2018 IL App (2d) 171020-U
No. 2-17-1020
Order filed October 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF WHEATON,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17-MR-77
	)	
MORNINGSIDE WHEATON LLC,	)	Honorable
	)	Paul Fullerton,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting summary judgment for defendant on plaintiff's complaint for a declaratory judgment regarding the parties' rights under a redevelopment agreement. Summary judgment for defendant is vacated, and the case is remanded for entry of summary judgment in plaintiff's favor.

¶ 2 Plaintiff, the City of Wheaton, filed a declaratory judgment action against defendant, Morningside Wheaton LCC, concerning a contract for construction of a residential building in downtown Wheaton. Subsequently, the parties filed cross-motions for summary judgment. The issue in the summary judgment proceeding was whether plaintiff owed defendant certain reimbursement payments under the construction contract. The trial court denied summary

judgment for plaintiff and granted it for defendant. Plaintiff appeals. We vacate the summary judgment for defendant and remand for entry of summary judgment in favor of plaintiff.

¶ 3 I. BACKGROUND

¶ 4 In a contract dispute such as this, extrinsic (or parol) evidence may be considered in limited circumstances. See *Mount Hawley Insurance Co. v. Robinette Demolition, Inc.*, 2013 IL App (1st) 112847, ¶ 45 ("As a general rule, extrinsic evidence outside of the contract is only admissible if the contract is ambiguous."). For the sake of completeness, our factual presentation references not only the contract documents but also the extrinsic evidence adduced by the parties below, some of which the trial court relied on its decision. In our analysis, however, we hold that the contract at issue must be construed without extrinsic evidence.

¶ 5 We set forth first the relevant contract documents. On July 2, 2012, plaintiff adopted ordinance No. F-1648, which allowed defendant to construct an apartment complex in downtown Wheaton (the property). On July 3, 2012, the parties entered into a "Redevelopment Agreement" (Agreement) in which defendant agreed to construct the property. The property was part of a tax increment allocation financing (TIF) redevelopment plan for downtown Wheaton. According to the Agreement, plaintiff had authority to finance certain costs of the project under the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq.* (West 2014)). Section 6.02 of the Agreement made defendant responsible for the entire cost of the project "[s]ubject to repayment of the UTILITY COST REIMBURSEMENT and REIMBURSABLE COSTS by the CITY[.]" "REIMBURSABLE COSTS" were "REDEVELOPMENT COSTS associated with PUBLIC IMPROVEMENTS, excluding UTILITY COSTS, for which the CITY will reimburse the DEVELOPER pursuant to the terms of [the Agreement]." "UTILITY COST

REIMBURSEMENT" meant "payments from the CITY to REIMBURSE the DEVELOPER for the actual costs of UTILITY WORK."

¶ 6 Under section 10.2 of the Agreement, plaintiff would pay defendant the "REIMBURSABLE COSTS" upon "CITY FINAL APPROVAL," which would be "the later to occur of (1) the CITY's issuance of a final certificate of occupancy for the BUILDING IMPROVEMENTS and (2) the CITY's passage and publication of an ordinance accepting the PUBLIC IMPROVEMENTS." By contrast, plaintiff would provide defendant "UTILITY COST REIMBURSEMENT" on a rolling basis as defendant incurred costs for qualifying utility work.

¶ 7 Section 11 of the Agreement provided for "LOOK BACK," or "the potential for the CITY to recover TIF financial assistance paid or payable to the DEVELOPER if the profitability to [defendant] exceeds defined parameters as provided in Section 11." Look-back payments were the means by which plaintiff could recoup, in whole or part, what it had paid defendant pursuant to section 10 of the Agreement as reimbursement for project costs. Section 11 provided a formula for calculating defendant's look-back responsibility and specified how often that responsibility would be calculated while defendant owned the property. The Agreement further provided that plaintiff would perform a look-back calculation if and when the property was sold or transferred to a third party prior to expiration of the Agreement. The Agreement would remain in effect "until the earlier of: (1) the CITY's receipt of full reimbursement for its payment of REIMBURSABLE and UTILITY COST REIMBURSEMENT to the DEVELOPER through either TAX INCREMENT and/or LOOK BACK PAYMENTS; or (2) the payment of the second installment of the real estate taxes for the tax year marking the expiration of the Wheaton Main Street Redevelopment Tax Increment Financing District."

¶ 8 Section 18.09 of the Agreement contained the following integration clause:

> "This AGREEMENT together with all Exhibits and attachments thereto, constitute the entire understanding and agreement of the PARTIES. This AGREEMENT integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the PARTIES with respect to all or any part of the subject matter hereof. All waivers of the provisions of this AGREEMENT must be in writing and signed by the appropriate authorities of the CITY or the DEVELOPER, and all amendments hereto must be in writing and signed by the appropriate authorities of the CITY and the DEVELOPER."

