profits with reasonable certainty; and (5) the trial court erred in refusing Cortland's jury instruction Nos. 7 and 11.

¶ 38 Due to the length and complexity of Cortland's arguments on appeal, we first set forth this court's general holdings. For the reasons set forth below, we conclude that the 2003 agreement was an enforceable contract and that Cortland breached it. The primary ground for the breach is that, after passing the PUD, Cortland abandoned the financing plan set forth in the 2003 agreement in favor of a SSA agreement, which placed completely different financial obligations on Eagle and which compromised Eagle's advantage *vis a vis* other developers. The more pressing question is not whether the 2003 agreement constituted a contract, but whether the 2006 SSA agreement rescinded that contract (as stated on its face) or whether the 2006 SSA agreement was entered into under duress. And, on this point, the evidence is sufficient to uphold the jury's verdict that the 2006 SSA agreement was entered into under duress, leaving the 2003 agreement to stand. In addition, the question of damages constituted a substantial question at trial and here on appeal.

¶ 39 A. 2003 Agreement was a Valid Contract

¶ 40 i. Adequate Consideration

¶ 41 Cortland first argues that the 2003 agreement does not constitute a valid contract because it lacks consideration. To be valid, a contract must have an offer, acceptance, and consideration. *Halloran v. Dickerson*, 287 Ill. App. 3d 857, 868 (1997).

¶ 42 Cortland asserts that what on first glance might appear to be a bargained-for promise on its part, *i.e.*, approval of the PUD, was not that at all, but, rather, was an *illusory* promise. Consideration means a bargained-for exchange of promises or performances, and it may consist of a promise, an act, or a forbearance. *Village of Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940 (2004). An illusory promise, in constrast, is one that, on closer examination, reveals that the promisor has not *actually* promised anything—performance is optional. *Dwyer v. Graham*, 99 Ill. 2d 205, 209 (1983); *W.E. Erickson Construction, Inc., v. Chicago Title Insurance Co.*, 266 Ill. App. 3d 905, 909 (1994).

¶ 43 Cortland points to paragraph 6 of the 2003 agreement, which states:

> "The obligations of [Eagle Homes] set forth herein shall be contingent on the Town approving a PUD for [Eagle Homes] Parcel 1 ***. Approval of said PUD shall be in the *sole discretion of the Town Board*." (Emphasis added.)

Cortland argues that, because the approval of the PUD was in the "sole discretion of the Town Board," performance was optional, and the approval of the PUD at best constituted an "illusory promise," which cannot serve as "consideration."

¶ 44 Cortland's argument is based on flawed logic. Cortland focuses on a single paragraph within the larger contract (paragraph 6) that sets forth no consideration on the part of Cortland. However, it does not follow that, because the quoted portion of paragraph 6 sets forth no consideration on the part of Cortland, the larger contract sets forth no consideration on the part of Cortland. As we discuss below, it does. In any case, Cortland mischaracterizes the function of paragraph 6 within the larger contract.

¶ 45 Paragraph 6 sets forth a condition precedent to performance, not an illusory promise. A condition precedent to performance is one that must be performed by one party to an existing contract before the other party is obligated to perform. *McAnelly v. Graves*, 126 Ill. App. 3d 528, 532 (1984). Where a party's obligation to perform is conditioned upon the happening of a collateral event, "it is quite incorrect to say that, until the event occurs, there is no contract." *Id.* at 533.

¶ 46 Here, Eagle was not obligated to perform until, Cortland, albeit at its own discretion, approved the PUD. This constituted a condition precedent to performance. Eagle's obligations included assisting Cortland in financing the sanitary system. Then, *in exchange for* Eagle's financial assistance, Cortland, at a minimum, expressly promised to: (1) fix for five years the impact and construction fee for Eagle Homes' parcels (paragraph 2); and (2) reserve sufficient P.E. to service Eagle Homes' parcels (paragraph 7). In sum, there was adequate consideration where Cortland bargained for an exchange of promises with Eagle Homes, *i.e.*, fixing fees and ensuring service to Eagle's parcels (over those of other developers) in exchange for financial assistance with the project.

¶ 47 ii. Legality of the 2003 Agreement

¶ 48 Next, Cortland challenges the legality of the 2003 Agreement, arguing that it (Cortland): (1) improperly contracted away police power; and (2) failed to set aside adequate appropriations as set forth in section 8-1-7 of the Illinois Municipal Code (65 ILCS 5/8-1-7) (West 2003) ("no contract shall be made by corporate authorities *** unless an appropriation has been previously made concerning the contract"). These arguments put us in the strange position of considering whether to rule in favor of Cortland based on Cortland's own (alleged) policy and statutory violations. However, particularly as to the alleged statutory violation, a party contracting with a municipality is presumed to know that a municipality is prohibited from entering into a contract in violation of

the Municipal Code. *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, __ (1995); but see *City of Chicago v. Peck*, 196 Ill. 260, 264 (1902) (in an action against a city on a contract, the city having the general authority to make the contract, it is *not* incumbent upon the plaintiff to show the existence of conditions requisite to authorize the city to make the contract, such as making an appropriation and awarding a project to the lowest bidder after advertisement).

