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2017 IL App (3d) 160216-U

Order filed May 2, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

CITY OF PEORIA,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee/Cross-Appellant,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-16-0216
	)	Circuit No. 06-MR-155
PEORIA AREA ADVANCEMENT GROUP,	)	
LLC,	)	Honorable
	)	James A. Mack,
Defendant-Appellant/Cross-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The City of Peoria breached the 2005 agreement with Peoria Area Advancement Group, LLC by failing to complete the due diligence tasks set out in exhibit A to the 2005 agreement. The trial court erred by staying the litigation pending the outcome of court-ordered arbitration when the trial court should have ordered the City of Peoria to repay the $1 million loan from Peoria Area Advancement Group, LLC plus interest due to the City of Peoria's breach of the 2005 agreement. The matter is remanded for a trier of fact to resolve the amount of interest Peoria Area Advancement Group, LLC is entitled to as a result of the City of Peoria's breach of the 2005 agreement.

¶ 2 On March 24, 2016, the trial court entered an order granting partial summary judgment in favor of the defendant, Peoria Area Advancement Group, LLC, and against the plaintiff, the City of Peoria, on both the City of Peoria's complaint for declaratory judgment and on Peoria Area Advancement Group, LLC's breach of contract counterclaim. In addition, the court entered an order staying the litigation pending the outcome of court-ordered arbitration. On appeal, Peoria Area Advancement Group, LLC requests the reversal of the trial court's order compelling arbitration to determine Peoria Area Advancement Group, LLC's right to recovery and requests this court to remand the matter with directions for the trial court to order the City of Peoria to repay the $1 million loan, plus interest.

¶ 3 The City of Peoria's cross-appeal also challenges the trial court's order compelling arbitration. In the cross-appeal, the City of Peoria asserts the 2005 agreement is void and unenforceable due to the prior appropriation rule contained in section 8-1-7(a) of the Illinois Municipal Code (65 ILCS 5/8-1-7(a) (West 2004)). Alternatively, even if this court determines the 2005 agreement is enforceable, the City of Peoria argues in the cross-appeal that the trial court erroneously found the City of Peoria breached the terms of the 2005 agreement. Lastly, the City of Peoria submits Peoria Area Advancement Group, LLC's inability to establish damages arising out of the breach of contract should have precluded its successful claim for summary judgment.

¶ 4 FACTS

¶ 5 Illinois American Water Company (IAWC) owns the waterworks facility that supplies water to the citizens of the City of Peoria (the City). Pursuant to an agreement entered into between the City and IAWC's predecessor, Peoria Water Company, long ago in 1889, and

amended thereafter, the City has the option, every five years, to purchase the waterworks facility. The validity of the purchase option was confirmed by this court in *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098 (2002), *appeal denied* 202 Ill. 2d 603 (2002).

¶ 6 I. The 1998 Agreement

¶ 7 On December 19, 1998, the City and Peoria Area Advancement Group, LLC (PAAG) entered into an agreement (the 1998 agreement) wherein PAAG agreed to loan the City up to $1 million to be used by the City to explore the feasibility of purchasing certain assets of IAWC related to the operation of the waterworks facility located in and around Peoria, Illinois. According to the 1998 agreement, it was anticipated that the loaned funds would be used by the City to employ public relations consultants, engineers, appraisers, and similar experts associated with the acquisition. The 1998 agreement contained a 9% interest rate on the $1 million loan, as well as an arbitration clause requiring the parties to arbitrate any disputes arising out of the 1998 agreement.

¶ 8 The 1998 agreement also contemplated that various legal services would be required on behalf of the City to determine the feasibility of the acquisition. The 1998 agreement provided that the fees and expenses of such legal counsel would be paid out of the loan proceeds.

¶ 9 Finally, the 1998 agreement provided for a selection committee tasked with determining the financial feasibility of the acquisition. The selection committee was comprised of two representatives designated by PAAG, the mayor of the City, and two additional members designated by the mayor of the City and approved by the city council. The 1998 agreement provided that the City may terminate the agreement if the selection committee determined that the acquisition was not financially feasible under the procedures set forth in the agreement. The 1998 agreement further provided that if the City elected to terminate the agreement pursuant to

this provision, "the City shall have no obligation to repay the Loan and all indebtedness associated therewith shall be deemed forgiven by PAAG." On the other hand, if the purchase was financially feasible and the City terminated the agreement, the City would be required to repay PAAG the entire loan plus interest at the rate of 9% per annum.