¶ 9 Section 18.10 of the Agreement provided that plaintiff could execute no amendment to the Agreement without the authorization of an ordinance or resolution adopted by plaintiff's corporate authorities.

¶ 10 On October 21, 2013, plaintiff adopted ordinance No. F-1736, which permitted plaintiff to execute a first amendment to the Agreement. Also dated October 21, the first amendment provided, *inter alia*, that "[t]he maximum amount of reimbursement payable by the CITY to the DEVELOPER for PUBLIC IMPROVEMENTS shall be One Million, Three Hundred Ninety Three Thousand, Nine Hundred Fifty-Seven Dollars ($1.393,957)." The first amendment was to be "deemed by the PARTIES to be fully integrated into [the Agreement]."

¶ 11 On May 18, 2015, plaintiff adopted ordinance No. F-1867, which permitted plaintiff to sign a second amendment to the Agreement. The second amendment was attached to the ordinance. The ordinance also gave plaintiff's City Manager authority to sign a further agreement, the "side-letter agreement," which "shall be prepared by the City Attorney and contain those terms as set forth in [the second amendment], as well as any other terms necessary to effectuate its intent and application as determined by the City [A]ttorney."

¶ 12 The second amendment itself was dated May 19, 2015. The second amendment amended section 11 of the Agreement, which concerned look-back payments. The new section 11.08 called for a simplified look-back reimbursement procedure in the event of a sale of the property, and also required the parties to enter into the side-letter agreement:

> "11.08. Simplified Look Back Reimbursement. The Developer may notify the City, in the instance of a sale of the redevelopment property ('Property Sale'), that the sale will result in the City recovering or completing the recovery of, as required by this AGREEMENT, all public funds paid to the Developer. In this event and simultaneously with the closing of the sale of the redevelopment property (the 'Closing'), the Developer shall provide the City with full reimbursement of the REIMBURSABLE and UTILITY COSTS in the amount of $1.393,957 ('RPF').
>
> Upon receipt of the RPF at Closing and simultaneously therewith, the City will provide to Developer a written release in recordable form stating that the Agreement has been terminated, including, without limitation; that the Developer is released from all obligations of Developer under the Agreement ('City's Release'). The release shall include a reciprocal release of the Developer's claims under the Agreement except its rights under the Side Letter referred to below. The City's Release shall be recorded by the Developer on the same day as the Closing.
>
> Additionally, upon the City's receipt of the RPF, the City and Developer shall simultaneously enter into a side letter agreement which shall not in any manner change, compromise or effect the Parties Release and the termination of the Agreement. The side letter agreement shall provide that within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes and in 2016 of each installment of the 2015

real estate taxes, *the City shall reimburse Developer for that portion of the real estate taxes paid by the Developer relating to the Tax Increment Financing ('Reconciled Taxes') that the City is required to reconcile under the terms of the Agreement*; provided, however, that the Reconciled Taxes shall not exceed the RPF.

Should the Closing not occur prior to July 15, 2015, then this Amendment shall be void, and all rights of the Agreement shall remain in full force and effect." (Emphasis added.)

The contrast between the italicized language and the parallel language of the side-letter agreement is the basis of the controversy in this case.

¶ 13 The second amendment also contained its own integration clause:

"This Agreement constitutes the entire agreement and understanding by, between and among the Parties hereto on the subject hereof and supersedes all prior agreements, representations, warranties, statements, promises and understandings, whether oral or written, with respect to the subject matter of this Agreement. There are no restrictions, agreements, promises, warranties, covenants or undertakings other than those expressly set forth herein. No Party hereto has in any way relied, nor shall in any way rely, upon any oral or written agreements, representations, warranties, statements, promises or understandings made by any other party, any agent or attorney of any other party or any other person unless such agreement, representation, warranty, statement, promise or understanding is specifically set forth in this Agreement. No Party hereto nor any of his or its attorneys shall be bound by or charged with any statement, promises, or understandings not specifically set forth in this Agreement."

The second amendment provided that it was to be "deemed by the Parties to be fully integrated into the Agreement."

¶ 14 The side-letter agreement, which is undated, contained several recital clauses, including the following:

> "**WHEREAS**, on May 18, 2015 the City approved Ordinance F-1867, adopting a Second Amendment to the Agreement by amending Section 11 of the Agreement to provide for a simplified look back reimbursement;
>
> **WHEREAS**, the Ordinance requires that the City enter into a Side Letter agreement with Developer which would allow the City to be fully and promptly reimbursed for its reimbursable and utility costs in the amount of One Million Three Hundred Ninety-Three Thousand Nine Hundred Fifty-Seven Dollars and 00/100 ($1,393,957.00) (the '[RPF]'), if and when the Developer sells the Property and is able to make or complete full reimbursement of the reimbursable and utility costs to the City, and for Developer to be reimbursed by the City for certain portions of the real estate taxes relating to the tax increment financing[.]"

