2021 IL App (2d) 200101-U
No. 2-20-0101
Order filed March 24, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MCJ INVESTMENTS, LLC, and SUKHDARSHAN BEDI,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiffs and Counterdefendants-Appellees and Cross-Appellants,	)	
v.	)	No. 17-MR-234
ICONIC ENERGY, LLC,	)	
Defendant and Counterplaintiff-Appellant and Cross-Appellee.	)	Honorable Bradley J. Waller, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment in this breach-of-contract action was affirmed where (1) the trial court's conclusion that MCJ Investments, LLC did not "abandon," "terminate," or "cancel" the solar energy project was not against the manifest weight of the evidence, (2) there was no consideration supporting the second amendment to the parties' contract, (3) Iconic Energy, LLC's failure to prove its damages defeated its claim to recovery pursuant to the personal guaranty signed by Sukhdarshan Bedi, and (4) the trial court did not abuse its discretion in determining that no party was entitled to attorney fees as a prevailing party.

¶ 2 MCJ Investments, LLC (MCJ), owns Suburban Apartments in De Kalb, Illinois. Sukhdarshan Bedi[1] is Suburban Apartments' property manager and a part owner of MCJ. In 2017, MCJ contracted with Iconic Energy, LLC (Iconic), to install a large solar farm at Suburban Apartments. Bedi signed a guaranty in connection with that contract, in which he guaranteed (1) MCJ's payment of its "indebtedness" (that term was not specifically defined) and (2) MCJ's performance "in connection with any advance, credit or financial accommodation afforded by Iconic" to MCJ. MCJ and Iconic amended the contract twice. The project fell through amid confusion as to whether De Kalb County would allow the project to proceed.

¶ 3 Iconic insisted that it was entitled to liquidated damages because MCJ "abandoned," "terminated," or "canceled" the project, as those terms were used in the contract. In response, MCJ and Bedi filed this action in the circuit court of De Kalb County. They sought declaratory judgments that the contract and its amendments were null and void and that the liquidated damages clause was unenforceable. Iconic filed a countercomplaint against MCJ for breaching the second amendment to the parties' contract and against Bedi for breaching his guaranty. The parties each sought to recover their respective attorney fees pursuant to a "prevailing party" clause in the contract. The matter proceeded to a bench trial. During trial, the court allowed Iconic to add a second breach-of-contract count against MCJ for breaching the first amendment to the contract.

¶ 4 The court ultimately found that the contract and the first amendment were valid but that there was no consideration supporting the second amendment. The court found that MCJ breached the first amendment to the contract by not paying Iconic in accordance with the terms in that

[1] Bedi's first name is spelled in various ways in the record. We use the spelling that Bedi provided when he testified at trial and which he uses on his appellee's brief.

amendment. Nevertheless, the court found that MCJ owned Iconic no damages, because (1) MCJ did not "abandon," "terminate," or "cancel" the project so as to implicate the liquidated damages clause, (2) the liquidated damages clause was otherwise unenforceable, and (3) Iconic did not prove its actual damages. The court found that Iconic's claim against Bedi based on the guaranty failed because Iconic never provided MCJ any "financial accommodation." The court determined that no party was entitled to attorney fees as a prevailing party.

¶ 5 Iconic appeals, challenging many of the trial court's findings. In their cross-appeal, MCJ and Bedi argue that they are entitled to their attorney fees as prevailing parties and that the trial court abused its discretion in allowing Iconic to amend its countercomplaint. For the reasons that follow, we affirm.

¶ 6 I. BACKGROUND

¶ 7 A. Events Preceding the Contract

¶ 8 In the fall of 2016, Bedi met Jerry Dickey, who was Iconic's chief executive officer and owner. Bedi and Dickey discussed installing a solar farm at Suburban Apartments. On December 5, 2016, MCJ paid Iconic $7545. At trial, Bedi and Dickey gave conflicting testimony as to the purpose of this payment. Bedi testified that part of this payment was for Iconic to obtain the necessary permits to complete the project. Dickey, on the other hand, testified that this money was for site evaluation to determine whether ground mounting of the solar panels (as opposed to roof mounting or parking lot canopies) was a suitable option. Dickey further claimed that he and Bedi discussed that Iconic would obtain any necessary building, electrical, structural, and mechanical permits but that Bedi would obtain a special use permit, if required.

