2019 IL App (2d) 180452-U
No. 2-18-0452
Order filed April 4, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AMERICAN UTILITY AUDITORS, INC., d/b/a AmAUDIT,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 16-L-0969
THE VILLAGE OF UNIVERSITY PARK,	)	Honorable Ronald D. Sutter,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment affirmed where, although the Village made no prior appropriation concerning its contract with AmAudit for certain auditing services, the contract provided that AmAudit's fee could be paid only from a special fund and not the Village's general fund. However, we vacated the award of damages because the affidavit of damages did not conform to Illinois Supreme Court Rule 191(a), and remanded for a new determination of damages.

¶ 2 Plaintiff, the Village of University Park (the Village), appeals from orders granting summary judgment and awarding damages in favor of defendant, American Utility Auditors, Inc. (AmAudit), in this breach of contract action. AmAudit was retained by the Village to provide certain audit services to the Village in an effort to increase tax revenue. AmAudit completed the

audits and generated additional revenue for the Village. According to their contract, AmAudit was to be compensated based on a percentage of any new tax revenue received by the Village for a period of 36 months. The Village ceased paying AmAudit's fee after just four months, and AmAudit filed a complaint for breach of contract in the circuit court of Du Page County. The Village argued that the contract was void *ab initio* because the length of the contract exceeded the remainder of the mayor's term in office in violation of section 8-1-7(b) of the Illinois Municipal Code (the Code) (65 ILCS 5/8-1-7(b) (West 2016)). It also argued that the special fund exception, which is a well-established exception to the prior appropriation requirement in section 8-1-7(a) of the Code, did not apply. Because we determine that section 8-1-7(b) of the Code is inapplicable to the contract, and because payment of AmAudit's fee was to be paid from a special fund, we affirm the portion of the circuit court's order granting summary judgment in favor of AmAudit. However, we vacate the damages award of $420,532 and remand the cause for a new determination of AmAudit's damages because the affidavit of damages does not conform to the requirements of Illinois Supreme Court Rule 191(a) (eff. Jan 4, 2013).

¶ 3 BACKGROUND

¶ 4 The Village is a home rule municipality located about forty miles south of Chicago. It is organized and operates under the managerial form of municipal government, and it has a population of approximately 7,000 residents.

¶ 5 AmAudit is an Illinois corporation that provides utility cost and tax audit services for its municipal clients. Through its auditing processes, it seeks to discover uncollected taxes and identify new sources of revenue related to utility services for persons and businesses located within the geographical boundaries of its municipal clients. It concentrates on the natural gas, electric power, and telecommunication industries.

¶ 6 On June 10, 2014, the Village entered into a municipal franchise and tax audit agreement (the contract) with AmAudit in an effort to increase tax revenues. Under the contract, AmAudit agreed to provide certain audit services to the Village, including an analysis of particular utility service and franchise fee agreements and collections, as well as review the Village's methods for assessing those utility taxes. At the completion of the audit, AmAudit would prepare a written report of its findings, which was to include recommendations "for the purpose of correcting payment collection and increasing future revenues." Under the contract, the Village had the power to "choose to implement any or all of the recommendations presented by [AmAudit] subsequent to receipt of [the written report]." If the Village was unable or chose not to collect additional revenue through existing or new users identified by AmAudit, the agreement provided that the Village would owe no fee.

¶ 7 The contract set forth the method for calculating AmAudit's fee for services rendered. The Village agreed to pay 50% of any gross income generated stemming from AmAudit's findings and recommendations for a period of 36 months. The monthly payment of AmAudit's fee was to begin the month following the month in which the recommendations in the written report were implemented. The contract also provided that AmAudit's "costs and fees shall be deemed outside consultant fees owed to professional consultants under 65 ILCS 5/8-1-7(b)."

