2018 IL App (2d) 170575-U
No. 2-17-0575
Order filed May 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NORTH ROUTE 38, LLC,	)	Appeal from the Circuit Court
	)	of Ogle County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-CH-142
	)	
CITY OF ROCHELLE,	)	Honorable
	)	John C. Redington,
Defendant-Appellee.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: We affirm the trial court's order dismissing one claim of the plaintiff's complaint and granting summary judgment in favor of the defendant on all other claims.

¶ 2 On September 6, 2013, the plaintiff, North Route 38, LLC (Developer), filed a two-count complaint against the defendant, City of Rochelle (City), related to letters of credit that were posted as security for development work. On August 24, 2015, the trial court dismissed one of the claims. The Developer subsequently amended its complaint, preserving the dismissed claim and stating additional claims. On June 26, 2017, the trial court granted summary judgment in favor of the City on the additional claims. The Developer appeals from these orders. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Annexation Agreement

¶ 5 On March 14, 2005, the Developer and the City entered into an Annexation Agreement for 191 acres north of Route 38, between Caron Road and Dement Road. On October 27, 2008, the City approved a plat for a subdivision known as Lighthouse Point (the Project). The Developer was to complete the Project, which was a commercial development that included a Walmart store, improvements to Route 38 and Caron Road, construction of a public road known as North Pointe Drive, construction of two private roads known as Grande Point Street and Coronado Drive, and construction of a bike path.

¶ 6 On April 14, 2009, the parties entered into a pre-development agreement which provided that the City would pay up to $3.31 million of the Developer's cost for the Project and that the City would use its best efforts to form a tax increment financing (TIF) district to help fund the payment to the Developer. Article II, section 2.5 of the agreement provided that the City would issue a punchlist within 15 days of the completion of construction of the public improvements, and would accept the public improvements within 30 days following the Developer's completion of the punchlist items. On September 14, 2009, the Developer and Walmart entered a development agreement.

¶ 7 Section 86-52 of the City's Municipal Code required developers to post a bond, or cash, or letters of credit, in the amount of 110% of the estimated costs of public improvements, to secure completion of the improvements, as a condition to the City's approval of a final plat (the "completion bond"). Section 86-56 of the City's Municipal Code required developers to post a bond, cash, or letter of credit, in the amount of 10% of the estimated costs to guarantee the performance of the public improvements after completion (the "performance bond"). The

posting of the Performance Bond was a condition for release of the Completion Bond. These provisions of the Municipal Code were incorporated into the Annexation Agreement. The Annexation Agreement provided that the performance bonds would be held for a two-year period.

¶ 8 On February 2, 2010, the Developer caused five irrevocable letters of credit to be issued by Dubuque Bank and Trust Company (Bank), as the Developer's completion bond for the Project. The letters of credit ran in favor of the City and Walmart, as beneficiaries, and were deposited with Title Underwriters Agency of Rockford, Illinois. Each of the letters of credit secured the completion of specified portions of the public improvements as follows: (1) No. 08518 in the amount of $1,958,797 for IL Route 38; (2) No. 08522 in the amount of $632,718 for North Pointe Street south of Coronado Drive; (3) No. 08519 in the amount of $465,736 for North Pointe Street north of Coronado Drive; (4) No. 08521 in the amount of $397,503 for Caron Road; and (5) No. 08520 in the amount of $82,998 for the bike path. Absent the Developer's default, the letters of credit would only be released upon the joint written direction of the parties and Walmart.

¶ 9 On or about November 3, 2010, the Developer posted a completion bond with the Illinois Department of Public Transportation (IDOT) for the improvements to IL Route 38. On or about December 14, 2010, the City received the proceeds from the issuance of TIF bonds in the amount of $2.94 million. Between January 2011 and December 2012, the City disbursed the total amount of $3.31 million to the Developer pursuant to the predevelopment agreement.

¶ 10 On June 27, 2011, the City Council approved a reduction in the amount of letter of credit No. 08518, for Route 38, to $196,000, which was the 10% performance bond for the improvements. The City Council meeting minutes stated:

> "Ryan Fitzgerald, representing North Route 38 LLC, has requested a reduction in the letter of credit based on the completion of a portion of the improvements and the fact that there are three levels of surety for the same improvements: the letter of credit, the IDOT bond and the general obligation bonds issued under the TIF District. City Engineer Sam Tesreau has reviewed the request and estimates that there are over $900,000 worth of improvements yet to be completed which are secured by this letter of credit. The IDOT bond does not allow the City to draw on surety funds in the event there is a need which, providing the City's surety is reduced will leave IDOT in control of the completion of the Route 38 improvements. City Engineer Sam Tesreau recommends that if a reduction in the letter of credit is granted the surety should not be less than 10%, or $196,000, of the original surety amount and that a replacement letter of credit be submitted for a period of not less than 24 months prior to release of the original surety."