¶ 10 Over the next six years, PAAG provided the City with $1 million. According to PAAG, the City expended the borrowed funds to pay litigation expenses to fight a declaratory judgment action filed by IAWC, seeking to declare the City's option to purchase the waterworks facility to be invalid. See *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098 (2002), *appeal denied* 202 Ill. 2d 603 (2002).

¶ 11 In November 2004, the City and PAAG modified the original 1998 agreement to reduce the contractual interest rate from 9% to 6.9%. This modification arose from the City's promise to fund up to $500,000 in additional fees for the required appraisal necessary before the City could purchase the waterworks facility.

¶ 12 On April 7, 2005, the selection committee approved a motion stating that the purchase of the private waterworks facility for $225 million was not financially feasible under the terms of the 1998 agreement based on a straight-line debt service of 26 years. However, the selection committee also voted unanimously for a "[m]otion to forward [a] financial feasibility analysis that demonstrated affordability based on assumptions adopted by the Water Selection Committee for City Council deliberation and decision." On April 19, 2005, the city council voted to approve the motion to accept a purchase price of $220 million for the waterworks facility as set by the appraisal commission and to remove PAAG from repayment.

¶ 13 II. The 2005 Agreement

¶ 14 On April 25, 2005, the City and PAAG entered into another contract (the 2005 agreement) related to the purchase of the private waterworks facility.

¶ 15 The relevant language of the 2005 agreement is set forth below:

> "1. The City terminated the Loan Agreement dated December 19, 1998, and amended November 16, 2004.
>
> 2. In consideration for the City conducting, in good faith the due diligence towards the acquisition of the water works facility, completing the tasks substantially as outlined by the City's consultants as set forth on Exhibit A attached hereto, PAAG hereby covenants and agrees to forego the return of the amount loaned and interest and not to institute any action, suit, demand, cause of action, suit in equity or at law or under any statute or otherwise, on account of the City's termination of the Loan Agreement. It is understood by and between the parties that the City is not covenanting to PAAG to purchase the water works facility."

¶ 16 Exhibit A to the 2005 agreement was prepared by engineering consultant Clark Dietz, Inc. and itemized the projected costs for due diligence and for the purchase of the waterworks facility and beginning operations. The preliminary estimate addressed the costs of due diligence tasks to be undertaken between April and October 2005 during the "period between the City's decision to proceed with the purchase and the City's second Go/No Go decision six months later." Exhibit A also contained an estimated timeline for tasks to be undertaken between November and December 2005 during "the period for finalizing the purchase and beginning operation." However, exhibit A indicated that "[i]f the City should decide in October not to

proceed because of information uncovered during the due diligence period, the costs for November – December would not be incurred."

¶ 17 Prior to the completion of the initial due diligence phase, city council member Manning "gave a brief overview of due diligence performed by Council Members over the past two months" during the city council meeting held on August 23, 2005.[1] On August 23, 2015, the city council reversed itself and voted not to proceed with the anticipated due diligence activities set forth in exhibit A of the 2005 agreement. On the same date, the city council voted not to spend $350,000 to retain an engineering firm, Clark Dietz, Inc. The city council also voted not to retain legal counsel to represent the City in the acquisition of the waterworks facility. On September 26, 2005, the City sent a letter to IAWC and PAAG declining to exercise the purchase option.

¶ 18 On March 30, 2006, PAAG filed a demand for arbitration with the American Arbitration Association. In PAAG's demand, PAAG asserted that the City breached the 1998 agreement by failing to repay the $1 million loan and breached the 2005 agreement by failing to conduct due diligence or act in good faith to determine the affordability of the purchase of the waterworks facility. Therefore, PAAG sought repayment of its $1 million loan plus interest, attorneys' fees, and arbitration costs.

¶ 19 III. The City's 2006 Declaratory Judgment Action

¶ 20 In response to PAAG's demand for arbitration, on May 23, 2006, the City filed a complaint against PAAG in the circuit court of Peoria County in case No. 06-MR-155. The complaint for declaratory relief requested the trial court to declare that the City did not breach

[1]This fact was not brought to the trial court's attention by either party in the summary judgment proceedings. Therefore, we disregard this fact when reviewing the trial court's ruling on the parties' summary judgment motions. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.").

the 2005 agreement and could not be compelled to participate in arbitration or repay the loaned funds. The City's complaint also asked the trial court to award the City the costs associated with bringing the 2006 lawsuit.