¶ 9 This $7545 was the only sum that MCJ ever paid Iconic. During the fall of 2016 and winter of 2017, Dickey explored the feasibility of multiple designs and plans. Neither Bedi nor Dickey

applied for a special use permit for the project.

¶ 10 B. The Contract

¶ 11 On February 28, 2017, Bedi, on behalf of MCJ, and Dickey, on behalf of Iconic, signed a contract with the following salient terms. Iconic would provide materials and labor for the installation of a photovoltaic solar farm at Suburban Apartments. Specifically, Iconic would provide and install the following materials: "(9375) 320 Watt Boviet solar panels, sixty-nine (69) Solectria space 36 KW inverters, aero compact ground mount solar racking with fleece underlayment, electrical wiring, connectors, fuses, and combiner boxes as required in the discretion of Iconic." Iconic would also provide (1) all permits and engineered blueprints that were required to complete the project, (2) ground excavating, if required, and (3) solar interconnection through Commonwealth Edison. Iconic would begin work upon receiving a down payment and would complete work within 122 days thereafter. Iconic reserved its right to "revise the specifications and/or detailed drawings at any time during the progress of work," so long as such revisions could be "fairly inferred from the originals." Any revisions, however, would not change the cost of the project.

¶ 12 The total project cost was $4,154,407.62. MCJ would pay Iconic $3,504,407.62 as a down payment before Iconic ordered materials or commenced work. When the project was completed, MCJ would pay Iconic the balance of $650,000 in 12 equal monthly installments, at 3.8% interest. This $650,000 balance would be secured by a mortgage on MCJ's property, and Bedi would guarantee the installment note. (At trial, no such mortgage or installment note was entered into evidence. However, the parties introduced a guaranty signed by Bedi on February 28, 2017. Per the guaranty, Bedi's liability was limited to $650,000, plus interest on the indebtedness and expenses associated with any collection efforts. The guaranty referenced that Iconic was providing

"financial accommodation" to MCJ.)

¶ 13 The contract contained the following liquidated damages clause in paragraph 17: "ABANDONMENT OF PROJECT. In the event that the project is terminated by MCJ it shall pay Iconic for all work performed to date and all materials plus a 25% of the total contract amount as a liquidated damages [*sic*] payable within thirty days of cancellation." The contract also contained a clause in paragraph 16 providing that, in the event of litigation or other legal action, "the prevailing party shall be entitled to attorney's fees and costs from the losing party as determined by the court or agreed to by the parties."

¶ 14 At trial, Bedi testified that he and Dickey never discussed liquidated damages before they signed this contract. Dickey, on the other hand, testified that he and Bedi discussed the liquidated damages clause six days before they signed the contract. Specifically, Dickey claimed that he told Bedi that Iconic's standard contract called for 30% of the contract price as liquidated damages; however, given the scale of the project, Dickey felt that it was fair to reduce liquidated damages to 25%. Dickey testified that Bedi responded: "that's fine, no problem." Dickey testified that his attorney drafted the contract and that Bedi was unrepresented by counsel at the time.

¶ 15 MCJ required financing for this project. Bedi worked with STC Capital Bank to take steps toward obtaining a loan. As explained below, the deal between MCJ and Iconic ultimately fell through, so neither STC Capital Bank nor Iconic extended any financing to MCJ.

¶ 16 C. The First Amendment to the Contract

¶ 17 On March 9, 2017, the parties executed the first amendment to the contract. In the "whereas" clauses, the parties acknowledged that MCJ had not made the down payment that was contemplated by the contract. Nevertheless, MCJ "wishe[d] to have Iconic begin the first phase of installation," and Iconic was "willing to commence the first phase of installation[,] which will be

land excavation of the field where the solar farm is to be installed." The parties amended the contract to provide that MCJ would pay $20,000 to Iconic that same day (March 9, 2017), "for the sole purpose of land excavation at the solar farm installation site." On or before March 21, 2017, MCJ would pay Iconic $3,484,407.62, which was the balance of the down payment. Iconic would begin land excavation upon being paid the first $20,000. Iconic would then "commence" the remainder of the work set forth in the contract within 122 days of receiving the balance of the down payment.