¶ 11 On July 21, 2011, the Developer sent an email to Tesreau, stating that the improvements on the Project had been "substantially completed," and that the City should provide a punchlist within 15 days (August 5, 2011) pursuant to article II, section 2.5 of the predevelopment agreement. Included with the email was a letter from Mick Gronewold, the Developer's engineer, to Nathan Bryant, the Developer's President, indicating the same. In a discovery deposition, Gronewold testified that his letter should have been sufficient to release part of the surety, that for which the work was completed.

¶ 12 On August 5, 2011, Tesreau sent a punchlist to the Developer. The punchlist identified 23 items to be corrected or completed, including street lights along the public streets to be dedicated to the City. On August 9, 2011, the City's water reclamation superintendent sent a punchlist to the Developer. On October 3, 2011, the Developer's representative, Ryan

Fitzgerald, sent an email to Tesreau indicating that the punchlist items had been completed, with the exception of the bike path, which would be completed that week.

¶ 13 On November 21, 2011, Tesreau sent a letter to Fitzgerald, acknowledging Fitzgerald's request for a reduction in the amount of letters of credit Nos. 08519, 08520, 08521, and 08522. The letter noted that certain punchlist items, including street lighting, had not been completed. Tesreau stated that the City's staff would recommend reducing the letters of credit to amounts which would cover the cost of the remaining punchlist items ($139,864) plus the 10% performance bond required by the Municipal Code and Annexation Agreement ($157,896).

¶ 14 On November 23, 2011, the City's Attorney sent an email to the Walmart attorney, advising that the Developer's request for a reduction in the letters of credit would be on the City Council agenda for November 28, 2011. On that day, the City Council approved the reduction of the letters of credit Nos. 08519, 08520, 08521 and 08522 to the amounts recommended by Tesreau. On December 1, 2011, the City's attorney sent an email to the Walmart attorney, advising of the City Council's approval of a reduction in the amounts of the letters of credit, and requesting that he be advised of Walmart's action.

¶ 15 On February 2, 2012, the Bank issued amendments to all of the letters of credit, reducing them as follows: (1) #08518 to $238,000; (2) #08522 to $88,488; (3) #08519 to $71,790; (4) #08521 to $87,000; and (5) #08520 to $8300. At that same time, Walmart was removed as a beneficiary on the letters of credit. On February 3, 2012, Walmart consented to the release of all of the letters of credit.

¶ 16 On December 6, 2012, the Bank issued notices that it would not renew the letters of credit, as amended, when they expired on February 12, 2013. On December 10, 2012, the City Council approved a reduction in the amount of the letters of credit to a total of $181,695. On

December 13, 2012, Riverside Community Bank issued an irrevocable letter of credit No. 191, in favor of the City, in the amount of $181,690, with an expiration date of November 1, 2013. On November 18, 2013, the City returned letter of credit No. 191 to the Developer.

¶ 17 B. Phase One Northeast Interceptor Agreement

¶ 18 On or about June 29, 2004, the Developer and the City entered a Phase One Northeast Interceptor Agreement (Interceptor Agreement). The agreement related to the construction of a sewer line known as the "Northeast Interceptor." One portion of the sewer infrastructure required boring under Route 38. Pursuant to the agreement, the City was responsible for the installation of the sewer infrastructure and the Developer was required to pay for a portion of the installation costs. The City and Rochelle Municipal Utilities (RMU) contracted with D.R. Gilbert & Sons, Inc. (Gilbert), to perform the work. Gilbert bid a set price to complete the work. However, Gilbert submitted change orders along the way, on the basis that unforeseen conditions had necessitated additional work. Ultimately, the City terminated its contract with Gilbert, although the sewer work was not complete.

¶ 19 On October 5, 2007, the City sent a letter to the Developer, stating that the Developer's grading plans for the Project had been approved by the City's engineers, but that in order to obtain the permit, the Developer would have to pay $486,000 as its share of the sewer extension work. On October 10, 2007, the Developer sent a letter in response saying that, to avoid significant financial loss by delay in the issuance of the grading permit, it would pay the amount requested under protest and it objected to paying for work that Gilbert never completed. On or about October 15, 2007, the Developer paid $486,888 under the Interceptor Agreement, and the City issued the requisite grading permit. Of the $486,888, $271,084 was in excess of the amount originally owed under the Interceptor Agreement.