¶ 8 The contract further provided that all revenue generated as the result of AmAudit's work product would constitute a "special fund" from which AmAudit's fee would be paid.[1] In particular, this portion of the agreement states as follows:

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[1] In the alternative, the agreement provided that the Village "represents and warrants that it has the power to enter into this Agreement, bind itself and future [Village] administrations, and has passed all necessary or required appropriations pursuant to 65 ILCS 5/8-1-7 to effectuate

> "[The Village] represents and warrants that all revenue generated pursuant to this Agreement constitutes a Special Fund and will take all necessary steps to ensure that all required [*sic*] to be made to [AmAudit] shall not be made from [the Village's] general corporate funds. Therefore, this Agreement is subject to the Special Fund Rule, and the Parties expressly agree that this Agreement shall not be deemed to create any debt upon behalf of [the Village]. Payment of amounts due hereunder shall be limited to the amounts which should be deposited into the Special Fund. *** In the event [the Village] must pay [AmAudit] its reasonable fees hereunder or attorneys' fees and costs under this Agreement, those costs shall also be deemed to be paid from the *** Special Fund."

¶ 9 If the Village defaulted on any payment, the contract provided that "in its discretion, [AmAudit] may accelerate all payments due under this Agreement and seek recovery of the entire estimated audit fee." The contract provided that the method for estimating the future revenues would be described in the written report, as these figures would necessarily depend on the process used to establish those revenues.

¶ 10 On October 5, 2016, AmAudit filed a six-count complaint against the Village sounding in breach of contract. The complaint included counts for breach of contract and anticipatory breach of contract, as well as four alternative counts: estoppel, unjust enrichment, quantum meruit, and injunctive relief. The complaint alleged as follows. Under the contract, "AmAudit acted as an 'outside professional consultant' by virtue of its status as 'auditors who require technical training or knowledge' pursuant to 65 ILCS 5/8-1-7." AmAudit performed the audits, prepared a written report of its findings and recommendations, and presented it to the Village. The report included

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payment to [AmAudit] for fees due hereunder." This provision is apparently not applicable, as the parties agree that the Village made no appropriation for AmAudit's fee.

recommendations on how the Village could increase its natural gas utility tax collections, and it identified one or more entities that were not paying the natural gas utility taxes they owed because they were not included in the relevant database of entities owing the tax. AmAudit added these entities to the tax rolls.

¶ 11 The Village implemented "some or all of the recommendations" in the written report. In particular, the Village implemented a municipal natural gas use tax on September 1, 2015, which was a new source of revenue for the Village. The natural gas use tax ordinance was created by AmAudit, implemented by the Village, and separately accounted for by Nicor. These measures "significantly increased [the Villages'] natural gas utility tax collections." As of the date of filing of the complaint, AmAudit's services had already provided the Village with "more than $100,000 dollars in new tax revenue," and the Village would "continue to enjoy the revenues generated by AmAudit for years into the future."

¶ 12 Although the Village paid AmAudit's invoices for September through December of 2015 representing 50% of the new tax revenue collected during that period, the Village stopped paying the invoices in July 2016, when it paid only part of a past-due invoice for tax revenue the Village received in January 2016. AmAudit therefore exercised its right under the contract to accelerate all payments due and sought recovery of the entire estimated audit fee. In its prayer for relief, AmAudit sought judgment in the amount of $420,532, as well as attorney fees and costs, and a late penalty of 1.5% per month on all unpaid amounts.

¶ 13 On January 10, 2017, the Village filed an answer denying all the allegations contained in the complaint except for those pertaining to the party information, jurisdiction, venue, and the existence of the contract. Thereafter, AmAudit filed a motion for summary judgment, arguing that the Village's general denials were insufficient to create a genuine issue of material fact. In

support, AmAudit attached the affidavit of its president, Greg Karr. He averred, in pertinent part, as follows: "AmAudit fully performed under the contract by identifying one or more entities that were not paying the natural gas utility taxes they owed"; AmAudit "added these taxpayers to the tax rolls"; AmAudit exercised its contractual right to accelerate all payments due under the contract; and the Village therefore "owes AmAudit over $420,532."