¶ 18 At trial, Bedi testified that the impetus for this first amendment to the contract was that Dickey wanted $20,000 to perform land excavation in the field where the solar farm was to be installed. Dickey, on the other hand, testified that he executed the first amendment to the contract at Bedi's request because STC Capital Bank was taking longer than expected to provide financing.

¶ 19 MCJ did not make any payments to Iconic in accordance with the terms of the first amendment to the contract. Bedi claimed that the reason for this was that the parties never got the necessary permits to do excavation work. Dickey testified that no permits were required to do the excavation work. Dickey recounted that he asked Bedi daily for the $20,000, and Bedi responded that he was "working on it."

¶ 20 D. Dekalb County's Moratorium on Commercial Solar Farms

¶ 21 On March 15, 2017, the DeKalb County Board passed ordinance No. 2017-02, which imposed a moratorium on processing applications pertaining to "commercial solar farms/gardens." DeKalb County Ordinance No. 2017-02 (adopted Mar. 15, 2017). The ordinance did not define the term "commercial solar farms/gardens." The moratorium was to last for 18 months, or until the Board adopted a "sustainability ordinance."

¶ 22 Dickey testified that he knew in advance that the De Kalb County Board intended to impose

a moratorium on wind energy. However, he insisted that he did not learn until April 3, 2017—when he received the following email from Derek Hiland, DeKalb County's community development director—that the moratorium also applied to solar energy:

> "It was a pleasure talking to you this morning. As we discussed the County is open to renewable energies however at this time the County Board has implemented an 18 month moratorium on wind and solar farms/gardens to evaluate the evolving technologies and determine whether or not to codify regulations into the County Code. Unless the moratorium is lifted or a sustainable energy ordinance is adopted I would not be able to process a Special Use Permit for either of the two technologies described above.
>
> Yours Truly,
>
> Derek M. Hiland"

That same day, Dickey forwarded to Bedi a portion of Hiland's email, changing the substance of Hiland's message to read:

> "It was a pleasure talking to you this morning. As we discussed the County is open to renewable energies.
>
> Yours Truly,
>
> Derek M. Hiland"

¶ 23 At trial, Dickey testified that he immediately called Bedi to tell him about the remainder of Hiland's email. Dickey believed that, irrespective of what Hiland indicated in his email, the project could proceed because it did not involve a "commercial" solar farm.

¶ 24 Bedi, on the other hand, testified that he learned from Hiland, not Dickey, that Dickey had sent an altered version of the email. Bedi asserted that he learned of the moratorium from reading about it in a newspaper article. He related that he was scheduled to sign documents with his bank

on April 3, 2017, in his efforts to procure financing for the project. However, after discussing the moratorium with his banker, Bedi decided to "put everything on hold for the time being," to resolve the issues with the County.

¶ 25 E. Iconic's First Declaration of Default

¶ 26 On April 11, 2017, Iconic, through counsel, sent Bedi a letter declaring that MCJ was in default for failing to make payments in accordance with the first amendment to the contract. Iconic indicated that it deemed the contract terminated by MCJ. Accordingly, Iconic requested liquidated damages in the amount of $1,038,601.91, which represented 25% of the total contract amount. Iconic also asserted that Bedi, by virtue of his guaranty, was "personally liable for the liquidated damages."

¶ 27 At trial, Bedi testified that he had no intention of terminating the contract or abandoning the project. He explained that it was always his intention to start the project once the moratorium was lifted. Bedi claimed that he contacted Dickey after receiving the April 11, 2017, letter. Dickey told Bedi "not to worry about it" and that they both would attend the upcoming meeting of the De Kalb County planning and zoning committee.