¶ 15 Among the relevant operative provisions of the side-letter agreement were the following:

> 1. Developer hereby notifies the City that Developer is exercising its rights under Section 11.08 'Simplified Look Back Reimbursement' of the Second Amendment to the Agreement and that Developer is prepared at a closing sale of the Property prior to July 15, 2015, to deliver to the City reimbursables and utility costs in the amount of One Million Three Hundred Ninety-Three Thousand Nine Hundred Fifty-Seven Dollars and 00/100 ($1,393,957.00).

2. Release of the Redevelopment Agreement. The City shall deliver the release of the Redevelopment Agreement attached hereto as Exhibit 1 (hereinafter 'Release') to be held in escrow by the title company closing of [*sic*] the sale of the Property. The City shall provide written instructions to the Title Company to tender the Release to the Developer for recording upon the title company's receipt and wire transfer of the One Million Three Hundred Ninety-Three Thousand Nine Hundred Fifty-Seven Dollars and 00/100 ($1,393,957.00) to the City. The City shall provide the wire transfer instructions to the Title Company.

3. Reimbursement. Within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes, and in 2016 of each of the installments of the 2015 real estate taxes, *the City shall make reimbursement payments to the Developer for that portion of the real estate taxes relating to the tax increment financing (reconciled taxes) that the City is required to reconcile under the terms of the Agreement, as amended.* In no circumstance shall the combined amounts of the reconciled taxes exceed the RPF. The City shall only be obligated to make the reimbursement payments to Developer as and when each installment of the taxes are paid to and received by the City. The payments shall not include interest.

4. Release Unaffected. This Side Letter is independent of the Agreement and shall not be interpreted to in any way invalidate or compromise the City's release referred to in Section 11.08 'Simplified Look Back Reimbursement' of the [second] amendment to the Agreement approved by Ordinance F-1867." (Emphasis added.)

The italicized language was similar, but not identical to, the corresponding language in the second amendment, which we italicized above (*supra* ¶ 11). Most notably, the side-letter

agreement did not contain the phrase "paid by Developer" following "that portion of the real estate taxes ***."

¶ 16 The side-letter agreement contained an integration clause identical to the clause in the second amendment.

¶ 17 In January 2017, plaintiff filed its initial and amended complaints for declaratory relief. Plaintiff sought a declaration that the "reimbursement payments" referenced in the side-letter agreement were only intended to compensate defendant for real estate taxes it paid on the property, and, therefore, plaintiff had no obligation to make those payments if defendant did not pay the taxes. Plaintiff relied on the parallel language in the second amendment that "the City shall reimburse Developer for that portion of the real estate taxes *paid by the Developer*" (emphasis added).

¶ 18 Defendant answered the complaint and raised the affirmative defenses of equitable estoppel and unclean hands. Defendant also brought a countercomplaint, which it later amended. The amended countercomplaint had three counts: breach of contract (which was a counterpoint to plaintiff's count for declaratory relief), unjust enrichment, and fraud in the inducement.

¶ 19 Defendant subsequently filed a motion for summary judgment, and plaintiff filed a cross-motion. Defendant's position on the contract interpretation issue was that, when the parties drafted the side-letter agreement using almost identical language from the second amendment, they deliberately omitted the phrase "paid by Developer" because they knew that the agreement by which defendant sold the property to a third party, Invesco Advisers, Inc., made Invesco, not defendant, responsible for payment of the 2015 real estate taxes on the property. Therefore, according to defendant, the "reimbursement payments" referenced in the side-letter agreement

were intended as reimbursement not for real estate taxes (for which defendant had no responsibility after the sale) but for the $1.3 million look-back sum paid by defendant at closing.

¶ 20 In their pleadings, the parties relied on the following extrinsic evidence. Plaintiff produced an affidavit from Colleen Lavery, one of plaintiff's finance directors. Lavery averred that between August 2012 and January 2015, plaintiff made three payments to defendant of, respectively, $479,432.57, $24,173, and $980,351.43, for a total of $1,393,957 (this figure was the maximum reimbursement for which plaintiff was responsible under the first amendment).