¶ 49 Cortland's first argument is based on the policy that a municipality should not barter away its "legislative discretion for emoluments that [have] no bearing on the merits of the requested [legislation]." *Hedrich v. Village of Niles*, 112 Ill. App. 2d 68, 78 (1969). Municipal legislation is voidable where it can be shown that it was adopted *only* because the municipality was set to receive some emolument in exchange, and not because the public health, safety, comfort, morals, and welfare would be protected or improved. See, *e.g.*, *Cederberg v. City of Rockford*, 8 Ill. App. 3d 984, 987-88 (1973) (re-zoning voided where there was no indication in the record that it was necessary or that the municipality considered the appropriate use of the land within the total zoning scheme of the community).

¶ 50 Ordinarily, courts cannot inquire into the reasons motivating a legislative body in enacting regulations such as a PUD. See, *e.g.*, *Hedrich*, 112 Ill. App. 2d at 77. We may determine only if the municipality had the authority to pass the ordinance and, if so, whether it is arbitrary and unreasonable or bears a reasonable relation to the public health, safety, and welfare. *Id.* There is a presumption of validity in favor of the ordinance, and the party attacking the presumption must overcome it by clear and convincing evidence. *Id.* This question of motive is one of fact for a trial court. *Id.* ("this issue must be considered by a trial court before we can consider it").

¶ 51 At trial, Cortland never raised the issue of motive for the jury decide. It cannot do so now. *Cf. Hedrich*, 112 Ill. App. 2d at 79 (remanding to consider the issue of motive *where the parties raised it at trial*, and the trial court improperly refused to consider it). Cortland did not raise the issue at trial, and the presumption of validity in favor of the ordinance stands.

¶ 52 We also reject Cortland's argument that the 2003 agreement was illegal because Cortland failed to set aside adequate appropriations pursuant to section 8-1-7 of the Municipal Code (65 ILCS 5/8-1-7 (West 2003)). Section 8-1-7 states that "no contract shall be made by corporate authorities *** unless an appropriation has been previously made concerning the contract." *Id.*

¶ 53 To our research, the 2003 agreement does not violate the statute. The case of *Brown v. City of Evanston*, 4 Ill. App. 2d 124 (1954), is instructive. In *Brown*, the court held that the city's contract to purchase a gravel pit in 1948 was not invalid for lack of a prior appropriation. *Id.* at 126. Because the contract did not require the city to make any payments in 1948, no appropriation was legally required prior to the date of contract. *Id.* (the city was not required to make payments until 1949).

¶ 54 Here, the 2003 agreement did not require Cortland to make any expenditures in that year. To the contrary, the 2003 agreement put Cortland in control of the project's start date, by allowing it to pass the PUD at its discretion, and then triggered obligations of *payment by Eagle*. It was the 2004 Cortland-Sheaffer agreement, *not* at issue in this appeal, that required *Cortland* to make payments. Therefore, we reject Cortland's position that the 2003 agreement was illegal.

¶ 55 B. Evidence Sufficient to Support Duress

¶ 56 Cortland next challenges the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) as to the jury's finding that Eagle acted under duress in signing the 2006 SSA agreement. A judgment notwithstanding the verdict is properly entered only where the evidence,

when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). In ruling on a motion for JNOV, the trial court does not weigh the evidence, nor is it concerned with the credibility of witnesses. *Id.* A JNOV is improper where there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where witness credibility or a resolution of conflicting evidence is decisive of the outcome. *Id.* at 454. We review *de novo* a trial court's denial of a motion for JNOV. *Serrano v. Rotman*, 406 Ill. App. 3d 900, 908 (2011).

¶ 57 In its motion for JNOV, Cortland sought to overturn the jury's verdict that Eagle acted under duress when it signed the 2006 SSA agreement. Indeed, *if* Eagle had freely signed the 2006 SSA agreement, which rescinded the 2003 agreement, it would have waived its claim of breach of the 2003 agreement. See, *e.g.*, *YPI 180 N. LaSalle Owner, LLC, v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 4 (2010) (when a contract is rescinded, it is as if the contract never existed).

¶ 58 A release (here, a recision of the 2003 agreement) is only valid if signed knowingly and voluntarily. *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 91 (1999). It may be voided where its execution was obtained through fraud, duress, illegality, or mistake. *Id.* Economic duress is present where a party is induced by the wrongful act or threat of another party to make a contract under circumstances depriving him or her of free will. *Id.* Acts or threats cannot constitute duress unless they are wrongful. *Id.* However, the term "wrongful" is not limited to acts that are criminal, tortious, or in violation of a contractual duty; wrongfulness extends to acts that are wrong in a moral sense. *Id.*; *Herget National Bank of Pekin v. Theede*, 181 Ill. App. 3d 1053, 1056-57 (1989). The defense of duress does not apply if consent to the agreement is secured from mere hard

bargaining or pressure of financial circumstance, *unless* the difficult circumstance is the result of the wrongful actions taken by the advantaged party. *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 840 (1995); Lord, Richard A., Methods of Duress or Coercion-Injury to Business or Livelihood, 28 Williston on Contracts § 71:43 (4th ed.). The issue of duress is generally one of fact, to be judged in light of all of the surrounding circumstances. *Schlossberg v. E.L. Trendel & Associates*, 63 Ill. App. 3d 939, 943 (1978). The following three cases illustrate the concept of economic duress and support the trial court's denial of the motion for JNOV.