¶ 21 On July 21, 2006, PAAG filed a motion to compel arbitration and to stay the litigation in case No. 06-MR-155. On September 7, 2006, the trial court entered an order denying PAAG's motion to compel arbitration after finding the 2005 agreement unambiguously terminated the entire 1998 agreement. Therefore, the trial court concluded that since the entire 1998 agreement was terminated, the 2005 agreement could not be considered an amendment to the previous agreement. Since there was no arbitration clause in the 2005 agreement, the trial court denied PAAG's motion to compel arbitration.

¶ 22 IV. The 2007 Appeal

¶ 23 Following the trial court's decision, PAAG filed an interlocutory appeal to the Third District Appellate Court. *City of Peoria v. Peoria Area Advancement Group, LLC*, No. 3-06-0876 (2007) (unpublished order under Supreme Court Rule 23). According to the unpublished decision resolving the 2007 appeal, PAAG argued that the trial court improperly denied PAAG's motion to compel arbitration because the 2005 agreement represented an amendment to the 1998 agreement, which contained an arbitration clause. *Id*. at 4.

¶ 24 In the 2007 appeal, this court held that the language used throughout the 2005 agreement expressed a clear intent by the parties to terminate the 1998 agreement and also held the 1998 agreement no longer existed. *Id*. at 5. Consequently, this court affirmed the trial court's order denying PAAG's motion to compel arbitration. *Id*. Our court stated that "any disputes over the due diligence of the determination of financial feasibility and the corresponding responsibility to

repay the loan are governed by the April 2005 agreement, which does not include an arbitration provision." *Id*. at 9.

¶ 25 V. PAAG Counterclaim

¶ 26 Following remand from the appeal in case No. 3-06-0876, on February 12, 2009, PAAG filed a breach of contract counterclaim against the City. PAAG's counterclaim alleged the City breached the 2005 agreement by failing to conduct the required due diligence before deciding the acquisition of the waterworks facility would not be affordable. Further, as part of the 2009 counterclaim, PAAG requested that the trial court award PAAG $1 million in contractual damages, plus interest at the rate of 6.9% due to the City's breach. PAAG also requested the court to order the City to pay PAAG's costs incurred to defend against the declaratory action the City initiated against PAAG in case No. 06-MR-155.

¶ 27 In early 2015, PAAG filed a motion for summary judgment on both the City's 2006 complaint for declaratory judgment and on PAAG's 2009 counterclaim for breach of contract in case No. 06-MR-155. In support of PAAG's motion for summary judgment, PAAG argued there was no genuine issue of material fact pertaining to the issue of whether the City breached the 2005 agreement by failing to satisfy the due diligence clause of the 2005 agreement. Further, PAAG asserted the trial court should compel the City to pay obvious damages to PAAG in the amount of $1 million, plus interest at the rate of 6.9%, and costs incurred in relation to the City's complaint for declaratory action in case No. 06-MR-155.

¶ 28 In April 2015, the City filed a cross-motion for summary judgment on its complaint for declaratory judgment and on PAAG's counterclaim for breach of contract. In this motion, the City argued that the 2005 agreement explicitly terminated and forgave the City's prior obligation to repay PAAG. Further, the City argued that the city council must first vote to proceed with the

purchase of the waterworks facility as a condition precedent to the City's contractual obligation to begin the first due diligence phase contemplated by the 2005 agreement. Lastly, the City argued the 2005 agreement was void and unenforceable since the city council did not make a prior financial appropriation to cover the costs of conducting the due diligence activities set forth in the 2005 agreement pursuant to section 8-1-7 of the Illinois Municipal Code (65 ILCS 5/8-1-7 (West 2004)).

¶ 29 The trial court rejected the City's argument that the 2005 agreement explicitly terminated and forgave the City's prior obligation to repay PAAG. Instead, the trial court concluded the 2005 agreement simply memorialized the dispute between the parties over whether the City's termination of the 1998 agreement was proper without resolving the dispute itself.