¶ 20 The Developer also needed final plat approval to satisfy its contract requirements with Walmart. Walmart was pushing for a July 2008 plat approval but the City was withholding plat approval until an agreement was reached as to completion of the work required under the Interceptor Agreement. The utilities, plat approval and final grading had to be complete by November 1, 2008, to satisfy the contract with Walmart. Accordingly, on November 27, 2007, the Developer sent a letter to the City proposing that the Developer be allowed to complete the work related to the Interceptor Agreement on certain terms. On March 27, 2008, the City responded by proposing additional terms, including a release by the Developer of any claims it may have against the City relating to the Interceptor Agreement. Attorneys for the parties exchanged emails and drafts of the release language over a period of three months. The release was incorporated into an amendment to the Interceptor Agreement that was signed by the parties on July 14, 2008.

¶ 21 C. The Developer's Complaint

¶ 22 On September 6, 2013, the Developer filed its initial complaint. On February 21, 2014, the Developer filed its first amended complaint alleging claims for declaratory judgment (count I) and breach of contract (count II). In count I, the Developer argued that the Project was completed and accepted as of October 21, 2011, but the City did not release the five letters of credit within the time required by statute. The Developer further argued that the $1.9 million letter of credit, No. 08518, for Route 38 was duplicative due to a performance bond with IDOT and that TIF bonds served as "surety duplicative to various of the Letters of Credit." The Developer requested (1) a declaratory judgment that the extended holding of the letters of credit was unlawful and (2) the imposition of statutory damages of approximately $800,000 under section 3(c) of the Public Construction Bond Act (Bond Act) (30 ILCS 550/3 (West 2016)).

¶ 23 In count II, the Developer alleged, with respect to the Interceptor Agreement, that the City chose the contractor to complete the sewer infrastructure work, but the Agreement obligated the Developer to pay for that work. The City's contractor, Gilbert, did not complete the work at the specified price and submitted numerous change orders, approved by the City, which increased the cost by $271,085. Additionally, the work was never completed by the City's contractor and there were additional costs of $485,197 to complete the work and $32,705 for additional engineering work and supervision. The Developer requested damages in the amount of $788,987.

¶ 24 On March 3, 2014, the City filed a motion to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). With respect to count I, the City argued that it was not required to release any letters of credit until 60 days after it received written notice of the completion of the Project work for which the letter of credit was required. The City submitted an affidavit from Tesreau, in which Tesreau stated that the Developer never submitted the requisite written notice of completion. With respect to count II, the City argued that the claim should be dismissed because it was the subject of a release. In support, the City submitted an affidavit of its City Attorney, Alan Cooper. In his affidavit, Cooper stated that the Developer asserted the claims in count II against the City in 2008 and that the claims were released as part of an amendment to the Interceptor Agreement. A copy of the amendment was attached to the affidavit.

¶ 25 On July 16, 2015, the Developer filed a response in opposition to the motion to dismiss. With respect to count I, the Developer first argued that the motion to dismiss should be denied because it only spoke to the notice issue but did not address whether all the letters of credit were either unnecessary or duplicative. Further, the Developer argued that required notices were

given. In support, the Developer submitted an affidavit from Fitzgerald, the Project manager, stating that the punchlist items were complete October 3, 2011, the work was accepted on October 21, 2011, and numerous notices were sent to the City about the substantial completion of the Project work.

¶ 26 Regarding count II, the Developer acknowledged that it entered a release with respect to its claim for damages related to the Interceptor Agreement, but argued that the claim should not be dismissed because the release was obtained under duress. In his affidavit, Fitzgerald stated that the Developer had a $4 million dollar contract with Walmart and needed plat approval and a grading permit to complete the work for Walmart on time. The City refused to grant plat approval or the necessary grading permit unless the Developer agreed to an amendment to the Interceptor Agreement, which included the subject release. If the Developer had not accepted the release, it would have defaulted on its contract with Walmart. Fitzgerald alleged that the Developer signed the amendment and release under economic and moral duress.

¶ 27 On August 24, 2015, following a hearing, the trial court denied the motion to dismiss count I, finding that there were genuine issues of material fact concerning when the various notices were sent and the timing of the releases of the letters of credit. The trial court granted the dismissal of count II. The trial court found that the hard bargaining and financial pressure of the plat approvals and grading permits were not enough to show economic duress and that the City's conduct in obtaining the release was not tainted with fraud or wrongdoing. Further, the trial court noted that the Developer had the assistance of counsel at all times and had adequate time to review and consider the proposed release.