¶ 59 In *Carlile*, the court held that there was a question of fact, precluding summary judgment, as to whether a tool dealer entered into a release with the tool manufacturer under duress. *Carlile*, 271 Ill. App. 3d at 840. There, the dealer did not owe anything to the manufacturer, but the manufacturer allegedly pressured the dealer to sign the release or suffer lengthy delays in obtaining payment for inventory repurchased by the manufacturer. *Id.* at 840-42.

¶ 60 In *Herget*, the court held that the defendant made a *prima facie* case that he acted under duress when he signed a note consolidating certain loans. *Herget*, 181Ill. App. 3d at 1058. There, the businessman-defendant alleged that the plaintiff-bank took advantage of his financial stress in inducing him to sign the note. The businessman's wife, unbeknownst to him, had depleted his business's line of credit with the bank. The businessman discovered the problem when the bank dishonored a $15,000 check drawn upon the account. The bank's commercial loan officer then falsely led the businessman to believe that he was responsible for loans taken out by his wife. The loan officer then proposed that the bank would honor the $15,000 check if the businessman would sign a note consolidating the loans incurred by his wife. The businessman claimed that the bank provided misinformation concerning his wife's depletion of the credit line, and he, anxious to restore

his financial reputation, had signed the loan agreement. *Id*. at 1055. The court held that these allegations were sufficient to establish a *prima facie* case of duress. *Id*. at 1058.

¶ 61 Finally, in *Raintree Homes v. Village of Long Grove*, 389 Ill. App. 3d 836, 864 (2009), the court affirmed the finding that a homebuilder paid (illegal) impact fees under duress. Although *Raintree* dealt with a fee rather than a contract, the circumstances that constituted duress are similar to those before us here. In *Raintree*, the developer conducted a substantial portion of its business in the village and had existing commitments to land in the village. *Id*. The developer's contracts with third party purchasers often had deadlines and were financed on credit. *Id*. at 866. These conditions made it such that, if the developer did not pay the village fees, it would have been subject to severe financial hardship. *Id*. at 857. Therefore, despite the fact that the developer paid the fees for many years without protest and was profitable during those years, the trial court's finding of duress was not against the manifest weight of the evidence. *Id*. at 866.

¶ 62 Here, Eagle presented evidence, particularly through Wisniewski's testimony and Cortland's February 3, 2006, letter, that provided a basis for the jury's verdict. Wisniewski testified that Eagle relied on the 2003 Agreement and the May 2005 PUD for Nature's Crossing when it invested more than $3 million in infrastructure improvements to Nature's Crossing through August 2006. This money was a loan. Eagle could not recoup that $3 million without completing and selling homes, which it could not do without ensuring the installation of a sanitary system.

¶ 63 In the February 3, 2006, letter, Cortland's attorney wrote to Eagle's attorney, "informing" Cronauer why Eagle should sign the SSA. Again, the letter stated in part:

> "Any financial offer made by [Eagle] was conditioned upon the original Scheaffer contract which, it appears, will not go forward. At best, your withdrawal from the SSA will

> leave your client with a lawsuit. In addition, any lawsuit against [Cortland] will not be against a governmental entity with any significant cash reserves. ***
>
> On the other hand, *** [Eagle] appears poised to participate in a multi-Developer financed system [*i.e.*, the 2006 SSA agreement] ***. If not, it might be somewhat hard to explain to your lender why you are considering not participating in an SSA, which will allow you to almost immediately begin building homes and selling them on Nature's Crossing parcel.
>
> *** [As to the development of Cornerstone Square], I can only suggest we [continue discussion] if we are assured, ***, by you and [Eagle], that you intend to proceed with the SSA.***.
>
> Frankly, if we do not have that assurance, we may need to consider other alternatives, including, perhaps, proceeding with the SSA without [Eagle's] full consent."

In other words, Cortland, in the letter, set forth that: (1) suing it for breach of the 2003 agreement would provide limited financial relief; and that, if Eagle did not go through with the SSA, (2) Eagle would have "a difficult time" explaining to its lenders why it was not taking every opportunity to complete and sell homes; (3) Cortland would cease to move forward on the second Eagle development contemplated in the 2003 agreement (Cornerstone Square); and (4) Cortland would, in any case, likely go through with an SSA no matter what, perhaps without Eagle's consent (and therefore without Eagle's ability to negotiate for the best possible terms, albeit in a very disadvantaged position). It is not so much that this letter itself was a threat sufficient to establish duress, but it was that the letter was evidence of the position in which Cortland knowingly placed Eagle. That position was sufficient to establish duress. Cortland refused to go through with the 2003

agreement. Cortland put Eagle in the position of either joining the SSA or suing (with limited financial relief), knowing that, due to Eagle's reliance on the 2003 agreement, Eagle had already invested large sums of money in pushing the project forward.

¶ 64 Granted, Eagle's case for duress contained some weaknesses. For example, some of the written documentation by Eagle indicated an initial *willingness* to participate in the SSA agreement. Also, Wisniewski's statement that he relied on the 2003 agreement and the 2005 passage of the PUD when he chose to invest the $3 million in infrastructure is not without doubt. Wisniewski was present at the 2005 Board meetings wherein the SSA agreements were discussed; he had reason to know that the City might breach the 2003 agreement. However, it is the jury's role to weigh the evidence and judge credibility. The evidence in favor of duress—particularly as evidenced in the February 3, 2006, letter—more than meets the standard necessary to survive a motion for JNOV. The trial court did not err in denying the motion.