¶ 30 The court was also not persuaded by the City's contention that the prior appropriation rule rendered the 2005 agreement void. Finally, the court rejected the City's assertion that the condition precedent in the 2005 agreement had not materialized, thereby excusing the City's failure to exercise due diligence. In particular, the City claimed a duty to perform due diligence under the 2005 agreement did not exist until the City voted to proceed with the purchase of the waterworks facility. The City argued the City had not voted to expend funds or to purchase the waterworks facility. The trial court found that at the time the 2005 agreement was entered into, the City had already voted to pursue the next stage of the purchase procedure, the due diligence activities, on April 19, 2005, several days prior to the execution of the 2005 agreement. Consequently, on March 24, 2016, the trial court issued an order concluding that, as a matter of law, the City breached the 2005 agreement by failing to complete the due diligence tasks set out in exhibit A to the 2005 agreement. After finding the City breached the 2005 agreement, the trial

court found that the "2005 agreement tacitly provides that PAAG may now pursue the repayment of its loan principal and interest, provided it prevails under the 1998 agreement."

¶ 31 The trial court also found PAAG's ability to claim repayment of the loan and interest should be resolved under the terms of the 1998 agreement, as amended in 2004. The trial court held the 1998 agreement required the parties to engage in arbitration to settle the disputes between the parties. Therefore, the trial court stayed the litigation pending an arbitrator's decision regarding PAAG's right to recovery.

¶ 32 ANALYSIS

¶ 33 In this appeal, PAAG challenges the trial court's March 24, 2016, order partially denying PAAG's motion for summary judgment on PAAG's counterclaim alleging the City breached the 2005 contract and should repay the $1 million loan plus interest. Specifically, PAAG first asserts the trial court erred by compelling arbitration because this court held the 1998 agreement containing an arbitration clause was terminated by the terms of the 2005 agreement. Further, PAAG argues the trial court erred by denying its request to enter an order requiring the City to repay the $1 million loan plus interest based on the plain language of the 2005 agreement.

¶ 34 The City has also filed a cross-appeal for our consideration. Similarly, the City's cross-appeal challenges the trial court's order compelling arbitration because the trial court's decision is directly contrary to this court's ruling in the first appeal. Next, the City requests this court to reverse the trial court's March 24, 2016, order finding the 2005 agreement was not void as a matter of law due to the requirements of the prior appropriation rule contained in section 8-1-7(a) of the Illinois Municipal Code. 65 ILCS 5/8-1-7(a) (West 2004). Alternatively, even if this court affirms the trial court's holding that the 2005 agreement is enforceable, the City argues the

minutes from the city council's August 23, 2005, meeting contradict the trial court's finding with respect to the absence of due diligence. Finally, the City argues that PAAG's inability to establish damages resulting from a purported breach by the City defeats PAAG's claim for summary judgment.

¶ 35 Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and other relevant evidence on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 15 (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). However, once a party has made a properly supported motion for summary judgment, the nonmoving party must come forward with evidence showing that there is a genuine issue for trial. *Id*. In appeals from summary judgment rulings, the review is *de novo. Id*.

¶ 36 To recover for a breach of contract, a party must prove "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages." *Village of South Elgin v. Waste Management of Illinois, Inc*., 348 Ill. App. 3d 929, 940 (2004). Since the trial court's order staying litigation and compelling arbitration involves an issue common to both the appeal and cross-appeal, we address this issue first.

¶ 37 I. Arbitration

¶ 38 In this appeal, both parties contest the trial court's March 24, 2016, order staying the litigation pending arbitration. Here, the parties agree that the trial court's order compelling

arbitration is inconsistent with the holding in *City of Peoria v. Peoria Area Advancement Group, LLC*, No. 3-06-0876 (2007) (unpublished order under Supreme Court Rule 23). Both sides agree, based on the law of the case doctrine, arbitration is not required to resolve the pending contractual dispute regarding the repayment of the loan at issue. We agree.

¶ 39 The law of the case doctrine "provides that where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question for all subsequent stages of the suit." *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 374, (2007) (internal quotations omitted). "The law-of-the-case doctrine prohibits the reconsideration of issues that have been decided by a reviewing court in a prior appeal." *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824-25 (2008) (quoting *Norton v. City of Chicago*, 293 Ill. App. 3d 620 624 (1997).