¶ 28 On March 6, 2017, the Developer filed its third amended five-count complaint. In count I, the Developer restated its original claim for declaratory judgment. The Developer alleged that

the letters of credit were not timely released and that certain letters of credit were unnecessary and duplicative. In count II, the Developer restated its claim for breach of the Interceptor Agreement in order to preserve it for appeal. In count III, the Developer stated a claim for trespass to chattels, arguing that the failure to release the letters of credit, and holding duplicative letters of credit, was an intentional and unlawful dispossession of the related funds from the Developer. The Developer requested judgment in excess of $800,000, plus attorneys' fees and costs. Count IV stated a claim for violation of statute, based on the alleged extended holding of the letters of credit and other surety in violation of section 3(c) of the Bond Act (30 ILCS 550/3(c) (West 2016)). Count V stated a claim for promissory estoppel, arguing that the City promised to release letter of credit No. 08518, for work related to Route 38, if the Developer obtained a performance bond for the work from the Illinois Department of Transportation (IDOT). However, when the Developer obtained the IDOT bond, the City refused to release the aforementioned letter of credit.

¶ 29 On March 29, 2017, the City filed its answer and affirmative defenses to the Developer's third amended complaint. The City asserted that counts I, III, IV, and V were barred by the one-year statute of limitation set forth in the Illinois Local Government Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101 (West 2016)).

¶ 30 On April 18, 2017, the City filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2016)). The City argued it was entitled to summary judgment on counts I, III, IV and V because the claims were barred by the one-year statute of limitations provided for in the Tort Immunity Act (745 ILCS 10/8-101 (West 2016)).

¶ 31 On May 22, 2017, the Developer filed its response to the motion for summary judgment. The Developer argued that the Tort Immunity Act did not apply to its claims because the release

of the letters of credit was a ministerial act, not a discretionary act. Further, the one-year statute of limitations did not apply because the Developer's claim was for declaratory judgment, not for damages. Even if the statute of limitations applied, the Developer argued that its cause of action did not start to accrue until November 18, 2013, when the final letter of credit was released. With respect to count V, the Developer argued that the one-year statute of limitations did not apply to claims for promissory estoppel because such claims sounded in contract rather than tort.

¶ 32 On May 31, 2017, the City filed a reply in support of its motion for summary judgment. As to count V, the City additionally argued that the Developer failed to establish that there was an unambiguous promise and that, therefore, the City was entitled to judgment as a matter of law because the Developer failed to meet the elements of a promissory estoppel claim.

¶ 33 On June 26, 2017, following a hearing, the trial court issued a written memorandum of opinion and order. The trial court found that the statute of limitations started to run on July 21, 2011, the day the Developer claimed it sent written notice of completion. Since the Developer's complaint was filed on September 6, 2013, it was filed outside the one-year statute of limitations. The trial court granted summary judgment on counts I, III, IV and V because they were barred by the Tort Immunity Act's one-year statute of limitations. The trial court had previously dismissed count II pursuant to section 2-619 of the Code on August 24, 2015. Thereafter, the Developer filed a timely notice of appeal.

¶ 34 II. ANALYSIS

¶ 35 On appeal, the Developer first argues that the trial court erred in granting summary judgment in favor of the City. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 2-1005(c) (West

2016). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Pielet v. Pielet*, 2012 IL 112064, ¶ 53. We review *de novo* the trial court's judgment on a motion for summary judgment. *Garlick v. Naperville Township*, 2017 IL App (2d) 170025, ¶ 44.

¶ 36 Counts I, III, and IV

¶ 37 The Developer contends that the trial court erred in finding counts I, III, and IV barred by the Tort Immunity Act's one-year statute of limitations. Section 8-101 of the Tort Immunity Act provides "[n]o civil action *** may be commenced *** against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101(a) (West 2016). A "local public entity" includes any "municipal corporation." 745 ILCS 10/1-206 (West 2016).

¶ 38 The applicability of a statute of limitations to a cause of action presents a legal question that is reviewed *de novo*. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 345 (2002). The purpose of the Tort Immunity Act's one-year limitation period "is to encourage early investigation into a claim *** when the matter is still fresh, witnesses are available, and conditions have not materially changed. Such an investigation permits prompt settlement of meritorious claims and allows governmental entities to plan their budgets in light of potential liabilities." *Ferguson v. McKenzie*, 202 Ill. 2d 304, 313 (2001).

¶ 39 A statute of limitations begins to run when the party to be barred has the right to invoke the aid of the court to enforce his remedy. *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 266 (2001). "Stated another way, a limitation period begins 'when facts exist which authorize one party to maintain an action against another.'" *Id.* (quoting *Davis v. Munie*, 235 Ill. 620, 622 (1908)). The appropriate statute of limitations to apply to a cause of action "is determined by the nature of the Developer's injury rather than the nature of the facts from which the claim arises." *John Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 413 (2009). To determine the applicable statute of limitations, a court must focus on the nature of the liability and not on the nature of the relief sought. *Travelers Casualty & Surety Company v. Bowman*, 229 Ill. 2d 461, 467 (2008).