¶ 14 The Village filed a response to AmAudit's motion for summary judgment, arguing that the contract was void *ab initio* and *ultra vires* because the 36-month payment term exceeded the term of the mayor holding office when the contract was executed in violation of section 8-1-7(b) of the Code. The Village also asserted that Karr's affidavit was not in compliance with Rule 191(a) because it set forth only legal conclusions and lacked any documentary evidence or calculations to support the asserted amount of damages.

¶ 15 In response, AmAudit argued that the contract did not violate section 8-1-7(b) of the Code because the mayor who signed the contract was re-elected in April 2015 and therefore continued to serve her "term" as mayor "under the intended purpose of [section 8-1-7(b)]." AmAudit also argued that the contract did not violate the Code because its fee was to be paid from a special fund set up and maintained by the Village rather than from the Village's general fund. In the alternative, if the contract was void *ab initio*, AmAudit argued that it should be compensated under equitable principles because the Village benefited from its auditing services. As for Karr's affidavit, AmAudit asserted that it was compliant with Rule 191(a) because it was "based on his personal knowledge, such as the right to accelerate payments," and because Karr had reviewed the contract and knew of the timeline of events between AmAudit and the Village.

¶ 16 After a hearing, the circuit court entered summary judgment in favor of AmAudit on all counts and awarded it $420,532. The court commented that both parties were sophisticated

entities that had entered into a valid and enforceable contract, and that AmAudit had complied fully with its obligations resulting in additional revenue for the Village. The court also expressly rejected the Village's argument that the contract violated section 8-1-7(b) of the Code, concluding that "the Special Fund exception to section 8-1-7(b) of the Municipal Code clearly applies." The court later denied the Village's motion to reconsider, and this appeal followed.

¶ 17 ANALYSIS

¶ 18 Summary judgment is appropriate where "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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). In evaluating whether a genuine issue as to any material fact exists, the trial court must construe the pleadings and evidentiary material in the record strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is a drastic measure and should be allowed only when the right of the moving party is clear and free from doubt. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. We review *de novo* a trial court's decision to grant a motion for summary judgment in conjunction with the consideration of a prove-up affidavit. *Bayview Loan Servicing, LLC v. Szpara*, 2014 IL App (2d) 140331, ¶ 18.

¶ 19 On appeal, the Village's primary argument is that the contract violates section 8-1-7(b) of the Code. As relevant here, section 8-1-7(b) provides as follows:

> "Notwithstanding any provision of this Code to the contrary, the corporate authorities of any municipality may make contracts for a term exceeding one year and not exceeding the term of the mayor or president holding office at the time the contract is executed, relating to: *** (2) the employment of outside professional consultants such as

engineers, doctors, land planners, auditors, attorneys or other professional consultants who require technical training or knowledge. *** In such case the corporate authorities shall include in the annual appropriation ordinance for each fiscal year, an appropriation of a sum of money sufficient to pay the amount which, by the terms of the contract, is to become due and payable during the current fiscal year." 65 ILCS 5/8-1-7(b) (West 2016).

¶ 20 The Village argues that because AmAudit was retained to provide audit services, and because the contract provided that AmAudit's "costs and fees shall be deemed outside consultant fees owed to consultants under 65 ILCS 5/8-1-7(b)," the term of the contract could not exceed the term of the mayor as mandated by section 8-1-7(b) of the Code. In its brief, the Village describes the contract as a "three-year professional auditing agreement," and stresses that it was executed in June 2014, which was just ten months before the Village's mayoral election in April 2015. Because the length of the agreement exceeded the time remaining in the mayor's term, the Village contends that the agreement unambiguously violates section 8-1-7(b) and should be deemed void *ab initio* and *ultra vires*. See *Ligenza v. Village of Round Lake Beach*, 133. Ill. App. 3d 286, 290-91 (1985) ("[A] contract made in violation of section 8-1-7 is void *ab initio*").

