

2011 IL App (2d) 110074-U & 110345-U, cons.
Nos. 2-11-0074 & 2-11-0345, cons.
Order filed October 25, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LAY-COM, INC.,)	Appeal from the Circuit Court
)	of Kendall County.
Plaintiff-Appellant and Cross-Appellee,)	
)	
v.)	No. 07-L-81
)	
CENTEX HOMES,)	
)	
Defendant-Appellee and)	
Cross-Appellant.)	
)	Honorable
(The United City of Yorkville, Defendant-)	Timothy J. McCann,
Appellee).)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court did not err in finding that an annexation agreement between the parties was not sufficiently detailed to permit specific performance. In addition, the trial court did not err in denying Centex Homes' request for attorney fees. However, the trial court did err in granting Yorkville's petition for fees.

¶ 1 In this suit, the plaintiff, Lay-Com, Inc. (Lay-Com), asserted that the defendants, Centex Homes (Centex) and the United City of Yorkville (Yorkville), breached their obligations under an annexation agreement, and sought to compel specific performance of that agreement. Following a

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bench trial, the trial court denied Lay-Com's request for specific performance. The defendants then filed petitions to recover their attorney fees from Lay-Com. The trial court denied Centex's petition for fees but granted Yorkville's petition. Lay-Com appeals from the trial court's orders denying its request for specific performance and granting Yorkville's fee petition. Centex cross-appeals from the trial court's denial of its request for fees. We affirm in part and reverse in part.

¶ 2

I. BACKGROUND

¶ 3 Lay-Com owned several parcels of land near Yorkville in unincorporated Kendall County including (1) a 112-acre tract on the south side of Galena Road and the west side of Cannonball Trail (the Lay-Com parcel); and (2) a 29-acre tract on the south side of Galena Road and the east side of Cannonball Trail. In 2001, Lay-Com and Yorkville entered into an agreement that Lay-Com's property would be annexed into Yorkville if and when Yorkville's municipal boundaries expanded to become contiguous with Lay-Com's property. They agreed that upon annexation, the Lay-Com parcel would be zoned for single family homes and the 29-acre parcel would be zoned for commercial use and townhomes.

¶ 4 In 2004, Centex began acquiring land in the Yorkville area for the purpose of developing a 600-acre planned unit development (PUD) called Bristol Bay. Bristol Bay was to encompass Lay-Com's parcels and several neighboring parcels on both sides of Galena Road. On June 23, 2004, Centex and Lay-Com entered into a Real Estate Purchase Agreement (REPA) whereby Lay-Com agreed to sell 134 acres to Centex. This included the entire Lay-Com parcel and 22-acres of the 29-acre parcel. As set forth in the REPA, Centex agreed to purchase the 134 acres at \$48,000 per acre, for a total purchase price of approximately \$6.4 million. Pursuant to the REPA, the parties agreed that Lay-Com would retain the earnest money as its sole remedy in the event Centex terminated the REPA without purchasing the property.

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¶ 5 On January 17, 2005, Lay-Com and Centex entered into an amendment to the REPA, which bifurcated Centex’s purchase obligations. Centex agreed to close immediately on the 22-acre parcel but deferred the right to close on the Lay-Com parcel until a future date—no later than April 2008. As compensation for the delay, Centex agreed to pay Lay-Com’s carrying costs on the Lay-Com parcel until closing, namely, Lay-Com’s mortgage payments and taxes. Centex and Lay-Com closed on the 22-acre parcel shortly thereafter and Centex began making quarterly payments for the carrying costs on the Lay-Com parcel.

¶ 6 Thereafter, Centex began working toward the development of Bristol Bay. During that process, Yorkville’s city council objected to the high density of proposed housing north of Galena Road. In the spring of 2005, Centex and Yorkville reached a compromise. Yorkville agreed to the high-density housing north of Galena Road, but required Centex to provide open space south of Galena Road on the Lay-Com parcel and an adjoining parcel known as the “Mesirow” parcel. Centex agreed to convey the proposed open space to Yorkville and Yorkville agreed to construct a park on the open space. The park was to include baseball fields, bicycle trails, and a lake that would act as a regional stormwater management facility (RSMF) for 1,900 surrounding acres.