¶ 40 In the present case, the trial court did not err in granting summary judgment on counts I, III, and IV of the Developer's complaint on the basis that the claims did not fall within the one-year statute of limitations. The statute of limitations provided in section 8-101 of the Tort Immunity Act begins to run "from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101 (West 2016). The Developer argues that it sent its written notice of completion on July 21, 2011, and that the letters of credit were required, by section 3(c) of the Bond Act (30 ILCS 550/3(c) (West 2016)), to be released within 60 days, which is about September 21, 2011. Assuming that the July 21, 2011 letter of substantial completion sufficiently served as a notice of completion, the statute of limitations for failing to release the surety within 60 days accrued on September 21, 2011, and any claim related thereto had to be filed within one year, or by September 21, 2012. In its complaint, the Developer also indicates that all the Project work was complete and accepted on October 21, 2011. In that case, any claim had to be filed by October 21, 2012. Since the Developer's complaint was not filed until

September 6, 2013, it was outside the Tort Immunity Act's one-year statute of limitations. The purpose of a statute of limitations to encourage diligence in the bringing of actions. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 137 (1975). A plaintiff cannot delay in filing its claims in order to maximize the recovery. At the time the Developer filed its initial complaint on September 6, 2013, the letters of credit had already been reduced to cover the cost of uncompleted Project work and the 10% performance bond. The last letter of credit, which held the 10% performance bond, was released about two months later, on November 18, 2013.

¶ 41 The Developer argues that its complaint not only alleged an untimely release of the letters of credit, but also alleged that too much surety was taken by the City due to the existence of the IDOT bond and the proceeds from the TIF bonds. To the extent the Developer's claims are based on the taking of too much or excessive surety, those claims accrued at the time the surety was taken in February 2010 and the statute of limitations for any such claims expired in February 2011. As for the Developer's claim that some of the surety should have been refunded when it posted the IDOT bond, that claim began to accrue when it posted the IDOT bond on November 3, 2010. Thus, the statute of limitations on that claim ended on November 3, 2011. To the extent the Developer is arguing that the City should have released some of the security when it received proceeds from the TIF bonds that cause of action accrued on December 14, 2010, when the City received those funds and the statute of limitations was exhausted on December 14, 2011.

¶ 42 The Developer, relying on *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248 (2004), argues that the one-year statute of limitations is not applicable. In *Raintree*, the City, the Village of Long Grove (Village), had an ordinance that required the Developers, Raintree Homes, Inc. and Raintree Builders, Inc. (hereinafter "Raintree"), to pay "impact fees" in return

for each building permit that the Village issued to it. *Id.* at 252. Raintree sought a declaratory judgment that the Village lacked statutory and constitutional authority to enact such an ordinance, and they also sought a refund of the impact fees they had paid to the Village. *Id.* at 253. The Village moved for the dismissal of the amended complaint, pursuant to section 2-619(a)(5) of the Code, because Raintree had not brought their action within the one-year period of limitation in section 8-101 of the Tort Immunity Act. *Id.* The trial court granted the motion, but the appellate court reversed the trial court's judgment, holding that the Tort Immunity Act only applied to actions sounding in tort. *Id.*

¶ 43 Our supreme court affirmed the appellate court's judgment, but for a different reason. Section 2-101 of the Tort Immunity Act provided that "[n]othing in this Act affects the right to obtain relief other than damages against a local public entity." 745 ILCS 10/2-101 (West 2002). Our supreme court held that the Tort Immunity Act was not applicable to Raintree's claim because the claim sought relief "other than damages." *Raintree*, 209 Ill. 2d at 256 (quoting 745 ILCS 10/2-101 (West 2002)). The court stated that Raintree requested "nothing more than a declaration that the ordinance [was] unlawful and a return of the impact fees collected pursuant to the ordinance." *Id.* It further stated that:

> "[Raintree] seek[s] the return of their monies paid to the Village, and no more. They do not seek compensation for the loss of capital which they could have devoted to other investments, such as earnings from investing in the construction of another residence. Thus, if the lawsuit is ultimately successful, the amount of the award will be measured by the Village's unjust gain, rather than the Developer's loss." *Id.* at 257.

¶ 44 The Developer argues that, as in *Raintree*, the Tort Immunity Act's one-year statute of limitations is not applicable because it is not seeking damages. The Developer contends that its

request for the statutory penalty provided in section 3(c) of the Bond Act is more like the claim in *Raintree* because it is not based on the Developer's loss. We disagree.