¶ 21 To the extent that the agreement purports to create a special fund from which AmAudit's fee was to be paid, the Village contends that the special fund exception is inapplicable because its application is limited to section 8-1-7(a) of the Code, which generally prohibits municipalities from entering contracts or incurring expenses without a prior appropriation concerning that contract or expense. The Village asserts that although the special fund exception is a well-established exception to section 8-1-7(a)'s prior appropriation requirement, no case in Illinois

has applied the special fund exception to a contract that is otherwise void *ab initio* under section 8-1-7(b).

¶ 22 The Village stresses that, as a municipality, it could exercise only those powers that are conferred on it by the Illinois Constitution or by statute, and it therefore lacked the authority to enter into a contract that did not comply with the prescribed conditions for the exercise of its power. See *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 45 (2003). As such, it asserts that the contract is void *ab initio* and *ultra vires*, and it should be treated as though it never existed. See *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 164 (2004) (explaining that a contract is void *ab initio* "where one of the contracting parties exceeded its authority in entering the pact").

¶ 23 AmAudit's response appears to be three-fold. First, it argues that the mayor who executed the contract on behalf of the Village continues to serve her "term" as contemplated in section 8-1-7(b) because she was re-elected in April 2015 and has remained mayor throughout these proceedings. AmAudit cites various cases that comment on the rationale behind section 8-1-7(b), which was to prevent elected officials from tying the hands of their successors regarding certain employment decisions. See *Cannizzo v. Berywn Township 708 Community Health Board*, 318 Ill. App. 3d 478, 483-84 (2000); *Grassini v. Du Page Township*, 279 Ill. App. 3d 614, 619-20 (2000). Second, AmAudit argues that the contract does not violate section 8-1-7(b) because it does not require the Village to continue to employ AmAudit or continue to utilize its auditing services. AmAudit contends that it performed all of its obligations to completion under the contract and stresses that it seeks only payment of its fee for services already rendered. Third, AmAudit argues that the agreement is valid because it falls within the special fund exception to the prior appropriation requirement in section 8-1-7 of the Code, which it contends

applies to both subparts (a) and (b). AmAudit continues that, under the contract, the Village agreed to maintain a special fund to house the Village's new tax revenue stemming from AmAudit's services—from which AmAudit's fee was to be paid. It also asserts that the agreement explicitly limits payment of its fee to the special fund and does not expose the Village's general fund to liability.

¶ 24 We agree with AmAudit that the contract does not violate section 8-1-7(b) of the Code—not because the contract is compliant therewith—but because said section is not applicable here. A plain reading of section 8-1-7(b) demonstrates that: the corporate authorities of a municipality may enter into two types of employment contracts that exceed one year: contracts relating to the employment of municipal officers under subpart (1), and contracts relating to the employment of outside professional consultants, including auditors, under subpart (2). See *Sampson v. Graves*, 304 Ill. App. 3d 961, 964-65 (1999). Under either type of contract, the term relating to the employment of municipal officers or outside professional consultants may not exceed "the term of the mayor or president holding office at the time the contract is executed."

¶ 25 In its briefs on appeal, the Village describes the contract as a "three-year agreement for 'outside professional consultant' auditor services," and as a "three year professional auditing agreement." This characterization is both imprecise and misleading. Put simply, the Village did not contract with AmAudit to render services for a fixed 36-month period. Rather, the contract reflects the parties' agreement that AmAudit would perform particular and specified tasks, untethered to any fixed duration of time. For purposes of section 8-1-7(b), this distinction is critical. As noted above, the parties agreed that AmAudit would audit certain tax and franchise fee agreements and analyze the Village's processes and methods for assessing certain utility taxes. Following completion of the audits and reviews, pursuant to the contract, AmAudit

prepared a written report containing its findings and recommendations and presented it to the Village. Neither the record nor the briefs on appeal disclose when these tasks were completed. The Village concedes both that AmAudit completed these tasks and that it received additional tax revenue stemming from AmAudit's services.