¶ 7 To memorialize this deal, on April 26, 2005, Centex, Yorkville, Lay-Com and several other landowners entered into an annexation agreement. Under the annexation agreement, Yorkville provided preliminary approvals for Bristol Bay and agreed to annex all 600-acres of the proposed Bristol Bay PUD, including the Lay-Com parcel, into Yorkville. Pursuant to the annexation agreement, the RSMF was to be built on portions of the Lay-Com parcel and the adjoining Mesirow parcel. In addition, the western-most 67 acres of the Lay-Com parcel, which was originally zoned for single family homes, became the designated location for the RSMF.

¶ 8 Paragraph 10 of the annexation agreement included the following:

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“The Regional Stormwater Management Facility shall be conveyed by [Centex] by deed or by a grant of a nonexclusive easement to [Yorkville] simultaneous with the approval by [Yorkville] of the First Final Plat of Subdivision ***. Any portion of the Regional Stormwater Management Facility not conveyed to [Yorkville] by deed simultaneous with the First Final Plat of Subdivision shall be conveyed by deed to [Yorkville] at such time as [Centex] becomes the owner of that portion of the Regional Stormwater Management Facility on which an easement has been previously established consistent with this Paragraph 10.”

Under paragraph 10, once Yorkville received title or easement rights, it was required to construct the RSMF on the Lay-Com and Mesirow parcels.

¶ 9 In addition, paragraph 33-BB of the annexation agreement stated that the agreement could only be amended by the mutual consent of the parties. Paragraph 33-E required the parties to “take all action necessary or required to fulfill the intent of [the] Agreement as to the use and development of the SUBJECT PROPERTY.” The annexation agreement also provided, in paragraph 33-A:

“This Agreement shall be enforceable in the Circuit Court of Kendall County by any of the Parties or their successors or assigns by an appropriate action at law or in equity to secure the performance of the covenants and agreements contained herein, including the specific performance of this Agreement.”

¶ 10 On April 26, 2005, Yorkville adopted the necessary ordinances to approve the annexation agreement and annexed Bristol Bay, including the Lay-Com parcel, into Yorkville. In the fall of 2005, Yorkville approved the final plat of subdivision for a significant portion of Bristol Bay. Pursuant to paragraph 10 of the annexation agreement, that approval triggered Centex’s obligation to convey title or easement rights to Yorkville so that it could construct the RSMF.

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¶ 11 In the early fall of 2006, Yorkville asked Centex to convey easement rights or title for the RSMF. Centex then approached Lay-Com about acquiring easement rights to the Lay-Com parcel. Centex and Lay-Com were unable to reach an agreement as to an easement. During that same time frame, Yorkville informed Centex that it needed approximately \$325,000 to complete an “outfall project,” which would provide temporary stormwater management until the Lay-Com parcel was developed. Centex agreed to advance the necessary funds if Yorkville granted it a waiver from the requirement to convey easement rights to the Lay-Com parcel, as required by paragraph 10 of the annexation agreement. Yorkville agreed. On December 26, 2006, the Yorkville City Council approved an agreement indicating that Centex agreed to assist with construction of the outfall project “in lieu of providing the easement as described” in paragraph 10 of the annexation agreement. Thereafter, in early 2007, Centex terminated the REPA.

¶ 12 On October 3, 2007, Lay-Com filed a complaint against Centex and Yorkville alleging breach of their obligations under paragraph 10 of the annexation agreement. Specifically, Lay-Com alleged that “Centex and Yorkville have breached the Annexation Agreement by failing to convey and/or obtain the necessary property rights to construct the [RSMF].” Lay-Com alleged that it had no adequate remedy at law and requested that the trial court compel Centex to comply with paragraph 10 of the annexation agreement. Centex and Yorkville both filed answers to the complaint.