¶ 21 Plaintiff also attached a March 17, 2015, agreement by which defendant sold the property to Invesco for $95 million (the sale agreement). The sale agreement provided as follows for the payment of real estate taxes on the property: (1) Invesco would pay a prorated amount of the 2014 real estate taxes, which were due in 2015, the year in which closing was set to occur; and (2) Invesco would be solely responsible for the 2015 real estate taxes (due in 2016) and subsequent years.

¶ 22 In their allegations, the parties agreed that, following the sale of the property to Invesco, defendant was paid the $1.3 million contemplated in the second amendment and side-letter agreement. They further agreed, that, after receiving Invesco's payment of the 2014 real estate taxes on the property, plaintiff made a payment to defendant of $333,173.42.

¶ 23 Defendant referenced extrinsic evidence in the form of communications between the parties preceding the execution of the second amendment. Defendant attached an email exchange on May 14, 2015, in which the parties agreed that defendant would receive four reimbursement payments from the City, corresponding to four installments of "taxes *** paid in 2015" and taxes "paid in 2016." Plaintiff's attorney suggested that this understanding be reflected in the side-letter agreement.

¶ 24 Defendant contended that these communications were significant because, even though the parties were aware on May 14, 2015, that the sales agreement made Invesco responsible for the real estate taxes on the property from 2015 onward, they still agreed that defendant would receive reimbursement payments.

¶ 25 Defendant also attached a May 19, 2015, email from defendant's attorney asking plaintiff's attorney to review an edited version of the side-letter agreement. The section on reimbursement payments was edited with the following underlining and strikeouts:

> 3. ~~2.~~ Reimbursement. "Within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes~~;~~, and in 2016 of each of the installments of the 2015 real estate taxes, the City shall ~~reimburse~~ make reimbursement payments to the Developer for that portion of the real estate taxes ~~paid by the Developer~~ relating to the tax increment financing (reconciled taxes) that they City is required to reconcile under the terms of the Agreement, as amended. In no circumstances shall the combined amounts of the reconciled taxes exceed the RPF. The City shall only be obligated to make the reimbursement ~~if~~ payments to Developer as and when each installment of the taxes are paid to and received by the City. The payments shall not include interest."

¶ 26 A clean copy of the edited paragraph appeared in the executed side-letter agreement. According to defendant, the elimination of "paid by the Developer" reflected the parties' understanding that defendant would receive the reimbursement payments regardless of whether it paid the real estate taxes on the property for 2015 and/or subsequent years.

¶ 27 Defendant relied as well on plaintiff's undisputed payment to defendant of $333,173.42 following plaintiff's receipt from Invesco of the 2014 real estate taxes on the property. Defendant cited this as evidence of plaintiff's understanding that defendant was due the

reimbursement payments under the side-letter agreement regardless of whether it paid the real estate taxes on the property.

¶ 28 In addition to seeking summary judgment, plaintiff moved to strike defendant's affirmative defenses and dismiss counts 2 and 3 of its countercomplaint.

¶ 29 After a hearing on the cross-motions for summary judgment, the trial court granted summary judgment against plaintiff on its complaint for declaratory judgment and in favor of defendant on count 1 (breach of contract) of its countercomplaint. The court agreed with defendant that the side-letter agreement controlled because it showed "the final intent of the parties" and that the omission of the phrase "paid by the Developer" was consistent with the parties' knowledge that, under the sales agreement, defendant was not responsible for the 2015 real estate taxes on the property.

¶ 30 Subsequently, the court clarified that its summary-judgment ruling rendered moot plaintiff's motion to dismiss counts 2 and 3 of defendant's countercomplaint.

¶ 31 Plaintiff filed this timely appeal.

¶ 32 II. ANALYSIS

¶ 33 Plaintiff challenges the trial court's summary-judgment ruling. Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2016). The purpose of summary-judgment proceeding 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). "A triable issue of fact exists where there is a dispute as to a material fact or where,

although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999).

¶ 34 Here, the parties filed cross-motions for summary judgment. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. "However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Id.* Review of a summary judgment ruling is *de novo*. *Id.*

¶ 35 The parties offer opposing views of the "reimbursement payments" that the side-letter agreement keys to plaintiff's receipt of the 2014 and 2015 real estate taxes on the property. The parties agree that the payments were intended as reimbursement, but disagree as to what defendant was intended to be reimbursed for. Plaintiff claims that the reimbursement payments were intended to reimburse defendant if and when it paid the real estate taxes on the property for 2014 and 2015, while defendant contends that it was due the payments regardless of whether it paid the taxes on the property, because the payments were intended to reimburse it for the $1.3 million that it paid plaintiff at the closing of the sale to Invesco. According to defendant, the $1.3 million was a simply an "advance" to plaintiff, which it would repay as it received the tax revenue for 2014 and 2015. For the reasons that follow, we agree with plaintiff's interpretation of the contract.