¶ 26 We note that AmAudit submitted monthly invoices to the Village for 50% of the new revenues it collected under the natural gas use tax, which the Village paid only in September, October, November, and December 2015—despite its obligation under the contract to pay AmAudit its fee for a period of 36 months following the full implementation of AmAudit's recommendations. Although the Village is correct that this 36-month period exceeded that of the mayor's remaining term in office, said term did not relate to the *employment* of AmAudit within the meaning of section 8-1-7(b), but rather, it related to the payment schedule of AmAudit's fee only after it completed the audits and yielded additional tax revenue for the Village. Indeed, we note that all of the cases relied on by the Village in support of its argument involved contracts for a term of *employment* that exceeded the term of the mayor or village president holding office when the contract was executed, as opposed to some other contractual feature as is the case here. For this reason, we agree with AmAudit that these cases more strongly favor AmAudit and provide little support to the Village.

¶ 27 In *Millikin v. Edgar County*, 142 Ill. 528 (1892), the board of county supervisors appointed Millikin to serve as steward of the county poorhouse for a term of three years. *Id*. at 530-31. The statute allowing the board to make the appointment imposed no time limit for which the appointment could be valid. *Id*. at 532. The board members' term of office was one year. *Id*. Millikin performed his duties faithfully, but the board discharged him less than one year into the appointment. *Id*. at 531. Millikin brought an action of assumpsit to recover

damages for the breach of contract, but the county obtained judgment on demurrer, which was affirmed by both the appellate and supreme court. *Id.* at 530-32. The supreme court concluded that the board exceeded its power in making the three-year employment contract, reasoning that to allow the board to enter into an employment contract for a term longer than its own term would tie the hands of succeeding boards and strip them of their powers. *Id.* at 533.

¶ 28 The concept espoused in *Milliken* has since been invoked in a number of other cases pertaining to employment contracts with bodies of local government. In *Grassini v. Du Page Township*, 279 Ill. App. 3d 614, 617 (1996), the plaintiff entered into a four-year employment contract with Du Page township to serve as township administrator. Shortly after the contract was executed, newly elected trustees replaced those who had authorized the contract, and they terminated the plaintiff. *Id.* The governing statute allowed the township board to hire employees as it deemed necessary, but it did not limit the period over which such employment contracts could extend. *Id.* at 619. The court held that the four-year employment contract was outside the township's authority and void *ab initio*. It was explicitly persuaded by the supreme court's decision in *Milliken*, which it commented "stands for the broad proposition that it is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision." *Id.* at 619-20. The court further noted that *Millikin* "has found expression with respect to employment decisions in section 8-1-7(b) of the Municipal Code," which reflects a legislative recognition that "the positions enumerated therein are important to the effective administration of municipalities, so that each succeeding authority, in concert with the municipality's chief executive officer, should determine for itself who should serve in such positions." *Id.* at 620. The court commented that, like municipalities, "a township board may not contract to employ persons for

terms greater than the period for which the board making the decision has left to serve." *Id.* As such, *Grassini* extended to townships the principle set forth in *Millikin* and espoused in section 8-1-7(b) of the municipal code, and it concluded that because the plaintiff's "employment was to extend beyond these officials' remaining period of service, the contract was outside the Township's authority and thus void *ab initio*." *Id.*

¶ 29 In *Cannizzo v. Berwyn Township 708 Community Mental Health Board*, 318 Ill. App. 3d 478-480 (2000), the plaintiff entered into a three-year employment contract with a mental health board to serve as its executive director. Approximately one year later, the parties executed another three-year employment contract that mirrored that of the prior contract, except for the dates. *Id.* at 480. The plaintiff was terminated for insubordination approximately 2 years later, and he filed an action for breach of contract. *Id.* The court held that both contracts were *ultra vires* and void *ab initio*, as "the [b]oard was not authorized to contract for such services that extended beyond the term of the town supervisor in office at that time." *Id.* at 487. In reaching its decision, the court reiterated *Grassini's* most salient pronouncements, namely that: (1) *Millikin* "stands for the broad proposition that it is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to the decisions regarding the welfare of the subdivision;" and (2) this concept is expressed in section 8-1-7(b) of the Code, which is a legislative recognition that "certain positions are important to the effective administration of municipalities, so that each succeeding authority, in concert with the municipality's chief executive officer, should determine for itself who should serve in those positions." *Id.* at 482-83.