¶ 40 In the first appeal between these parties, this court stated:

> "The language used throughout the April 2005 document expresses a clear intent that the 1998 loan agreement had been terminated and no longer existed. Based upon the plain language of the April 2005 agreement, the parties agreed that any consideration of the water facility purchase after April 25, 2005, would be governed by the terms of the April 2005 loan agreement. No right to arbitration appears in that agreement."

City of Peoria v. Peoria Area Advancement Group, LLC, No. 3-06-0876, at 5 (2007) (unpublished order under Supreme Court Rule 23). In addition, this court expressly held "any disputes over the due diligence of the determination of financial feasibility and the corresponding responsibility to repay the loan are governed by the April 2005 agreement, which does not include an arbitration provision." *Id*. at 9.

¶ 41 We agree the trial court erroneously ignored this holding. For these reasons, we reverse the trial court's order staying litigation and compelling arbitration to determine PAAG's right to recovery as a result of the City's breach.

¶ 42 Next, we consider the contested issues raised in the City's cross-appeal because the outcome of those issues allows for a more organized discussion of the issues raised by PAAG before this court.

¶ 43 II. The City's Cross-Appeal

¶ 44 A. Validity of the 2005 Agreement

¶ 45 In the City's cross-appeal, the City argues the 2005 agreement is void as a matter of law due to the requirements of the prior appropriation rule. 65 ILCS 5/8-1-7(a) (West 2004). The City's contention that the 2005 agreement is void under section 8-1-7(a) of the Illinois Municipal Code presents a question of law subject to a *de novo* standard of review. See *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 282 (2006) (stating that the construction of a statute is a question of law reviewed *de novo*). Section 8-1-7(a) of the Illinois Municipal Code provides, in relevant part:

> "[N]o contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality *** unless an appropriation has been previously made concerning that contract or expense."

65 ILCS 5/8-1-7(a) (West 2004).

¶ 46 The purpose of the prior appropriation rule is to protect the municipal treasury against incurring liabilities that exceed an appropriation or for which no appropriation has been made. *Beling v. City of East Moline*, 14 Ill. App. 2d 263, 272 (1957). The prior appropriation

requirement is "mandatory and was enacted for the protection of the taxpayer." *Id*. Therefore, any contract made by a municipality in violation of section 8-1-7 of the Illinois Municipal Code without a full prior appropriation by the city council is rendered null and void. *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 152-53 (1995).

¶ 47 In this case, the plain language of the 2005 agreement itself does not require the City to make any payments. Without a required payment, a prior appropriation is not necessary to validate a contract with a municipality. *Estate of Besinger v. Village of Carpentersville*, 258 Ill. App. 3d 218, 231 (1994). At most, the 2005 agreement provides estimated costs for certain due diligence tasks the City had a generous time frame to complete. Hence, if the City found it necessary to contract with a third party to complete a particular task, the third-party contract could require a prior appropriation to be enforceable. Therefore, the financial appropriation would be required before the formation of each third-party contract. As PAAG points out, the third-party contracts for the services set out in exhibit A to the 2005 agreement, including the services of various law firms and an engineering firm, were separately submitted for approval by the city council, but later withdrawn after the City voted not to proceed with several due diligence tasks during the meeting on August 23, 2005.

¶ 48 For these reasons, the 2005 agreement itself was not rendered void by section 8-1-7 of the Illinois Municipal Code. 65 ILCS 5/8-1-7(a) (West 2004). Therefore, we affirm the trial court's order partially granting PAAG's motion for summary judgment on the City's complaint for declaratory judgment and on PAAG's counterclaim for breach of contract and denying the City's cross-motion for summary judgment.

¶ 49 B. Due Diligence

¶ 50 Next, the City contends that if this court upholds the validity of the 2005 agreement, then we should reverse the trial court's finding that the City did not exercise due diligence. However, as PAAG points out, the City's position on due diligence on appeal is significantly different from the City's approach to due diligence in the trial court.

¶ 51 For example, when before the trial court, the City implicitly conceded due diligence did not take place and was not required until the City voted to proceed with the purchase of the waterworks facility.[2] Alternatively, the City contends that the 2005 agreement was void based on the lack of a prior appropriation for purposes of the expenditures contemplated by the 2005 agreement. The trial court rejected the first argument after finding that a vote had already taken place on April 19, 2005, several days prior to the execution of the 2005 agreement. The trial court also rejected the City's alternative argument based on the absence of a prior appropriation.