¶ 36 In construing a contract, the primary objective is to give effect to the intention of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). A court will first look to the language of the contract itself to determine the parties' intent. *Id.* A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id.* The parties' intent is not

determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract. *Id.* Also, documents executed contemporaneously as part of the same transaction are construed as one contract. *Tepfer v. Deerfield Savings & Loan Ass'n*, 118 Ill. App. 3d 77, 80 (1983). " 'Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect ***.' " *Id.* (quoting 17 Am. Jur. 2d Contracts § 264 (1983)). " '[C]ontemporaneous means so proximate in time as to grow out of, elucidate and explain the quality and character of the transaction, or an occurrence within such time as would reasonably make it a part of the transaction.' " *Id.* (quoting *Elsberry Equipment Co. v. Short*, 63 Ill. App. 2d 336, 346-47 (1965)).

¶ 37 Under the "four corners" rule of contract interpretation,

> " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)).

In applying the four-corners rule,

> "a court initially looks to the language of a contract alone. [Citation.] If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence. [Citation.] If, however, the trial court finds that the language of the contract is susceptible to more than one meaning, then an ambiguity is present. [Citation.] Only then may parol evidence be admitted to aid the trier of fact in resolving the ambiguity." *Id.* at 462-63.

¶ 38 There are several contract documents in the record that are pertinent here. Our first task is to determine whether to construe them as one contract or several. We view the Agreement and its two amendments as a single contract because both amendments contain clauses integrating them into the Agreement. Also part of this single contract is the side-letter agreement because it purports to effectuate the terms of the Agreement as modified by the second amendment. Of the four documents that constitute this single contract, only the side-letter agreement is undated. However, indicia within the second amendment and the side-letter letter suggested that the latter was signed between May and July 2015.

¶ 39 Although plaintiff itself cited extrinsic evidence below, it asks us to eschew such evidence because the contract is facially unambiguous and contains an integration clause. Defendant appears to agree that the contract language is facially unambiguous, but defendant still asks us to consider extrinsic evidence including: (1) the sale agreement; (2) the parties' negotiations preceding the signing of the second amendment and side-letter agreement; and (3) plaintiff's post-contract acts, namely its payment to defendant of $333,173.42 following Invesco's payment of the 2014 real estate taxes on the property. Defendant relies on the "provisional admission approach," which allows the use of extrinsic evidence to establish an ambiguity that is not apparent on the face of the contract. See *Air Safety*, 185 Ill. 2d at 463. We hold that the doctrine does not apply here.

¶ 40 In *Air Safety*, the supreme court was asked to adopt the provisional admission approach, which had been applied by the appellate court in several cases. *Id.* (collecting cases). The court explained that "[u]nder the provisional admission approach, although the language of a contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear

language of the contract." *Id.* The supreme court ultimately declined to adopt the approach in the case before it because the contract at issue contained an integration clause. *Id.* at 464. The court explained that "where the parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence." *Id.* The court held that "the four corners rule precludes the consideration of extrinsic evidence where a contract contains an integration clause and is facially unambiguous." *Id.* at 468.

¶ 41 Here, integration clauses appear in the original Agreement, the second amendment, and the side-letter agreement. Therefore, under *Air Safety*, we cannot consider extrinsic evidence unless we find an ambiguity on the face of the contract. This is the case even if the extrinsic evidence is undisputed, as defendant claims it is here. Defendant cites the First District Appellate Court's holding in *Bright Horizons Children's Center, LLC v. Riverway*, 403 Ill. App. 3d 234, 247-48 (2010), as authority for applying the provisional admission approach despite the presence of an integration clause. To the extent that *Bright Horizons* suggests that extrinsic evidence can be considered even where contract is integrated *and* has no facial ambiguity, then the decision is contrary to *Air Safety* and we cannot follow it.

¶ 42 Before examining the critical parts of the second amendment and the side-letter agreement, we review the wider transaction of which those documents are parts. The July 2012 Agreement requires plaintiff to reimburse defendant for certain costs of the project, but also provides a look-back procedure by which plaintiff may recoup from defendant the reimbursed costs depending on defendant's profits from the project. The Agreement provides that plaintiff will perform look-back calculations on a regular basis while defendant owns the property and

additionally when defendant sells the property. The October 2013 first amendment to the Agreement caps at $1.3 million the costs for which plaintiff will reimburse defendant.

¶ 43 The May 2015 second amendment states that defendant may notify plaintiff of a sale of the property to a third party that will result, under the look-back formula of the Agreement, in plaintiff recouping "all public funds paid to [defendant]," *i.e.*, the full $1.3 million. Simultaneous with the closing of the sale, defendant will submit to plaintiff the $1.3 million as "full reimbursement of the REIMBURSABLE and UTLIITY COSTS" that plaintiff paid to defendant pursuant to the Agreement.