¶ 13 On January 20, 2009, the trial court denied the parties’ cross-motions for summary judgment. On May 29, 2009, in response to a motion for clarification filed by Lay-Com, the trial court ruled that any evidence regarding the value of the Lay-Com parcel or the value of easement rights thereon was not relevant and would not be admitted at trial. A bench trial was held on May 27, June 3, and August 12, 2010.

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¶ 14 At trial, Joseph Popp testified that he had been president of Lay-Com for five years. Prior to the annexation agreement, the Lay-Com parcel was zoned for commercial and residential use. As a result of the annexation agreement it was zoned for duplexes on approximately 40 acres and open space/detention pond on the balance. Popp testified that paragraph 10 of the annexation agreement was the most important paragraph to him because it gave him confidence that the property would be developed according to the agreement and that he would not be left holding a piece of property zoned for detention. The inclusion of paragraph 33-A, providing specific performance as a remedy for breach of the annexation agreement, was included at the request of Lay-Com. It was his way to ensure that he was not left with a piece of property that was useless. In November 2006, Centex offered to pay Lay-Com \$250,000 for an easement over approximately 67 acres of the Lay-Com parcel, the portion that was to be used as the detention pond.

¶ 15 Popp testified that he did not accept Centex's November 2006 offer because \$250,000 was an inadequate price for such an easement. He believed the best course was for Centex to close on the property and then fulfill its obligation to Yorkville. Centex told him that he could either accept the \$250,000 or that it would give the money to Yorkville in exchange for a waiver of its obligation to provide the easement. To his knowledge, Yorkville and Centex reached such an agreement on December 26, 2006. On March 30, 2007, he received a letter from Centex indicating that it no longer intended to purchase the Lay-Com parcel. Thereafter, Yorkville's community development director informed him that the city believed Lay-Com was responsible to provide stormwater detention for Bristol Bay. Popp testified that Lay-Com was harmed by Centex's failure to convey the easement rights because now Lay-Com is essentially obligated to donate open space for the RSMF to serve all of the subject property.

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¶ 16 On cross-examination, Popp acknowledged that the underlying assumption of the annexation agreement was that Centex would purchase the land from Lay-Com. He further acknowledged that Centex was not obligated to purchase the land from Lay-Com. It was his understanding when he signed the annexation agreement that until Centex acquired the property, Centex would have no obligation to transfer title of that property to Yorkville. He knew that Centex refused to include specific performance as a remedy under the REPA. He acknowledged that in his deposition he had testified that paragraph 10 of the annexation agreement protected his interest because it was a means for Yorkville to enforce the agreement. He testified that he viewed paragraph 10 as insurance that Centex would close on the Lay-Com parcel. He acknowledged that Lay-Com was not obligated to give Centex an easement. He never intended to sell Centex an easement unless they agreed to close on the property. Popp acknowledged that the annexation agreement did not include any terms or conditions as to how Centex would acquire an easement from Lay-Com.

¶ 17 James Berry testified that he was Centex's director of planning and acquisition for the Bristol Bay development. Berry testified that the annexation agreement required Centex to convey title or easement to the Lay-Com parcel to Yorkville for the RSMF. He also testified that the conveyance was to be free of charge. When Yorkville finally requested the conveyance in 2006, he offered Lay-Com \$250,000 for the easement. Popp told him it was not enough. During his negotiation with Popp, a representative of Yorkville called him and said Yorkville needed money to complete an outfall project that would service Bristol Bay and the new Raging Waves Water Park. The outfall project was necessary to get the water park up and running. Yorkville asked if Centex would advance \$325,000 for it to complete the outfall project. Berry testified that the only money Centex had available was the money it was going to use to purchase the easement over the Lay-Com parcel. Berry proposed to give the \$325,000 to Yorkville if Yorkville waived Centex's obligation to provide

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an easement over the Lay-Com parcel. Later, Berry informed Popp that he had \$325,000 that he could either pay to Lay-Com for the easement, or give to Yorkville in exchange for a waiver of the obligation to provide the easement. Berry testified that Popp responded: “No. Give it to the City because that’s not enough to do me any good.” At one point, Popp told Berry that Lay-Com would accept \$750,000 for the easement.