¶ 65 Cortland's arguments do not convince us otherwise. Cortland argues that, because Eagle was able to negotiate for *some* favorable terms in the 2006 SSA agreement—such as permits for 52 homes prior to completion of the facility and a refund not to exceed $1,500 per residential unit if proceeds of the SSA bonds were underutilized—the jury cannot have found Eagle to have acted under duress. Cortland cites *Alexander v. Standard Oil Co.*, 97 Ill. App. 3d 809, 816 (1981), for the proposition that negotiation for benefits by the party claiming duress *undermines* that defense. Pointing to a factor that merely undermines a defense is not sufficient to secure a JNOV. See, *e.g.*, *Raintree*, 389 Ill. App. 3d at 865-66 (that developer remained profitable during the years it made the payments in question did not preclude a finding that said payments were made under duress). The relevant question was whether Cortland coerced Eagle to abandon one financing scheme (set forth

in the 2003 agreement) for another (the 2006 SSA agreement), and, given the circumstances, whether this coercion rose to the level of duress (regardless of whether Eagle was able to negotiate for some benefit *in the context of a mandatory SSA tax*). As discussed above, the evidence supported an affirmative answer to this question, particularly within the context of a motion for JNOV.

¶ 66 Cortland next makes the related argument that, because Eagle retained the benefit of the sanitary system, it cannot be said to have acted under duress when it agreed to finance the sanitary system with an SSA tax. This argument fails for the same reason as the previous argument. Moreover, the cases cited (but not discussed) by Cortland do not help its position. See, *e.g.*, *Inland Land Appreciation Fund v. County of Kane*, 344 Ill. App. 3d 720, 727 (2003) (real property owners were not under duress when they entered into an agreement to reimburse the county for money spent on a consultant where the letter from the county gave the owners an opportunity to reject the compensation arrangement and the letter *did not even hint* that the county would halt review if the owners refused to reimburse the county) and *Carlile*, 271 Ill. App. 3d at 840-42 (there *was* a question of fact, precluding summary judgment, as to whether a tool dealer entered into a release with the tool manufacturer under duress).

¶ 67 Finally, Cortland makes the legal argument that Eagle makes an improper "claim" of duress, using duress as an offensive action upon which to obtain relief. It is true that there is no precedent for offensively using economic duress as a cause of action to support a claim of damages. *Shields Enterprises v. First Chicago Corp.*, 975 F. 2d 1290, 1297 (7th cir. 1992) (discussing Illinois law); *Dahl v. Federal Land Bank Association of Western Illinois*, 213 Ill. App. 3d 867, 872 (1991). Rather, economic duress is an affirmative defense that releases a party from a contractual obligation. *Krilich v. American National Bank and Trust Co. of Chicago*, 334 Ill. App. 3d 563, 572 (2002).

¶ 68 Cortland misrepresents the procedural history of this case. Eagle's offensive claim in this case is breach of the 2003 agreement. As a defense, Cortland introduced the 2006 SSA agreement, which rescinded the 2003 agreement. Eagle replied that it entered into the 2006 SSA agreement under duress, and, therefore, it was still entitled to pursue its breach of contract claim. Therefore, Eagle properly used duress as an affirmative defense or reply to Cortland's assertion that Eagle rescinded the 2003 agreement (upon which Eagle's breach of contract claim was based).

¶ 69 C. Denial of Directed Verdict: Evidence Supports Breach of 2003 Agreement

¶ 70 Cortland argues that the trial court erred in denying its motion for a directed verdict. Similar to a motion for JNOV, a directed verdict is properly entered only where the evidence, when viewed in a light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Maple*, 151 Ill. 2d at 453 (dealing with a motion for judgment notwithstanding verdict, which applies the same rule of law). We review *de novo* a trial court's denial of a directed verdict. *Serrano*, 406 Ill. App. 3d at 908.

¶ 71 Cortland argues that, as a matter of law, Eagle cannot show breach of the 2003 agreement because the 2003 agreement does not mandate the construction of the sanitary system or set forth a firm date for its completion. We agree that, technically, the 2003 agreement did not mandate the construction of the sanitary system or set forth a firm date for its completion, because the agreement did not mandate Cortland to approve the PUD for Nature's Crossing. Neither party had an obligation to perform until Cortland adopted the PUD. *However*, Cortland's argument mis-characterizes the basis of Eagle's claim.

¶ 72 Eagle does *not* claim that Cortland breached the contract by failing to install the sanitary system or by installing the sanitary system too late (that is in part the basis of its theory on damages).

Rather, Eagle claims that Cortland breached the contract because, once Cortland chose to go through with the PUD for Nature's Crossing, it performed the condition precedent to performance and triggered the obligations under the contract to go through with the financing arrangement (paragraphs 1 and 9), impact and construction fee assignment (paragraph 2), and reservation of sufficient P.E. (paragraph 7). Instead, according to the claim, Cortland abandoned its obligations under the contract when it secured financing through the SSA agreement, in which Eagle was "forced" to partake or be denied access to the sanitary system altogether.

¶ 73 There is certainly sufficient evidence in the record, together with the reasonable inferences to be drawn therefrom, from which a jury could find a breach on this ground. The most obvious of which is that Cortland did not go through with the financing arrangement stated in the 2003 agreement. Cortland completely abandoned the terms of the 2003 agreement. Therefore, the trial court correctly denied Cortland's motion for a directed verdict.