¶ 44 The second amendment also requires the parties to prepare two documents simultaneous with the closing and plaintiff's receipt of the $1.3 million. The second amendment dictates the terms of both documents. First, plaintiff is to prepare a written release of the parties' rights and obligations "under the Agreement except [defendant's] rights under the [the side-letter agreement]." Concerning the side-letter agreement, the second amendment provides in relevant part:

> "The side letter agreement shall provide that within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes and in 2016 of each installment of the 2015 real estate taxes, the City shall reimburse Developer for that portion of the real estate taxes *paid by the Developer* relating to the Tax Increment Financing ('Reconciled Taxes') that the City is required to reconcile under the terms of the Agreement; provided, however, that the Reconciled Taxes shall not exceed the RPF [*i.e.*, the $1.3 million paid by defendant to plaintiff at closing]." (Emphasis added.)

¶ 45 Defendant does not appear to dispute that, under the terms of the side-letter agreement as contemplated in this passage, plaintiff will reimburse defendant for the 2014 and 2015 real estate

taxes on the property if and when plaintiff receives the tax payments from defendant. The parties' disagreement, rather, is over whether the side-letter agreement that the parties ultimately produced was consistent with the terms dictated for it by the second amendment. The side-letter agreement contains the following recital clause among others:

> "**WHEREAS**, the Ordinance requires that the City enter into a Side Letter agreement with Developer which would allow the City to be fully and promptly reimbursed for its reimbursable and utility costs in the amount of One Million Three Hundred Ninety-Three Thousand Nine Hundred Fifty-Seven Dollars and 00/100 ($1,393,957.00) (the '[RPF]'), if and when the Developer sells the Property and is able to make or complete full reimbursement of the reimbursable and utility costs to the City, and for Developer to be reimbursed by the City for certain portions of the real estate taxes relating to the tax increment financing."

¶ 46 The operative portions of the side-letter agreement contain the following language paralleling the above-quoted portion of the second amendment:

> "Within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes, and in 2016 of each of the installments of the 2015 real estate taxes, the City shall make reimbursement payments to the Developer for that portion of the real estate taxes relating to the tax increment financing (reconciled taxes) that the City is required to reconcile under the terms of the Agreement, as amended. In no circumstance shall the combined amounts of the reconciled taxes exceed the RPF [or, the $1.3 million that defendant paid plaintiff at closing]. The City shall only be obligated to make the reimbursement payments to Developer as and when each installment of the taxes are paid to and received by the City."

¶ 47 According to defendant, the absence of "paid by Developer" after "that portion of the real estate taxes" in the above language was deliberate, showing the parties' intent that plaintiff make the "reimbursement payments" to defendant corresponding to the 2014 and 2015 real estate taxes paid on the property *regardless* of whether defendant was the party who paid the taxes. Thus, on defendant's view, the purpose for the payments to defendant changed between the second amendment and the side-letter agreement. They remained reimbursement payments, but where the payments were previously (under the second amendment) meant to reimburse defendant for taxes paid, they were now meant to reimburse defendant for the $1.3 million that defendant paid plaintiff at closing, and thus were due whether or not defendant was the party that paid the taxes.

¶ 48 Defendant's position is untenable. Since the second amendment and the side-letter agreement are one contract, our interpretation is constrained by certain presumptions. "It is a well established principle in the law of contracts that a construction should be adopted which harmonizes all the various parts so that no provision is deemed conflicting with or repugnant to, or neutralizing of any other." *Calumet Construction Corp. v. Metropolitan Sanitary District of Greater Chicago*, 222 Ill. App. 3d 374, 378 (1991). Additionally, "[i]t has long been the rule that '[u]nless a contrary intent is evident, words used in one sense in one part of a contract are deemed of like significance in another part.' " *Marwaha v. Woodridge Clinic, S.C.*, 339 Ill. App. 3d 291, 294 (2003) (quoting *Cedar Park Cemetery Ass'n v. Village of Calumet Park*, 398 Ill. 324, 334 (1947)).