¶ 45 Section 3(c) of the Bond Act provides that a "municipality shall pay interest to the *** developer, beginning 60 days after the *** developer notifies the *** municipality in writing of the completion of the project improvement, on any bond not refunded to a *** developer, at the rate of 1% per month." 30 ILCS 550/3(c) (West 2016). The legislative history shows that the purpose of the statutory penalty in section 3(c) is to make up for the Developer's loss when there is delay in getting bonds refunded because this is a "considerable harm on cash flow to any small businessman or woman." 89th Ill. Gen. Assem., House Proceedings, May 8, 1996, at 133 (statement of Representative Black). The penalty in 3(c) is thus damages for harm the Developer suffers in being deprived of its assets for more than 60 days once the work is complete. *Raintree*, 209 Ill. 2d at 257. If the Developer was only seeking a declaratory judgment and the release of the letters of credit, that would be more similar to the claim for a refund of impact fees in *Raintree*. However, in paragraph 14 of its complaint, the Developer specifically states that it is "demand[ing] statutory damages in an amount to be proven at trial, anticipated to be approximately $800,000." The statutory penalty at issue here is more like a claim for damages and the Developer's reliance on *Raintree* is thus unpersuasive.

¶ 46 The Developer also argues that the Tort Immunity Act's one-year statute of limitations is not applicable because the release of the letters of credit is a ministerial act, which is not covered by the Tort Immunity Act. The Developer relies on *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 193-94 (1997), where the supreme court stated:

> "The discretionary immunity doctrine is codified in sections 2-109 and 2-201 of the Tort Immunity Act (745 ILCS 10/2-109, 2-201 (West 1994)). [Citations.] At common law, a

> municipality is afforded immunity from liability for the performance of discretionary acts. However, the municipality is not immune from liability for the performance of ministerial tasks. [Citation.]"

We find this argument to be without merit. Even assuming, *arguendo*, that the release of the letters of credit was a ministerial task, any claim must still be brought within the Tort Immunity Act's one-year statute of limitations.

¶ 47 Finally, the Developer argues that its claims are not barred by the one-year statute of limitations because the last letter of credit was released on November 18, 2013, which "finally ended [the City's] continuing offending conduct and would be the date of accrual for this claim." The Developer relies on *Starcevich v. City of Farmington*, 110 Ill. App. 3d 1074 (1982). In *Starcevich*, the plaintiff alleged that damage to his driveway occurred in 1974 and in 1980, during unusually heavy rainstorms, as a result of the defendant's modifications to the surrounding land and the installation of a culvert system, which occurred around 1969 and 1970, and development of the surrounding property, which occurred around 1976. *Id.* at 1076. The plaintiff filed suit in February 1981. *Id.* at 1075. The trial court dismissed the suit, finding it barred by the statute of limitations. *Id.* at 1076. The reviewing court held that, with respect to a lawsuit brought under the Tort Immunity Act, "[w]here a tort involves repeated injury, the statute of limitations *** begins to run from the date of the last injury or when the tortuous acts cease." *Id.* at 1079. The reviewing court reversed the trial court's determination, holding that a two-year statute of limitations applied and that, for the plaintiff's 1980 injury, the statute began to run on the date the plaintiff's driveway was washed away during the 1980 rainstorm. *Id.* at 1079. The reviewing court made no express determination concerning the 1974 injury.

¶ 48 The Developer's reliance on *Starcevich* is unpersuasive as the present case does not involve repeated injury. The Developer alleges only one injury, which occurred when the City demanded too much surety and failed to release it within the time required by statute. This is not like the repeated injury suffered in *Starcevich*. This case would be similar to *Starcevich* if there were multiple projects and the Developer was repeatedly required to post excessive surety and the City repeatedly failed, on each project, to timely release the surety. Under *Starcevich*, for each project, the posting of surety and the failure to timely release such would begin a new statute of limitation. However, that is not the case here. The Developer posted surety and the City allegedly required too much surety and failed to timely release it. There is no repeated injury as in *Starcevich*.

¶ 49 Moreover, on February 2, 2012, the Bank reduced the letters of credit to the 10% performance bond and the cost of unfinished work. To the extent the Developer argues that the statute of limitations did not begin to run until the letters of credit were released, that cause of action accrued with respect to the completion bonds when the letters of credit were reduced on February 2, 2012, and, therefore, the statute of limitations expired on February 2, 2013. This was prior to the Developer's initial complaint filed on September 6, 2013. Moreover, if, for the sake of argument, all the work was complete and accepted as of October 21, 2011, as stated in the Developer's complaint, the two-year performance bonds were to be released as of October 21, 2013. The final letter of credit was released one month later, on November 18, 2013. However, the record is clear that the work was not complete and accepted as of October 21, 2011. Tesreau sent a letter to the Developer on November 21, 2011, outlining multiple items that were not yet complete. Accordingly, there was no delay in the release of the performance bonds. For the foregoing reasons, we affirm summary judgment on counts I, III, and IV of the

Developer's third amended complaint in favor of the City on the basis that the claims are barred by the statute of limitations.