¶ 30 The *Canizzo* court noted that *Millikin* and *Grassini* "reflect the majority rule that where a board appoints an officer or contracts for services, and the duties of the officer or the services to

be rendered are duties delegated to the supervisor of the board, such appointment or contract [for services] for a period beyond the term of the board is not valid." *Id*. at 484. The court also provided an overview of decisions from various other jurisdictions that "amply illustrate the rationale behind this rule." *Id*. at 484-85. See *Zerr v. Tilton*, 224 Kan. 394, 400 (1978) ("the test generally applied is whether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities"); and *Mariano & Associates, P.C. v. Board of County Commissioners of the County of Sublette*, 737 P.2d 323, 329 (Wyo. 1987) ("test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired. [citation] *** If *** the contract is for the performance of personal or professional services for the employing officers, their successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely.").

¶ 31 In *Walters v. Village of Colfax*, 466 F. Supp. 2d 1046, 1048-49 (2006), the plaintiff police officer entered into a 10 year employment contract with a village to serve as its chief of police. Certain village positions, including chief of police, were to be filled by annual appointment as voted by the village board. The employment contract was signed by the mayor, whose term was to expire less than three years after the contract was executed. One year before his term was set to expire, the mayor resigned, and the village board nominated a new mayor to serve the remainder of the term. *Id*. at 1049. The new mayor appointed a different police officer to serve as police chief, but the village board voted against the appointment. The plaintiff was then nominated to serve an additional year, but the board voted against reappointing him. *Id*. at 1049. The plaintiff sued for breach of the employment contract, and the village moved for summary judgment and argued that the contract was invalid because section 8-1-7(b) of the Code

prohibited it from contracting to employ municipal officers, including police chief, for a term beyond that of the mayor in office who executed the contract. Applying Illinois law, the district court agreed with the village and held the contract was void *ab initio* and *ultra vires.* In reaching its holding, the court stated that "the purpose of 65 ILCS 5/8-1-7 is to 'inhibit such contracts [that exceed the mayor's term] entirely, for the only way of insuring [*sic*] their nonenforcement is to prevent their execution.' " *Id*. at 155 (quoting *City of Wellston v. Morgan*, 59 Ohio St. 147, 157 (1898)).

¶ 32 The contracts at issue in these cases share a common thread—they involved a term of employment for municipal officers or outside professional consultants that purported to extend the period of employment or service beyond the term of the mayor or president holding office when the contract was executed. This circumstance is simply not present in the instant matter. The contract here neither ties the hands of any successor elected official concerning the Village's welfare, nor does it prevent any succeeding authority or chief executive officer from determining for itself who should serve in any given capacity. See *Cannizzo*, 318 Ill. App. 3d at 482-83. Additionally, prior to completion of the specific audits for which it was hired, AmAudit was terminable at will, and nothing in the contract would have required a subsequent mayor to utilize AmAudit's services. See *Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 473 (2007). For these reasons, section 8-1-7(b) is inapplicable to the contract at issue, and we need not address AmAudit's argument that the special fund exception applies to section 8-1-7(b).

¶ 33 We next review whether the contract falls within the special fund exception. Section 8-1-7(a) of the Code prohibits the corporate authorities from entering into contracts or incurring expenses on behalf of the municipality without prior appropriation. It provides, in pertinent part, as follows:

> "Except as provided otherwise in this Section, no contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concerning that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof." 65 ILCS 5/8-1-7(a) (West 2016).