¶ 74 We quickly dismiss Cortland's remaining argument on this issue, which is only tangentially related to the denial of the directed verdict. Cortland argues that the trial court erred in allowing Eagle to imply in closing that it was a third party beneficiary to the 2004 contract between Cortland and Sheaffer. Eagle's attorney stated in closing: "[W]here is the deadline, I already showed you the deadline. The deadline is in the other contract which the town negotiated []—[]—it's the 270 period." This statement does *not* imply third-party beneficiary status. Rather, this information is relevant to the manner in which events would have unfolded had Cortland adhered to the terms of the 2003 agreement. It explains why Eagle expected to have homes ready to sell by 2006 and supports Eagle's theory on damages. Because Eagle never asserted that it was a third-party

beneficiary to the 2004 Cortland-Sheaffer agreement, we do not address Cortland's argument that the 2004 Cortland-Sheaffer agreement was illegal.

¶ 75 D. Damages

¶ 76 In regard to damages, Cortland makes three arguments: (1) Eagle should not have been allowed to introduce evidence on lost profits where it (allegedly) failed to so plead; (2) Eagle cannot claim damages for lost profits because, at the time the parties entered into the 2003 agreement, the parties could not have reasonably contemplated that a 2007 market crash would impact profits; and, (3) even if Eagle was entitled to damages for lost profits, Eagle did not establish its lost profits with reasonable certainty.

¶ 77 Before we proceed to the merits, however, we wish to clarify upfront the parties' terminology and framing of the arguments. As discussed in the previous section, throughout its brief, Cortland inaccurately states that Eagle alleged *breach* based on delay (and, unfortunately, Eagle at times engages in this framework). It is more accurate to state Eagle's theory on *damages* was based on delay in that, because Cortland abandoned the financing scheme set forth in the 2003 agreement, the sanitary system was not in place as early as it could have been, thereby preventing Eagle from selling as many homes as it otherwise could have. However, even these alleged "delay damages" are not the "delay damages" traditionally claimed in breach of contract cases—that is, delay damages based on a party's failure to complete "the project" within the time reasonably contemplated by the contract. See, *e.g.*, 15 Ill. Law and Prac. Damages § 69 (updated February 2012). Here, Cortland did not complete "the project" as contemplated by contract—period. It completed a *similar* project (the sanitary sewer system) under the terms of a different contract. Therefore, in a sense, it was a different project.

¶ 78 The parties also use the term "lost-profit" damages to describe the same theory of damages—*i.e.*, because Cortland abandoned the financing scheme set forth in the 2003 agreement, the sanitary system was not in place as early as it could have been, thereby preventing Eagle from selling as many homes as it otherwise could have. We, too, adopt the term "lost-profit" damages, as we find it to be more accurate than the term "delay damages," and we do so under the larger umbrella of "expectation interest," to be discussed below.

¶ 79 i. Motion *in Limine*: Trial Court did not Abuse Discretion in Allowing Evidence on Lost Profits

¶ 80 Cortland argues that the trial court erred in allowing Eagle to "change its theory" of damages from a cost-differential theory (as Cortland understood to be stated in the complaint) to a combination of a cost-differential theory (for $68,000 in damages) *and* a lost-profits theory (for $1,820,000 in damages). Cortland seems to raise this issue—*i.e.*, whether a party may "change its theory" on damages—in the abstract. However, Cortland is appealing from the trial court's decision on a motion *in limine*. Generally, an appellate court reviews a trial court's decision on a motion *in limine* for an abuse of discretion; however, where the trial court's decision was based on a question of law, our review is *de novo*. *People v. Armbrust*, 2011 IL App (2d) 100995, ¶ 6.

¶ 81 Here, the trial court made two decisions at the motion *in limine*. The first, whether the pleadings were adequate, was one of law. The second, whether to admit evidence on Eagle's lost-profit theory, was entitled to deference. The two decisions are related in the sense that, had the trial court determined that the pleadings were inadequate (question of law) and/or had it determined that Cortland did not have opportunity to conduct its own discovery on lost profits or was not apprised of the evidence on lost profits (questions of fact), it could have granted Eagle leave to amend its complaint to more specifically reference lost-profit damages and reopen discovery on the matter.

Due to this relation, we approach the trial court's decision to admit evidence on lost profits with some degree of deference.

¶ 82 It is axiomatic that a plaintiff must recover, if at all, on and according to the case he or she made for himself in his or her pleadings. *Lempa v. Finkel*, 278 Ill. App. 3d 417, 424 (1996). Illinois requires fact pleading. *Id*. Under fact pleading, the pleader is required to set out ultimate facts that will support his or her cause of action. *Id*. Courts are to construe pleadings liberally to do substantial justice between the parties. *Id*.

¶ 83 In a breach of contract case, the goal of damages law is to place the party in the position they would have been in had the contract been fully performed. *O'Conner Construction Co. v. Belmont Harbor Home Development*, LLC, 391 Ill. App. 3d 533, 538-39 (2009). This concept is referred to as "expectation interest," which is measured by: (1) the loss in value to the injured party of the other party's contracted for performance caused by the other party's failure or deficiency; plus (2) any other loss, including incidental or consequential loss, caused by the breach; minus (3) any cost or other loss that the injured party has avoided by not having to perform. *Id.*, quoting Restatement (Second) of Contracts § 347, at 112 (1981). Expectation interest covers both Eagle's cost-differential theory and its lost-profits theory. Particularly given Illinois' liberal pleading standard, Eagle sufficiently pleaded damages and sought to be compensated for its total expectation interest.