¶ 18 Valerie Burd, Mayor of Yorkville, testified that the annexation agreement was beneficial to Yorkville because it provided space for the RSMF and a park for the residents of Bristol Bay. The RSMF would also make the surrounding properties easier to develop. She believed it was fair to say that Centex was able to build high-density housing north of Galena Road, as allowed by the annexation agreement, but Yorkville never realized the RSMF. In fact, Yorkville was not making efforts to acquire easement rights to construct the RSMF. Although Centex no longer has an obligation to convey easement rights, it still has an obligation to convey title to the Lay-Com parcel if it ever obtained title to that parcel. Under the current PUD, Lay-Com cannot build homes or develop the part of its property that was set aside for the RSMF.

¶ 19 On December 2, 2010, the trial court entered a written order. The trial court found that under paragraph 33-A of the annexation agreement, Lay-Com was entitled to seek specific performance of the obligations in the agreement. The trial court further found that because the REPA and its amendment were executed prior to the annexation agreement, it did not supersede or terminate the rights or obligations under the annexation agreement. Accordingly, the trial court found that the affirmative defenses based on the REPA necessarily failed.

¶ 20 The trial court further found that Centex had breached its duty, under the annexation agreement, to either purchase or obtain an easement over the Lay-Com parcel and convey it to Yorkville. The trial court noted that Lay-Com claimed it had a right, under the annexation

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agreement, to require Yorkville to perform its obligations under the annexation agreement. It further noted that, in response, Yorkville asserted that it owed no duty to Lay-Com. The trial court disagreed with Yorkville's contention that it owed no duty. The trial court found:

“Yorkville had a duty to do a number of things under the Annexation Agreement, not the least of which is to construct the regional stormwater detention facility as directed by the Agreement.”

Regardless of the foregoing, the trial court noted that Lay-Com's standing to enforce the annexation agreement was “unimportant.” The trial court found that Lay-Com's claim failed because the annexation agreement lacked essential contract terms. Specifically, the trial court found:

“The Annexation [Agreement] here does not specify a sales price or a means of determining it. The Annexation Agreement further fails to provide other essential terms and conditions, such as title insurance, date of closing, down payment, financing terms, date of possession change, costs of closing and others.”

¶ 21 The trial court summarized its findings as follows: Centex breached the terms of the annexation agreement; Lay-Com had not shown that Yorkville “breached a duty owed to Lay-Com by Yorkville under the terms of the Annexation Agreement;” Lay-Com had not proved that it was entitled to specific performance. Accordingly, the trial court entered judgment in favor of Centex and Yorkville. Lay-Com filed a timely notice of appeal.

¶ 22 Thereafter, Centex and Yorkville filed petitions to recover their attorney fees under paragraph 33-CC of the annexation agreement that provided, in part:

“All reasonable legal fees and costs incurred by a Party in enforcing remedies under this Agreement or in defending an enforcement action under this Agreement shall be paid by the non-prevailing party.”

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On March 1, 2011, the trial court granted Yorkville's fee petition. The trial court noted that because it had found that Lay-Com had failed to prove that Yorkville breached a duty owed to Lay-Com, Yorkville was a prevailing party as to Lay-Com. On that same date, the trial court denied Centex's petition for fees. The trial court noted that because Centex breached the annexation agreement, it would be inequitable for Centex to recover its attorney fees from Lay-Com. On March 7, 2011, Lay-Com amended its notice of appeal to include an appeal from the award of attorney fees to Yorkville. On March 28, 2011, Centex filed a timely notice of appeal from the denial of its fee petition. On May 2, 2011, this court granted Centex's motion to consolidate the appeals.