The purpose section 8-1-7(a) is "to protect the municipal treasury against the incurring of liabilities which exceed the appropriation or for which none has been made." *Beling v. City of East Moline*, 14 Ill. App. 2d 263, 277 (1957). It was enacted to protect the taxpayer and operates as a limitation on the powers of all the officers and departments of the municipal corporation. *Id.* Section 8-1-7(a) has been consistently construed as denying a municipality the power to contract, and thereby incur indebtedness, for a period longer than one year in the absence of an enabling statute authorizing such a contract. *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 290 (1985). A party contracting with a municipality is presumed to know whether the municipality is prohibited from making the contract. *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 153 (1995).

¶ 34 The special fund exception is a well-established exception to the prior appropriation rule set forth in section 8-1-7(a) of the Code. This section is not violated "where the funding of a multi-year contract is to come out of a special assessment fund, as opposed to the general fund of a municipality." *Ligenza*, 133 Ill. App. 3d at 290. As observed by our supreme court, "a special fund is a 'segregation of income which never becomes a part of the general fund.' " *Kinzer v.*

City of Chicago, 128 Ill. 2d 437, 444 (1989). The exception to the prior appropriation rule exists only when payment of the contract price or incurred expense is limited to a special fund and such payment does not otherwise become an obligation of the municipality. *Id*.

¶ 35 The Village argues that the fund contemplated in the contract does not satisfy the special fund exception because the acceleration clause, among others, exposes the Village's general fund to liability for AmAudit's fee.[2] The Village points out that, in the event of a breach, the contract purports to allow AmAudit to demand payment of its entire projected fee over the life of the agreement—before the Village has collected new tax revenue sufficient to pay said fee. Because AmAudit sought its fee from future tax revenue by way of the acceleration clause, the Village argues that it would have no choice but to pay the fee from its general municipal fund.

¶ 36 The Village analogizes the contract and facts of the instant case to those present in *Beling*, 14 Ill. App. 2d 263. There, an engineer brought an action to recover more than $36,000 for engineering services rendered in designing a water works system for the city. *Id. at* 265-66. The city adopted an ordinance for the improvements, the cost of which was to be paid out of funds derived from the sale of revenue bonds. The contract provided that the engineer was to be paid out of a special fund supported by the sale of the bonds, if such bonds were sold. *Id*. at 275-76. However, if such bonds were not issued, the contract provided that the engineer's fee would be reduced and become due within three years after the approved plans were presented for bond ordinance purposes. *Id*. The city made no appropriation for the engineer's fee and, before it

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[2] The Village advanced this argument by assuming, *arguendo*, that the special fund exception applies to 8-1-7(b), as argued by AmAudit. Although we have determined that the contract is not governed by subpart (b), we deem it appropriate to address the parties' arguments concerning the special fund exception within the context of 8-1-7(a).

issued any bonds, it abandoned the project and repealed the ordinance. *Id*. at 266. The court held that the contract was null and void for want of prior appropriation, reasoning that it impermissibly obligated the city to pay the fees out of the general fund because no special fund was made available from the sale of water revenue bonds. *Id*. at 276-77.

¶ 37 We view *Beling* as distinguishable for one critical reason—a special fund *is* available from which AmAudit's fees could be paid. Indeed, the Village concedes that it has received and will continue to receive additional tax revenue because of its implementation of the recommendations in the written report prepared by AmAudit. Under the terms of the contract, the Village was obligated to maintain said revenue as a special fund from which to pay AmAudit, and no liability is imposed on the Village's general fund. Importantly, the contract explicitly limits the special fund as the exclusive source from which all fees due thereunder could be paid—including AmAudit's fee for its auditing services, as well as its attorney fees and costs in the event of the Village's breach. See *Kinzer*, 128 Ill. 2d at 444 (holding that "the exception to the prior-appropriation rule exists only when payment of the contract price or incurred expense is *limited* to a special fund and such payment does not otherwise become an obligation of the municipality." (Emphasis in original.))