¶ 84 Albeit in the context of its duress argument, Eagle pleaded that it was under financial pressure to construct and sell homes in a timely manner. These paragraphs show Eagle's implicit allegation, pervasive throughout the pleadings, that Cortland's breach jeopardized Eagle's profits:

> "36. [Without the sanitary system], not only would all the money spent by Eagle on sewer infrastructure have been wasted, but it would be 'hard to explain' to Eagle's lender

why it would not participate in the SSA which would allow *immediate* construction and sale of homes and revenue derived therefrom.

***

52. [The 2003 agreement] in fact induced Eagle's reliance upon its terms and obligations as evidenced by the fact that *Eagle pursued the development of Nature's Crossing and expended substantial sums of money* installing improvements therein." (Emphases added.)

¶ 85 Moreover, Eagle pleaded that financing under the 2006 agreement came with a greater risk to Eagle (paragraph 55), that its damages were *not* limited to the increased sanitary cost (paragraph 56), and that its damages exceeded $3 million (paragraph 57):

"55. Cortland breached the [2003 agreement] by abandoning the [financing] plan [set forth in the 2003 agreement][,] forcing Eagle to become a member of the SSA at significantly greater expense *and risk* to Eagle.

56. As a result of Cortland's breach as alleged, Eagle has suffered damages represented by, *among other things*, increased cost of sanitary sewer and wastewater treatment services for its Nature's Crossing Development.

57. As a result of Cortland's breach, Eagle has incurred damages regarding Nature's Crossing in an amount in excess of [$3 million]." (Emphases added.)

¶ 86 Given these paragraphs, Cortland was given reasonable notice that Eagle would pursue a lost-profits theory if evidence obtained in discovery supported that theory. Cortland does not substantively challenge the court's decision at the hearing that it did not, in fact, have opportunity to conduct its own discovery on lost profits or was not apprised of the evidence on lost profits. For

these reasons, we affirm the trial court's decision on the motion *in limine* to admit evidence on Eagle's lost-profits theory.

¶ 87 ii. Lost Profits were within the Reasonable Contemplation of the Parties

¶ 88 Next, Cortland argues that (even if Eagle's pleadings allowed for it to pursue a lost-profits theory in general) Eagle could not recover for lost profits resulting from the 2007 housing market crash. Cortland asserts that the parties "could not have anticipated the market crash of 2007 when the 2003 agreement was entered." Cortland argues that this is fatal to Eagle's lost-profits theory, which was based on how many homes Eagle would have been able to sell before the market crashed had the sanitary system been constructed under the original financing scheme. The trial court rejected this argument when it denied Cortland's JNOV motion, and, for the reasons that follow, we affirm the trial court's decision.

¶ 89 An award for lost profits is permitted only if: (1) the loss was proved with a reasonable degree of certainty; (2) the wrongful act of the defendant caused the loss of profits; and (3) the profits were reasonably within the contemplation of the defaulting party at the time the contract was entered into. *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 706 (2010). Loss may be foreseeable as a probable result of the breach if it follows from the breach in the ordinary course of events or it follows as a result of special circumstances about which the breaching party had reason to know. *Edward Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5, 12 (1991). A trial court's decision as to whether damages are recoverable is reviewed according to an abuse-of-discretion standard. *Hernandez*, 404 Ill. App. 3d at 707.

¶ 90 A review of the cases cited by Cortland, *Gillen* and *Hernandez*, does not convince us that the trial court abused its discretion. In *Gillen*, the plaintiff entered into contract to construct an offshore

breakwater in Lake Michigan for the defendant. The defendant entered into a separate contract with a third party to provide stone for the project. When the third party delivered the stone to the plaintiff, it did not meet the requirements set forth in the contract between plaintiff and defendant. The defendant ordered the third party to take back the stone and ship new stone. This resulted in delays in the construction of the breakwater. Plaintiff then carried the new stone in its tugboat out to the project site in *early October*, even though towing "was to have been completed" *by late September* to avoid high seas and strong winds on Lake Michigan. The tugboat crashed and sank. The plaintiff sued the defendant for breach of contract based on breach of warranty for the non-conforming stone. The plaintiff sought monetary damages, alleging that the delay resulting from the non-conforming stone caused the sinking of its tugboat. The trial court dismissed the complaint. The appellate court affirmed, holding that, as a matter of law, the complaint was insufficient to state a cause of action to recover damages resulting from the sinking of the tugboat, because it failed to establish that such damages were within the reasonable contemplation of the parties when they contracted. *Gillen*, 221 Ill. App. 3d at 12-13.

¶ 91 *Gillen* is distinguishable from the instant case; its facts simply make it an odd-ball case that has little bearing here. First, given that the complaint in *Gillen* was dismissed, we are not even certain that the initial shipment of non-conforming stone and the slight delay that it caused constituted a material breach of the contract. It is more likely that it was just the sort of snafu that parties work through in good faith. Second, it is quite a stretch to say that a two-week delay caused a tugboat to sink. It is easy to see why the trial court held that, at the time the parties formed the contract, it was not within defendant's reasonable contemplation that a minor delay would cause

plaintiff to put its tugboat in bad water and that the tugboat would sink. In contrast, Eagle's goal of selling homes at a profit and in a timely manner was certainly contemplated by both parties.