¶ 23

II. ANALYSIS

¶ 24 On appeal, Lay-Com argues that the annexation agreement was sufficiently detailed to permit specific performance. In addition, Lay-Com argues that the trial court erred in finding that Yorkville did not breach the annexation agreement, in granting Yorkville's fee petition, and in declining to permit evidence of valuation on the Lay-Com parcel. On cross-appeal, Centex argues that the trial court erred in denying its fee petition.

¶ 25 To state a cause of action for specific performance, a plaintiff must allege and prove the following: "(1) the existence of a valid, binding, and enforceable contract; (2) compliance by the plaintiff with the terms of the contract, or proof that the plaintiff is ready, willing, and able to perform the contract; and (3) the failure or refusal of the defendant to perform his part of the contract." *Schilling v. Stahl*, 395 Ill. App. 3d 882, 884 (2009). For a party to be entitled to specific performance, the contract must be so certain and unambiguous in its terms and in all its parts that a court can require the specific thing contracted for to be done. *Id.* at 884-85. "It is not sufficient to show the existence of some kind of agreement between the parties; where there is ambiguity, doubt, or uncertainty with respect to its terms, equitable enforcement by specific performance will

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be denied.” *Id.* The contract must specify not only the price but the terms and conditions of the sale as well. *Id.* Parole evidence may not be used to supply missing terms. *Kane v. McDermott*, 191 Ill. App. 3d 212, 217 (1989). Essential terms of a real estate contract must be wholly in writing. *Calvary Temple Assembly of God v. Lossman*, 200 Ill. App. 3d 102, 106 (1990).

¶ 26 “However, even where the contract is clear and unambiguous, specific performance is not a matter of right. Instead, the granting of the remedy rests in the sound discretion of the trial court, as determined from all the facts and circumstances.” *Dixon v. City of Monticello*, 223 Ill. App. 3d 549, 561 (1991). As we stated in *Washington v. Illinois Power Co.*, 200 Ill. App. 3d 939, 942, (1990):

“Abuse of discretion means clearly against logic. [Citation.] The question is not whether the appellate court agrees with the circuit court, but whether the circuit court acted arbitrarily, without employing conscientious judgment, or whether in view of all of the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. [Citation.]”

¶ 27 In the present case, we cannot say the trial court abused its discretion in denying Lay-Com’s request for specific performance. The sales price, or a means of determining it, and the terms and conditions of the sale are essential terms of a real estate contract. *Kane*, 191 Ill. App. 3d at 217. In the present case, paragraph 10 of the annexation agreement failed to set forth the sales price or the terms and conditions of the subject conveyance. Lay-Com argues that the annexation agreement did not include a price because it was supposed to be “free of charge,” as testified to by James Berry. However, extrinsic evidence cannot be used to supply missing essential terms. *Id.* The annexation agreement simply did not supply any mechanism or explanation as to how the conveyance of the subject easement or deed was to occur.

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¶ 28 Moreover, the record reveals that Centex does not currently own the property and that Lay-Com has no legal obligation to sell the property or an easement to Centex. Popp admitted at trial that if the trial court granted specific performance, every term and condition of the sale of the Lay-Com parcel or an easement would have to be negotiated between Lay-Com and Centex. However, the trial court cannot order the parties to negotiate a deal. See *D’Agostino v. Bank of Ravenswood*, 205 Ill. App. 3d 898, 903 (1990) (“[w]here the court would be left to order further negotiations and where the parties have yet to reach agreement on essential terms, specific performance is not available”). Accordingly, the trial court’s decision to deny specific performance cannot be said to have exceeded the bounds of reason. *Washington*, 200 Ill. App. 3d at 942.