¶ 50 Count V

¶ 51 The Developer next argues that the trial court erred in granting summary judgment on count V, its claim for promissory estoppel, as barred by the statute of limitations. The Developer cites *Harris v. Chicago Housing Authority*, No. 97-C-6285, 1998 WL 386371, at *3 (N.D. Ill. July 2, 1998), for the proposition that claims for promissory estoppel, which are grounded in the principles of contract, are an exception to the Tort Immunity Act's one-year statute of limitations. See 745 ILCS 10/2-101(a) (West 2016) ("Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on *** contract."). The City does not address whether count V is an exception to the Tort Immunity Act but argues that summary judgment can be affirmed because the Developer has failed to establish that an unambiguous promise was made, and thus, the claim for promissory estoppel fails.

¶ 52 Promissory estoppel provides a remedy for those who rely to their detriment, under certain circumstances, on promises, despite the absence of any mutual agreement by the parties on all the essential terms of a contract. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 55 (2009). In order to establish a claim of promissory estoppel, a plaintiff must allege: (1) defendant made an unambiguous promise to the plaintiff; (2) plaintiff relied on that promise; (3) plaintiff's reliance was expected and foreseeable by the City; and (4) plaintiff relied on the promise to its detriment. *Id.* at 51. It is well settled that a defendant can obtain a summary judgment by establishing that the plaintiff cannot prove a necessary element of his or her cause of action. *Johnson v. Owens-Corning Fiberglass Corp.*, 284 Ill. App. 3d 669, 677 (1996). While a plaintiff is not required to prove its case at the summary judgment stage, "[it] must present

enough evidence to create a genuine issue of fact." *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007).

¶ 53 To establish that a promise was made, the Developer relies on an email exchange between Tesreau, the City's engineer, and Gronewold, the Developer's engineer. In a June 9, 2009, email, from Gronewold to Tesreau, Gronewold apologized for missing a meeting the previous day but stated that he had been briefed by an associate. He further stated that he understood that "should another means of surety be put in place for the scope of work such as the contractors bond for the Route 38 improvements, the developers[' letters of credit] can and will be reduced immediately." In response, Tesreau wrote that the "City will need to review the final improvements, quantities and proposed bond along State's ROW to verify all necessary items are incorporated into said bond before those items are considered as an acceptable form of surety for platting purposes."

¶ 54 Tesreau's response to Gronewold was not an unambiguous promise that the security for the Route 38 work would be released if the Developer posted a bond with IDOT for the work. Tesreau stated that the City would review whether the "proposed bond along State's ROW" was acceptable. However, there was no promise that the IDOT bond would be acceptable or that, if it was, "the developer[']s letters of credit] can and will be reduced immediately" (Gronewold's words). As a matter of law, the email from Tesreau is not an unambiguous promise and the Developer has failed to establish a genuine question of material fact on this issue. Because the Developer cannot prove a necessary element of its cause of action, we affirm summary judgment in favor of the City on Count V. See *Jandeska*, 383 Ill. App. 3d at 398 (we may affirm on any basis supported by the record). Since we affirm on the foregoing basis, we need not determine whether a claim for promissory estoppel is an exception to the Tort Immunity Act.

¶ 55 In so ruling, we note that the Developer relies on *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46 (2009), in arguing that Tesreau's email was an unambiguous promise. In *Newton*, the plaintiff was negotiating to purchase a dealership that sold farm equipment. *Id.* at 47. The plaintiff only wanted to purchase the dealership if it was able to obtain authorization to sell the defendant's farm equipment. *Id.* at 48. At a meeting with the defendant's representative, the representative stated that the plaintiff would "be the dealer." *Id.* at 49. After the plaintiff purchased the dealership, the defendant denied the plaintiff's application to be its authorized dealer. *Id.* The plaintiff filed a complaint that included a claim for promissory estoppel. *Id.* The trial court granted summary judgment to the defendant, finding that promissory estoppel was not a recognized cause of action under Illinois law. *Id.* at 50. The appellate court affirmed the summary judgment. *Id.* Our supreme court reversed the appellate and trial courts, holding that promissory estoppel was an affirmative cause of action. *Id.* at 54.