¶ 49 Before us are not just two parts of a contract with parallel language; rather, one of those two parts effectively provides direction on how to construe the other. The parties agreed in the second amendment to draft the side-letter agreement to provide that plaintiff would reimburse defendant for taxes that it paid. First, ordinance No. F-1867 provided that the side-letter

agreement "shall be prepared by the City Attorney and contain those terms as set forth in [the second amendment] as well as any other terms necessary to effectuate its intent and application as determined by the City [A]ttorney." The second amendment itself stated that the side-letter agreement "shall" provide for reimbursement of taxes "paid by the Developer." We presume, absent a contrary indication, that the parties drafted the side-letter agreement to provide as directed in the ordinance and the second amendment. To facilitate comparison between the second amendment and side-letter agreement, we juxtapose the relevant language from the two documents:

> (1) *Second amendment*. "The side letter agreement shall provide that within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes and in 2016 of each installment of the 2015 real estate taxes, the City shall reimburse Developer for that portion of the real estate taxes paid by the Developer relating to the Tax Increment Financing ***."
>
> (2) *Side-letter agreement*. "Within thirty (30) days of the City's receipt in 2015 of each installment of the 2014 real estate taxes, and in 2016 of each of the installments of the 2015 real estate taxes, the City shall make reimbursement payments to the Developer for that portion of the real estate taxes relating to the tax increment financing ***."

¶ 50 We read the side-letter agreement as fulfilling the parties' intent, expressed in the second amendment, that defendant receive reimbursement if and when it paid the taxes on the property. The second amendment references payments to "reimburse" defendant for its payment of taxes; the side-letter agreement speaks of "reimbursement payments." The phrase "paid by Developer" does not reappear in the side-letter agreement, but we view that condition as tacit, particularly

because there is no mention in the immediate context of any outlay, other than taxes, for which the payments could be considered reimbursement. In this manner we construe the side-letter agreement as "contain[ing] those terms set forth in [the second amendment]," as ordinance No. F-1867 directs.

¶ 51 There is no merit to defendant's position that the "reimbursement payments" referenced in the side-letter agreement are compensation for the $1.3 million paid at closing and that plaintiff owes the payments regardless of whether defendant pays the taxes on the property. Defendant relies on the language in ordinance No. F-1867 that the side-letter agreement can contain "any other terms necessary to effectuate the intent and application [of the second amendment] as determined by the City [A]ttorney." The "other terms," however, would be those *in addition to* the "terms set forth in [the second amendment]," which provide for reimbursement for taxes that defendant paid. The side-letter agreement as interpreted by defendant would frustrate, not "effectuate," the intent of the second amendment that defendant be reimbursed for the taxes it paid.

¶ 52 Moreover, the contract documents preceding the side-letter agreement give no suggestion that defendant may recoup look-back payments. Under the Agreement, defendant is to bear all costs of the development except for certain costs for which plaintiff agreed to reimburse defendant. Under the look-back provision of the Agreement, plaintiff will be repaid some or all of those reimbursed costs from defendant if the project is profitable enough according to a specified formula. The first amendment to the Agreement caps at $1.3 million the costs for which plaintiff will reimburse defendant. The second amendment provides that, in the event of a sufficiently profitable sale of the property to a third party, defendant will repay the entire $1.3 million at closing. The side-letter agreement acknowledges that defendant had notified plaintiff

that a sufficiently profitable sale had occurred and that defendant will repay plaintiff the $1.3 million at closing. Defendant directs us to no provision in the original Agreement or its two amendments by which the $1.3 million may change hands, yet again, back to defendant.

¶ 53 Defendant's position that the right of recoupment somehow first emerged with the side-letter agreement ignores the relationship between that document and the second amendment. The latter directs that, upon defendant's receipt of the $1.3 million "in full reimbursement of the REIMBURSABLE and UTILITY COSTS [under the Agreement]," the parties will execute a release of the parties' rights and obligations "under the Agreement *except [defendant's] rights under the [the side-letter agreement]*." (Emphasis added). The parties thereby intended to settle their rights with respect to the $1.3 million, leaving unaffected defendant's rights under the side-letter agreement, which, by inference, do not concern the $1.3 million. Confirming this intent are the recitals to the side-letter agreement, which state that the purpose of the document is to "allow [plaintiff] to be fully and promptly reimbursed [for the $1.3 million] *** *and* for [defendant] to be reimbursed by the City for certain portions of the real estate taxes relating to the tax increment financing." (Emphasis added.) See *Hagene v. Derek Polling Construction*, 388 Ill. App. 3d 380, 385 (2009) (recitals, while not operative portions of the contract, may reflect the intent behind the operative portions). Two reimbursements are distinguished from each other here: reimbursement of plaintiff for the $1.3 million, and reimbursement of defendant for taxes. There is no mention of defendant recouping the $1.3 million.