¶ 29 Lay-Com relies on *Kane* and *Bond Drug Co. of Illinois v. Amoco Oil Co.*, 323 Ill. App. 3d 190 (2001), as support for its argument that the trial court could have specifically enforced the contract. However, Lay-Com’s reliance on these cases is unpersuasive. In *Kane*, the plaintiff, Paul Kane, brought an action for specific performance of an option contract on real estate. *Kane*, 191 Ill. App. 3d at 214. The defendant, McDermott, argued the option was not enforceable because the description of the real estate was not definite, the option failed to set forth sufficient terms and conditions of the sale, and the sales price of the property was not fixed in the option. *Id.* The trial court rejected these arguments and ordered specific performance. *Id.* at 216.

¶ 30 On appeal, the reviewing court affirmed, holding that the missing terms were either easily determined by the court or not material enough to preclude specific performance. Specifically, the reviewing court held that the option contained a sufficient legal description, that the payment of taxes and documentary stamps could be apportioned by custom and statute, and that the conveyance was impliedly by general warranty deed. *Id.* at 218-19. Although the option contract did not include a specific sale price, it stated the price would be “at the appraised bid as established by three

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disinterested persons.” *Id.* at 219. The reviewing court held that the trial court properly appointed three disinterested appraisers and considered custom and practice to determine who would share the appraisers' fees and how to reach a sales price if the appraisers could not agree as to valuation. *Id.* As such, although the option contract in *Kane* did not include a specific sales price, it included a means of determining the sale price. Unlike the option contract in *Kane*, the annexation agreement in this case neither set a price for the conveyance nor included a means to determine the price.

¶ 31 In *Bond*, Bond agreed to purchase a parcel of real estate from Amoco upon which a gas station was located. *Bond*, 323 Ill. App. 3d at 192. Under the agreement, (1) Bond was to deposit the purchase price of \$1,175,000 into an escrow account; (2) the escrow funds would be used by Bond to acquire property, chosen by Amoco, in exchange for the parcel; (3) at the closing scheduled two years in the future, Amoco would convey title to the subject parcel to Bond and Amoco would receive any remaining escrow funds. *Id.* In addition, paragraph 17 of the agreement provided that if health code violations were found to exist on the parcel, prior to Bond taking title and possession, Amoco would correct them. *Id.*

¶ 32 Prior to closing, environmental contamination was discovered on the parcel and the Illinois Environmental Protection Agency required Amoco to correct the situation. *Id.* Thereafter, Amoco advised Bond that it was terminating the agreement because of the unexpected cost of having to remove the contamination. *Id.* at 193. Bond filed an action seeking specific performance. *Id.* The reviewing court held that the environmental contamination was a health code violation as set forth in paragraph 17 of the agreement and that specific performance was an appropriate remedy. *Id.* at 198. *Bond* does not provide any support for Lay-Com in the present case. The agreement in *Bond* contained the essential contract terms such as price, closing date, and the terms and conditions of sale. In the present case, the annexation agreement did not contain any of those essential terms.

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¶ 33 Lay-Com's second contention on appeal is that the trial court erred in finding that Yorkville did not breach the annexation agreement. Whether or not a material breach of contract has been committed is a question of fact and, consequently, the trial court's determination will not be disturbed unless it is against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006). "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). A reviewing court should not substitute its judgment for that of the trier of fact. *Id.*

¶ 34 In the present case, the trial court's determination that Lay-Com had not proved that Yorkville breached any duties owed to Lay-Com under the annexation agreement was against the manifest weight of the evidence. To prevail on its claim for breach of contract against Yorkville, Lay-Com was required to show the existence of a valid and enforceable contract, that it performed its obligations under the contract, that Yorkville breached the contract, and that it suffered damages as a result. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009). There is no dispute that the annexation agreement is a valid, enforceable contract. In addition, upon review of the record, Lay-Com performed its obligations under the Agreement. Centex argues that Lay-Com did not perform its obligations under the contract because it refused to sell an easement to Centex. However, the annexation agreement did not require Lay-Com to sell an easement to Centex. As such, Lay-Com's failure to do so cannot be considered a breach of the Annexation Agreement.