¶ 52 Now, the City claims the record reveals the City actually exercised due diligence even though this point was not presented to the trial court by the City. In support of this new theory, the City asks this court to examine the minutes from the August 23, 2005, city council meeting indicating a council member, Manning ,"gave a brief summary of the due diligence activities that took place in the preceding two months."

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[2]The City's argument in the trial court is best understood by examining the City's response to PAAG's statement of undisputed material facts in support of PAAG's motion for summary judgment. The relevant language of the City's response is set forth below:

> "The City denies that PAAG can satisfy the condition precedent of showing that the City voted to proceed with the purchase of the Illinois American Water Company's Peoria Waterworks facility in order to trigger the first due diligence period referred to in the April 2005 Agreement and its attached and incorporated Exhibit A *** The City denies that it made an appropriation for the estimated expenses detailed in the April 25, 2005 Agreement, as required in order to not render the April 25, 2005 Agreement null and void under 65 ILCS 5/8-1-7."

¶ 53 It is undisputed that PAAG, not the City, submitted these city council minutes to the trial court for consideration during the summary judgment proceedings. It is well settled that issues not raised by a party in the trial court may not be raised by that party for the first time on appeal. See *Haudrich*, 169 Ill. 2d at 536. To avoid forfeiture, the City reminds this court that forfeiture applies to the parties and does not necessarily impose a limitation on the court. We agree. However, in this appeal, the City does not elaborate or persuasively discuss how the purported and minimal activities that took place before August 23, 2005, satisfied the substantial compliance requirements of exhibit A to the 2005 agreement. Respectfully, we observe it is neither the trial court's role nor this court's role to comb the record for evidence that could create a triable issue of fact to defeat the opposing party's summary judgment motion. A federal court has colorfully stated this proposition as follows: "Judges are not like pigs, hunting for truffles buried in [the record]." *Gross v. Town of Cicero, Illinois*, 619 F.3d 697, 702 (2010) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (1991). Therefore, we conclude forfeiture applies on the issue of whether the minimal activities that ended in August 2005 were sufficient.

¶ 54 For these reasons, we affirm the trial court's ruling that the City breached the 2005 agreement by failing to substantially complete the tasks required by the 2005 agreement.

¶ 55 C. PAAG's Damages

¶ 56 Next, the City argues that even assuming, *arguendo*, this court will uphold the trial court's declaration that the City breached the 2005 agreement, PAAG's inability to establish contractual damages defeats PAAG's claim for summary judgment. The case law establishes, "[d]amages are an essential element of a breach-of-contract claim, so a plaintiff's failure to prove damages entitles the defendant to judgment as a matter of law." *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 30. Contract damages are measured

by the amount of money needed to place the plaintiff in the same position as if the contract had been performed. *Id*.

¶ 57 As an initial matter, our careful review of the record reveals the City did not challenge PAAG's motion for summary judgment on its counterclaim for breach of contract by alleging PAAG's failure to establish damages. As a result, we conclude the City has also forfeited any argument that PAAG's failure to demonstrate the existence of damages resulting from the City's breach defeats recovery by summary judgment on PAAG's counterclaim. See *Haudrich*, 169 Ill. 2d at 536.

¶ 58 Further, in response to this issue raised for the first time on appeal by the City, PAAG asserts its damages are "markedly clear" because it is undisputed that "the City took PAAG's $1 million loan, kept it for 18 years, used it to affirm a $50 million purchase option, refused to comply with its obligation to perform due diligence, and now refuses to repay it." This statement is undeniable and very persuasive to this court. PAAG has waited over 18 years for the return of their loan and damages arising from the breach of the 2005 agreement are quite obvious.

¶ 59 II. PAAG's Appeal

¶ 60 A. Repayment of Principal and Interest under the 2005 Agreement

¶ 61 PAAG argues that the plain language of the 2005 agreement implies the City would be required to repay PAAG the $1 million loan plus interest. In contrast, the City asserts the undisputed language of the 2005 agreement "does not implicitly create a corresponding promise by the City to repay the loan if [the City] failed to fulfill its obligations."