¶ 92 The next case, *Hernandez,* is less of an anomaly and better illustrates the requirement that damages be within the "reasonable contemplation" of the parties. However, it, too, is distinguishable. In *Hernandez,* the realtor plaintiff entered into a contract to purchase a home from the defendant for $50,000. The defendant refused to proceed to closing, and the plaintiff filed a complaint seeking specific performance *and* money damages. As to money damages, the plaintiff claimed that she lost a resale opportunity when the market crashed in 2007. The court denied the plaintiff money damages, stating that, even if the defendant had general knowledge that the plaintiff was in the real estate business, this knowledge was insufficient to charge him with the knowledge necessary to sustain a claim for lost resale profits. *Hernandez,* 404 Ill. App. 3d at 707, citing *Spangler v. Holthusen*, 61 Ill. App. 3d 74, 82 (1978) (holding that lost profits from a proposed collateral sale arising after execution of the real estate sales contract could not be imposed upon the sellers of the real estate when the collateral sale was unknown to the sellers).

¶ 93 *Hernandez* bears *some* similarity to the instant case; the 2007 market crash prevented the plaintiff from selling the real estate at issue. However, this similarity does not require us to reach the same result. *Unlike* the instant case, the defendant in *Hernandez* was merely the owner of a single piece of real estate, which he had agreed to sell. The simple sales contract did not inform the defendant that the plaintiff intended to subsequently improve and resell the property or obligate him to aid in that plan in any way.

¶ 94 In contrast, in our case, Cortland was well aware that the property at issue was to be developed for profit. Its knowledge of the property's proposed development was *not* limited in scope

to the financing scheme for the sanitary treatment plant. Specifically, at the time the parties entered into the 2003 agreement, it was within their *reasonable contemplation* that: (1) Eagle was planning a residential development with more than 500 units (*i.e.*, requiring significant investment capital and loans); (2) a sanitary system serving the area was necessary in order to sell any homes therein; (3) Eagle would likely begin (infrastructure) construction upon Cortland's passage of a PUD and upon other indicators that events were unfolding as contemplated in the 2003 agreement (*i.e.*, Shaeffer's agreement to build the sanitary system); and (4) if Cortland breached the contract (by abandoning the agreed upon financing plan for the sanitary system) after the passage of the PUD and after Eagle had already begun construction, Eagle's ability to sell homes would be indefinitely hampered (*i.e.*, delayed) pending assurance of a new sanitary system. Therefore, in 2003, it was within Cortland's reasonable contemplation that abandoning the agreed upon financing scheme mid-performance would have injured Eagle, leaving Eagle with debt for its commitment to the project up to that point and leaving Eagle in a disadvantaged position to sell homes. Not only did Cortland know about Eagle's plan to profit from the development, the 2003 agreement made Cortland a partner in that development. Cortland cannot claim that it did not contemplate that breaching the 2003 agreement would jeopardize Eagle's ability to profit from the development.

¶ 95 Finally, we note that Cortland does not complain that this same 2007 market crash *lessened* the damages awarded under the cost-differential theory. Because the market crashed, Eagle sold only 34 homes, not over 500 as it had contemplated at the formation of the 2003 agreement. Therefore, Eagle's cost-differential damages were only $68,000 (34 x $2,000 each), as opposed to over $2,000,000 (over 500 x $2,000 each). In 2003, it was within Cortland's reasonable contemplation that breaching the 2003 agreement would change the financing of the sewer system (cost-differential

theory) *and* jeopardize Eagle's ability to profit from the development (lost-profits theory). That the specific occurrence of the 2007 market crash lowered damages under one theory and raised damages under the other theory does not alter the fact that both damage trajectories were within reasonable contemplation of the parties at the time they entered into the 2003 agreement.

¶ 96 iii. Evidence Supported Damages Amount

¶ 97 Next, Cortland argues that, even if Eagle was entitled to seek damages for lost profits, Eagle did not establish its lost profits with a reasonable degree of certainty. To recover damages, the proof must show that damages were sustained and must support a reasonable basis for the computation of those damages. *Olliver v. Alden*, 262 Ill. App. 3d 190, 196 (1994); 15 Ill. Law and Prac. Damages § 124 (2012). In an action for loss of profits caused by a breach of contract, a plaintiff must prove by a preponderance of the evidence that he or she sustained losses due to the breach. *Algonquin Manor Building Corp. v. Waters*, 79 Ill. App. 2d 486, 486 (1967); 15 Ill. Law and Prac. Damages § 124. However, proof of damages in breach of contract cases need not be as specific as in other types of cases. *Byrne v. Shell Oil Co.*, 295 F. 2d 797, 800 (7th Cir. 1961). Damages are within the province of the jury, as they present a question of fact. *Hunamadass v. Coffield, Ungaretti, and Harris*, 311 Ill. App. 3d 94, 102 (1999). Therefore, as the jury is free to assess the witnesses and testimony, a court of review should affirm those damage awards that are sustained by the evidence or the absence of evidence. *Id*. We consider in turn damages under the cost-differential theory and under the lost-profit theory. We also note that, as to both theories, Eagle's expert testimony was unrebutted.

¶ 98 As to the $68,000 in damages under the cost-differential theory, Cortland contends that the cost-differential of $2,000 per home is a "false premise" because that amount does not account for

lower potable water delivery costs (and the infrastructure to deliver it) provided for in the 2006 agreement. However, Eagle presented evidence that it did not *need* this type of water delivery. Eagle notes that being forced to pay for an unneeded service is not a proper component of damages. We agree.