¶ 35 Further, paragraph 33-E of the annexation agreement stated that Yorkville, Lay-Com, and Centex were required to "take all action necessary or required to fulfill the intent" of the Agreement. Paragraph 33-BB stated that the Agreement "may be amended only by the mutual consent of the Parties, by adoption of an ordinance by [Yorkville] approving said amendment as provided by law."

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By waiving Centex's obligation to convey an easement as required by paragraph 10 of the Agreement, Yorkville clearly breached a duty owed to Lay-Com under paragraphs 33-E and 33-BB of the Agreement. By waiving the easement requirement, Yorkville cannot be said to have taken all action necessary to fulfill the intent of the Agreement. In fact, Burd testified that Yorkville was not making any efforts to construct the RSMF. In addition, the waiver was essentially an amendment to the Agreement in the absence of the mutual consent of the parties. Centex argues that the waiver was not a modification to the contract. However, a party to a contract cannot unilaterally waive conditions that benefit other parties. *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 664-65 (2004). As such, Yorkville could not have waived Lay-Com's right to enforce the terms of the annexation agreement.

¶ 36 Finally, Lay-Com has suffered damages. The trial court noted that Lay-Com had given and received adequate consideration to enter in the Agreement and that it was entitled to receive the benefits of that agreement. Lay-Com allowed its property to be re-zoned as the location for the RSMF. However, the property was never developed and the RSMF was never built. Accordingly, Lay-Com proved the necessary elements and the trial court erred in finding that Lay-Com failed to prove its breach of contract claim against Yorkville.

¶ 37 Lay-Com's next contention on appeal is that the trial court erred in granting Yorkville's fee petition. A party seeking to enforce a certain provision in a contract has the burden of proving that he has substantially complied with all the material terms of the agreement. *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 599 (1987). A party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract. *Id.* Accordingly, because Yorkville breached the annexation agreement, it would be

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inequitable for Yorkville to recover its attorney fees from Lay-Com. The trial court thus erred in granting Yorkville's fee petition.

¶ 38 On cross-appeal, Centex argues that it did not breach the annexation agreement and, therefore, the trial court erred in denying its fee petition. As stated above, whether Centex breached the annexation agreement is a question of fact and, consequently, the lower court's determination will not be disturbed unless it is against the manifest weight of the evidence. *Mohanty*, 225 Ill. 2d at 72. Centex argues that it had no obligation under the annexation agreement to acquire title to the Lay-Com parcel or to buy an easement. Centex is correct that the annexation agreement did not specifically state that it had to acquire title to the Lay-Com parcel or that it had to buy an easement. However, the agreement did specifically state that Centex had to convey title or provide an easement to Yorkville. Centex failed to do either. Accordingly, the trial court's determination that Centex breached paragraph 10 of the agreement was not against the manifest weight of the evidence. Accordingly, we cannot say that the trial court abused its discretion in denying Centex's fee petition. *See id.*

¶ 39 Finally, we note that Lay-Com also argued on appeal that the trial court erred in barring the parties from presenting evidence relating to the price or value of the Lay-Com parcel or easement rights on the parcel. Lay-Com raised the issue on appeal "to preserve its ability to present such evidence in the future in the event this Court remands this case for further evidentiary proceedings." Because we are not remanding the case for further evidentiary proceedings, we need not address the issue.

¶ 40

III. CONCLUSION

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¶ 41 For the reasons stated, we affirm the decisions of the circuit court of Kendall County denying Lay-Com's request for specific performance and denying Centex's petition for fees. We reverse the determination of the trial court granting Yorkville's fee petition.

¶ 42 Affirmed in part and reversed in part.