¶ 56 *Newton* is distinguishable from the present case. In *Newton*, the plaintiff established, at the summary judgment stage, that the defendant told him he would "be the dealer." In the present case, the Developer has not established such an unambiguous promise. While Tesreau indicated the City would review the proposed bond along the State's ROW, he did not state that the City would necessarily deem it sufficient or that, if it did, it would reduce the requisite letter of credit on the Route 38 work. In other words, in *Newton* the plaintiff was told he would "be the dealer," but in this case the Developer was not told "the letter of credit would be released." Accordingly, the Developer's reliance on *Newton* is unpersuasive.

¶ 57 Count II

¶ 58 The Developer's final contention on appeal is that the trial court erred in dismissing count II of its complaint, its claim for breach of contract. The Developer acknowledges that it signed a

release with respect to this claim, but argues that it signed the release under economic duress. The Developer argued that it needed plat approvals and grading permits to meet the requirements of a $4 million dollar contract with Walmart. The City refused to issue the approvals and permits unless the Developer signed the subject release. The Developer argues that if it had not signed the release, it would have defaulted on its contract with Walmart.

¶ 59 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of the complaint but asserts affirmative matter to avoid or defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. When ruling on such a motion, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill. 2d 1, 5 (2004). The decision to dismiss a claim is subject to *de novo* review. *Id.* at 6. "[T]he question on appeal is whether there is a genuine issue of material fact and whether [a] defendant is entitled to judgment as a matter of law." *Mitchell v. State Farm Fire & Casualty Co.*, 343 Ill. App. 3d 281, 284 (2003).

¶ 60 Economic duress, which is also known as business compulsion, is an affirmative defense to a contract that releases the party signing under duress from all contractual obligations. *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 150, 173 (2010). "Duress occurs where one is induced by a wrongful act or threat of another to make a contract under circumstances that deprive one of the exercise of one's own free will." *Krilich v. American National Bank & Trust v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 572 (2002). Acts or threats must be legally or morally wrongful to constitute duress. *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 775 (2007). Duress is measured by an objective test, rather than a subjective one: the person claiming duress has the burden of proving,

by clear and convincing evidence, that he was bereft of the quality of mind essential to the making of a contract. *Id.* Where consent to an agreement is secured merely through hard bargaining positions or financial pressures, however, economic duress does not exist. *Krilich*, 334 Ill. App. 3d at 572.

¶ 61 In *Krilich*, the developer, Robert Krilich, agreed to sell a lot intended for residential real estate development to the plaintiff, Bongi Development Corporation (Bongi). *Krilich*, 334 Ill. App. 3d at 566. The parties completed the sale and subsequently modified the contract. *Id.* at 567. When litigation ensued for breach of contract, Bongi claimed that the contract modifications were unenforceable because Krilich employed economic duress during the negotiations. *Id.* at 568. Specifically, Bongi alleged that Krilich threatened to refuse to meet his obligations, under another agreement, to complete work on another project Bongi was developing. *Id.* Bongi alleged that Krilich knew that Bongi owed millions of dollars on the other project and that Krilich's delay on the other project would jeopardize Bongi's success. *Id.* The trial court granted Krilich's section 2-619(a)(9) motion to dismiss, concluding that Bongi had failed to state a claim for duress, and Bongi appealed. *Id.* at 569.

¶ 62 The reviewing court affirmed, concluding that Krilich's threat did not constitute duress. *Id.* at 573. The reviewing court stated:

> "'Ordinarily, a threat to break a contract does not constitute duress, and to infer duress, there must be some probable consequences of the threat for which the remedy for the breach afforded by the courts is inadequate. If there is no full and adequate remedy from the courts for the breach, the coercive effect of the threatened action may be inferred.' [Citation.] Furthermore, a finding of duress is less likely if the party has the assistance of counsel and adequate time to consider the proposed contractual terms. [Citation.]" *Id.*

The reviewing court noted that Bongi had the opportunity to consult counsel during the three-month period that the parties were negotiating the modifications to the contract. *Id.* The reviewing court also held that Bongi's allegations that it faced "financial collapse, bankruptcy, and protracted litigation if Krilich followed through on his threat" were not sufficient to establish duress because Bongi's breach of contract damages could have been recovered in court. *Id.*

¶ 63 In the present case, the trial court did not err in dismissing count II of the Developer's complaint. As in *Krilich*, the record demonstrates that the Developer was represented by counsel for the entire period that the release was negotiated, which was about three months. The release was first raised by the City in March 2008 and the parties signed the amended Interceptor Agreement, which included the release, in July 2008. Also, as in *Krilich*, if the Developer had defaulted on its contract with Walmart due to the actions of the City, it could have sought a full and adequate remedy in court. In the present case, even though the City arguably secured the Developer's agreement to the release through a hard bargaining position and financial pressures, the totality of the circumstances does not, as a matter of law, establish economic duress. *Id.*

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Ogle County is affirmed.

¶ 66 Affirmed.