¶ 99 As to the $1.82 million (plus interest)[2] in damages under the lost-profits theory, Cortland points to three alleged "flaws" in Eagle's evidence: (1) the $20,000 profit-per-home figure was unreliable; (2) the 175 home-sales number was unrealistic because it was unlikely to anticipate home sales in 2005 or 2006 (hence challenging the idea that breach of the 2003 agreement caused a delay); and (3) the 175 number was unrealistic because "Phase 1" of development consisted of only 140 homes.

¶ 100 First, we find no flaw with the $20,000 profit-per-home figure. The $20,000 dollar amount was a rounded number based on the projections in the *pro forma* report, which anticipated a $19,000 plus profit per home. Cortland complains that Eagle did not use the *actual* cost or *actual* profit on the 34 homes that sold (rather than projections). However, Eagle's expert, Newman, testified that the actual profits on the 34 homes sold were *greater* than $20,000. Therefore, Cortland's argument falls flat.

¶ 101 Second, we reject Cortland's argument that breach of the 2003 agreement did not postpone sales. Cortland bases this argument on Eagle's exhibit No. 1 (page JN0020), which stated that zero units would be sold in 2005 and 2006. However, this document is titled "Eagle Homes *SSA Cost*

[2] 175 homes (x) $20,000 profit per home = $2.888 million in total damages (-) $68,000 under cost-differential theory (-) the $1 million under the 2003 agreement Eagle was no longer obligated to pay = $1.82 million.

Analysis." In other words, this document projected the number of homes that would be sold under the 2006 SSA agreement, *not* the 2003 agreement. It says nothing about how many homes would have been sold in 2005 and 2006 under the 2003 agreement.

¶ 102 Third, the number of homes anticipated to be built in "Phase 1" of development is not dispositive of the number of homes that would have been sold prior to the 2007 market crash had the 2003 agreement been carried out. Rather than look to one apparent inconsistency, which was the jury's job to weigh, we look to the evidence overall.

¶ 103 The evidence is sufficient to support the jury's reliance on the 175 home-sales figure. The 2003 agreement indicated that *over 500* homes were planned. Eagle's projection that it would have sold 175 homes under the 2003 agreement was based in part on a comparison with Eagle's Heatherfield development in Cortland. Heatherfield was a similar development in the same community. Heatherfield averaged more than four home sales per month. This rate would support the figure of 175 homes sold. Additionally, Eagle's projection that it would have sold 175 homes under the 2003 agreement was based on its 40-page *pro forma* report, which it had submitted to its lender. The report was prepared by Eagle's CFO and CPA, Glenn Mordini, who had more than 20 years experience in preparing such reports. The report contained sales projections, a timeline for the project, and projected profits per unit sold. The report projected that three single-family homes and two carriage homes would be sold per month. Finally, Eagle's projection was based on an independent analysis commissioned by the lender. The lender's report projected 3 to 4 single-family home sales and 4 to 5 carriage home sales per month. The lender's report was based on comparisons to six comparable subdivisions, one of which was Eagle's Heatherfield. Eagle's expert testified that both reports were, for the time, conservative projections. In sum, Eagle presented three theories

upon which the 175 figure was based (two of which, the *pro forma* report and the lender's report, projected more than 175). This evidence is sufficient to sustain the jury's finding.

¶ 104 E. Jury Instructions

¶ 105 Finally, Cortland argues that the trial court erred in refusing two of the jury instructions it offered: (1) No. 7 (which set forth the three requirements of a contract: offer, acceptance, and consideration); and (2) No. 11 (which instructed the jury that, in order to find a breach, it was required to find that Cortland was obligated to "build a particular type and size of sewer system *by a date certain* under the 2003 Agreement"). A trial court's refusal to give an instruction, even if the instruction was improper, results in reversible error only if the instructions given clearly misled the jury and resulted in prejudice to the defendant. *New Pace Suburban Bus Service*, 398 Ill. App. 371, 381 (2010).

¶ 106 As to instruction No. 7, Cortland was not prejudiced by the court's failure to provide the jury with an instruction concerning contract formation. Where the facts are not in dispute, the existence of a contract is a question of law that the appellate court may independently review. *Reese v. Forsythe Mergers Group*, 288 Ill. App. 3d 972, 979 (1997). While certain factual aspects of this case have been disputed, it is apparent from the plain language of the 2003 agreement that a contract between the parties existed. This issue has been discussed extensively in section (II)(A)(i).

¶ 107 As to instruction No. 11, the court did not err in refusing to so instruct the jury. Cortland's proposed instruction was too narrow, in the sense that it allowed for only one "theory" of breach (based on "delay"). Again, the question of "delay," or postponement of Eagle's ability to sell homes, is a factor to consider in computing *damages*, rather than a requirement to finding a *breach*. The instructions actually given by the court, which broadly required the jury to find that Cortland was

obligated to "improve and expand sanitary sewer service providing a new treatment facility and reserving the capacity of that new system for Eagle Homes, LLC, Nature's Crossing, and Cornerstone Square developments *per the terms of the 2003 agreement*," more accurately framed the question of *breach*.

¶ 108 III. CONCLUSION

¶ 109 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 110 Affirmed.