¶ 62 Contract interpretation presents a question of law subject to *de novo* review on appeal. *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 18. "A contract will be considered ambiguous if it is capable of being understood in more sense than one." *Farm Credit*

Bank of St. Louis v. Whitlock, 144 Ill. 2d 440, 447 (1991). Generally, once a trial court determines that a contract contains an ambiguity, the construction of the contract becomes a question of fact and extrinsic evidence is admissible to ascertain the parties' intent. *Id.*; see also *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992) ("In cases involving contracts, there is a disputed fact precluding summary judgment when the material writing contains an ambiguity which requires admission of extrinsic evidence.") Conversely, if the parties' intent can be determined solely from extrinsic facts not in dispute, then the court can decide the issue as a matter of law. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 24; see also *Hernandez v. Schittek*, 305 Ill. App. 3d 925, 933 (1999) ("if the extrinsic facts are uncontroverted, the trial court must determine the contract's meaning as a matter of law without jury submission.")

¶ 63 In this case, both parties agreed when arguing this case on appeal that the 2005 agreement could have been drafted with more precision. Even so, we conclude that the parties' intent is clear from the face of the 2005 agreement. The 2005 agreement provides that in exchange for the City conducting due diligence, PAAG agreed "to forego the return of the amount loaned and interest" *and* "not to institute any action, suit, demand, cause of action, suit in equity or at law or under any statute or otherwise; on account of the City's termination of the Loan Agreement." We are persuaded by PAAG's argument that the implied corollary to this agreement is that, if the City failed to conduct due diligence, PAAG would be entitled to the return of its loan plus interest without any further impediment.

¶ 64 When construing a contract, a court must give effect to each clause and word used, without rejecting any words as meaningless or as surplusage. *Thomas Hoist Co. v. William J. Newman Co.*, 365 Ill. 160, 166 (1936). Here, the trial court's construction ignores the use of the

word "and" between the two clauses. By contrast, if the language read "PAAG agrees to forego the return of the amount loaned and interest by agreeing not to institute any action or suit against the City," we would have agreed with the trial court that the contract only gives PAAG the right to pursue a claim.

¶ 65 We also note that the 2005 agreement does not specify the amount loaned or how interest should be calculated. However, where we can determine the parties' intent based solely on undisputed facts, we can still resolve the ambiguity as a matter of law. *Gomez*, 2013 IL App (1st) 130568, ¶ 24. Here, it is undisputed that the "amount loaned" refers to the $1 million in principal loaned by PAAG to the City pursuant to the 1998 agreement.

¶ 66 On the other hand, we are unaware of any undisputed evidence in the record that sheds light on how the parties intended interest to be calculated under the 2005 agreement. The 2005 agreement is silent regarding the interest rate to be applied and the accrual date. We cannot simply assume that the 6.9% interest rate set forth in the 2004 amendment would also apply under the 2005 agreement. See *Farm Credit Bank of St. Louis*, 144 Ill. 2d at 448 (stating it is improper for a court to speculate regarding the parties' intent in order to resolve an ambiguity in a contract). As we have stated, the 2005 agreement expressly terminated the 1998 agreement, as amended in 2004. Thus, we conclude that the amount of interest accrued is a question of fact and parol evidence is admissible to explain what the parties intended regarding the interest rate to be applied over the course of the extended period this loan remained unpaid.[3]

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[3]In PAAG's counterclaim, PAAG requested that the trial court award PAAG $1 million in damages, plus interest at the rate of 6.9% due to the City's breach of the 2005 agreement. However, on appeal, PAAG requests that we remand the case for a determination by the trial court, with proposed calculations submitted by the parties, as to the amount of interest owed to PAAG.

¶ 67 For the foregoing reasons, we reverse the trial court's March 24, 2016, order to the extent it denied PAAG's request for $1 million in contract damages plus interest.[4] However, we must remand the matter so that a fact finder can consider extrinsic evidence to determine the parties' intent as to how interest should be computed under the terms of the 2005 agreement due to the City's breach.

¶ 68 CONCLUSION

¶ 69 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part.

¶ 70 Affirmed in part and reversed in part.

¶ 71 Cause remanded.

[4]PAAG also asserts that the application of equitable remedies supports an award of $1 million plus interest to PAAG. In light of our holding that PAAG is entitled to this relief based on the language of the 2005 agreement itself, we need not address these arguments.