¶ 38 We are mindful of the Village's assertion that it is "not even close to being on pace to have collected $420,532 plus attorney fees as a result of its implementation of the gas use tax." Nevertheless, we observe that any shortfall in the special fund would serve to limit AmAudit's ability to collect its fee because, under the contract, it may look only to the special fund, not to the Village's general fund, for payment. AmAudit acknowledges this limitation in its brief, wherein it noted that "no debt [was] created, nor will [payment of its fee] come from the general operating account of [the Village.]"

¶ 39 We need not address the issue further, however, because we agree with the Village that the affidavit upon which the damages award was based does not conform to Rule 191(a), which governs the requirements of affidavits in support of motions for summary judgment. It states, in pertinent part, as follows:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan 4, 2013).

¶ 40 A Rule 191 affidavit "serves as a substitute" for trial testimony and it is therefore "necessary that there be strict compliance with Rule 191(a) 'to insure that trial judges are presented with valid evidentiary facts upon which to base a decision.' " *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002) (quoting *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987)).

¶ 41 As noted above, AmAudit attached to its motion for summary judgment the affidavit of its president, Greg Karr, in support of its claim for damages. In addition to quoting portions of the contract that related to AmAudit's fee arrangement and asserting that the affidavit was made on his personal knowledge, Karr averred only that: (1) "AmAudit fully performed under the contract by identifying one or more entities that were not paying the natural gas utility taxes they owed;" (2) AmAudit "added these taxpayers to the tax rolls;" (3) AmAudit exercised its contractual right to accelerate all payments due under the contract; and (4) the Village "owes

AmAudit over $420,532 by virtue of AmAudit's decision to invoke its rights under [the contract]."

¶ 42 Karr's affidavit is not sufficient to satisfy the requirements of Rule 191(a). First, we note that the affidavit fails to attach any documentation on which it relies, apart from the contract itself. Karr asserts that AmAudit added "one or more entities to the [Village's] tax rolls," but fails to identify them or even quantify the number of entities added. More problematic, the affidavit contains no facts or admissible evidence to support the amount of damages claimed, and it fails to demonstrate how the damages figure was calculated or determined. Karr made no effort to establish the claimed damages of $420,532, apart from his own conclusory statement that this is the amount owed, and he did not aver that he reviewed or was familiar with any records or documents supporting this figure. These deficiencies are more than mere technicalities, as argued by AmAudit.

¶ 43 AmAudit asserts that the Village forfeited review of any argument regarding the sufficiency of the affidavit by failing to file a counteraffidavit, and the allegations therein should be deemed admitted. "[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion." *US Bank, N.A., v. Avdic*, 2014 IL App (1st) 121759, ¶ 22. AmAudit's argument that the Village forfeited the issue for review is untenable, as the record demonstrates that the Village objected to the sufficiency of Karr's affidavit in the circuit court repeatedly. Although the Village filed no counteraffidavit to contest the damages amount, we view the damages amount claimed as more akin to a conclusion or unsupported opinion of Karr, rather than a well-pleaded "fact." Under Rule 191(a), an affidavit must not contain mere conclusions and must include the facts upon which the affiant relied. *Id.* Accordingly, the

affidavit is insufficient under Rule 191(a) and should not have been utilized by the circuit court to establish damages in this case. *Cf. Steiner Electric Co. v. NuLine Technologies*, 364 Ill. App. 3d 876, 881 (2006) (Rule 191(a) affidavit failed to provide facts or admissible evidence to support conclusory statements regarding damages).

¶ 44 CONCLUSION

¶ 45 For the reasons stated, we affirm the circuit court's grant of summary judgment in favor of AmAudit, vacate the award of damages, and remand for a new determination of damages.

¶ 46 Affirmed in part and vacated in part.

¶ 47 Cause remanded.