¶ 54 Defendant asserts that the interpretation advocated by plaintiff has the "absurd" result of allowing plaintiff to be "paid twice"—initially though the $1.3 million payment at closing and again when the tax revenues for the property are received. See *Board of Education of Waukegan Community Unit School District No. 60 v. Orbach*, 2013 IL App (2d) 120504, ¶ 19 (a court will

construe a contract so as to avoid absurd results). Defendant believes it is unjust for plaintiff to turn a $1.3 million "profit" from the project. Defendant characterizes the $1.3 million paid at closing as simply an "advance" to plaintiff, which defendant expected to be repaid because "[a]fter all, this was a TIF district." Defendant thus admits that a certain understanding of TIF districts is guiding its interpretation of the parties' contract. Defendant claims, as its source for that understanding, the following statement on plaintiff's website:

> " 'The City of Wheaton created Tax Increment Financing (TIF) Districts in downtown Wheaton to help redevelop the area and attract new businesses. In these districts, the City offers financial assistance to developers who will redevelop areas that otherwise wouldn't be redeveloped. These areas must meet a number of criteria that are determined by state law, such as age, deterioration and depreciation. ***The money that the City allocates to the developer is repaid over time by the tax revenues that the redevelopment generates***.' See https://www.wheaton.il.us/350/Downtown-Redevelopment-TIF-Districts."
>
> (Emphasis in original.)

Defendant may have approached the construction project in this case with certain expectations, but the parties' arrangement is determined foremost by the written terms they agreed on. We find no ambiguity in those terms. Nor do we find any injustice in the contractual arrangement between the parties. Defendant received considerable financial assistance toward the project, and its obligation to repay that assistance was contingent on how much profit it realized from the project. Defendant also was given the benefit of tax reimbursements for 2014 and 2015.

¶ 55 Defendant's remaining points lack merit as well. Defendant asserts that it would be "nonsensical" for the parties to contemplate in the side-letter agreement that defendant would pay the real estate taxes on the property for 2014 and 2015, because "the purchaser of the subject

property would by definition pay real estate taxes in 2015 and 2016." Defendant fails to cite the "definition" on which it relies. Defendant's assertion is certainly not self-evidently true; parties to a real estate transaction are free to agree that the selling party will pay taxes that accrue or come due after closing.

¶ 56 Relatedly, defendant urges to consider extrinsic evidence that the parties were both aware, when the side-letter agreement was signed, that the sales agreement made Invesco partly responsible for the 2014 real taxes on the property and solely responsible for the 2015 taxes on the property. This evidence alone explains, according to defendant, why the parties did not include "paid by Developer" in the side-letter agreement. However, because the contract in this case contains an integration clause, we consider extrinsic evidence only if the contract language is facially ambiguous, *i.e.*, leaves room for reasonable debate as to the parties' intent. Finding no facial ambiguity, we do not consider extrinsic evidence of intent or speculate as to why the parties intended as they did.

¶ 57 Defendant also contends that it was "uncontested" in the trial court that the side-letter agreement was the "last writing in time." Even defendant appears to recognize, however, that documents executed at different times can still be considered one contract. Defendant nonetheless claims that we should interpret the second amendment in light of the side-letter agreement because it is the more recent document and is more "specific." Defendant does not explain how the side-letter agreement can be the more "specific" document when defendant's entire position is premised on the document lacking certain qualifying or restrictive language ("paid by Developer"). Moreover, it is the second amendment that directs what the side-letter agreement should contain, not vice-versa. Consequently, we interpret the side-letter agreement in view of the second amendment.

¶ 58 As there are no material issues of fact, we hold, as a matter of law, that the "reimbursement payments" referenced in the side-letter agreement were intended to compensate defendant for its payment of real estate taxes on the property. Consequently, the trial court erred in denying summary judgment for plaintiff and granting it for defendant.

¶ 59 Defendant asserts that we should not grant summary judgment in plaintiff's favor because the trial court did not "rule on the viability of [defendant's] affirmative defenses and counterclaims premised on fraud, equitable estoppel, and unclean hands." From our review of the record, the only issue before the trial court in the summary judgment proceeding was the issue of contract interpretation. Our ruling is correspondingly narrow.

¶ 60 Following oral argument, plaintiff filed a motion to amend its brief to request that, should plaintiff prevail on the merits, we remand this case for plaintiff to file a petition for attorney fees pursuant to a fee provision in the Agreement. That provision would award fees to the "prevailing" party in any "legal action because of breach of any agreement or obligation contained in [the Agreement]." Since there remain pending defendant's counterclaims and affirmative defenses, no party has yet prevailed in this action. Thus, because the issue of fees is premature, we deny plaintiff's motion to amend.

¶ 61 III. CONCLUSION

¶ 62 For the following reasons, we vacate the summary judgment entered in defendant's favor on plaintiff's complaint for declaratory judgment and on defendant's counterclaim for breach of contract. We remand this case for entry of summary judgment for plaintiff on the issue of contract interpretation that we have discussed.

¶ 63 Vacated and remanded with directions.