¶ 28 Dickey, on the other hand, testified that MCJ had been in breach of contract since March 10, 2017, when MCJ failed to pay the $20,000 required by the first amendment to the contract. Dickey testified that he considered the contract terminated as of April 11, 2017. He believed that, because he never received the deposit to start work, he did not have an obligation to pursue the contract after that date.

¶ 29 F. Continued Efforts by All Parties to Pursue the Project

¶ 30 Despite Iconic having declared a default and indicating that it deemed the contract terminated, Dickey and Bedi continued to work with De Kalb County officials to assess the

feasibility of completing the project in some form, including by mounting the solar panels on the roofs of the apartment buildings rather than on the ground. On April 26, 2017, Dickey and Bedi attended a meeting of the De Kalb County planning and zoning committee. They both pleaded with the committee to allow them to pursue the project. According to the meeting minutes, the committee determined that, when the De Kalb County Board enacted the moratorium, it "did not intend for [the moratorium] to impede projects" such as this one. The matter was continued until the committee's next meeting on May 24, 2017. In the meantime, Hiland's staff would prepare a text amendment to the ordinance for the committee's consideration.

¶ 31 Dickey testified that, after this committee meeting, he and Bedi understood that they would be able to move forward with the project. Bedi, by contrast, testified that he suggested to Dickey putting the project on hold until the moratorium was lifted. Bedi claimed that Dickey's response to putting the project on hold was "very positive."

¶ 32 G. The Second Amendment to the Contract

¶ 33 On May 8, 2017, Bedi and Dickey signed a second amendment to the contract. One of the "whereas" clauses indicated that MCJ and Bedi "individually have requested termination of the project" and that Iconic "has agreed to terminate the project." The second amendment provided as follows: (1) Iconic would immediately terminate all further efforts to complete the terms of the contract; (2) in consideration thereof, MCJ would pay Iconic $1,038,601.91 on or before June 8, 2017; (3) upon receipt of such funds, Iconic, MCJ, and Bedi would be released from any further duty, performance, or liability under the contract; (4) until Iconic received such funds, the contract and Bedi's guaranty would remain fully enforceable; (5) MCJ and Bedi recognized that the amount to be paid pursuant to this amendment was in accordance with the liquidated damages clause of

the contract; and (6) MCJ and Bedi agreed that the payment of such sum was made in consideration of Iconic's release of MCJ and Bedi from any further performance under the terms of the contract.

¶ 34 Bedi and Dickey offered conflicting testimony about the circumstances surrounding the execution of the second amendment to the contract. Bedi testified that it was his understanding from his discussions with Dickey prior to May 8, 2017, that the parties would "nullify the previous contracts" and then pursue the project again once the moratorium was lifted. Bedi claimed that Dickey said that his attorney had drafted a document in accordance with the parties' understanding and that Dickey would bring it to Bedi's office. According to Bedi, Dickey was in a hurry when he brought the document to Bedi's office on May 8, 2017. Bedi testified that he signed the document without reading it and that Dickey then rushed back to his car. Bedi explained that his "heart sank" when he read the document that he had just signed. Bedi claimed that he subsequently attempted to contact Dickey to see whether they could pursue the project once the moratorium was lifted, but Dickey refused to answer his calls. Bedi insisted that he never asked to terminate the contract and that he and Dickey never discussed liquidated damages in their conversations leading up to May 8, 2017.

¶ 35 Dickey, on the other hand, testified that the impetus for the second amendment to the contract was Bedi calling him on May 4, 2017, saying that Bedi's bank required him to cancel the contract. Dickey claimed that he pleaded with Bedi not to cancel the contract, and Dickey explained to Bedi that there were contractual "obligations" for doing so. According to Dickey, Bedi responded: "It's okay, just cancel." Dickey discussed the matter with his attorney and then brought the second amendment to the contract to Bedi's office on May 8, 2017. Dickey testified that he read the document aloud word-for-word as Bedi followed along. Dickey believed that Bedi understood that he would be responsible for paying liquidated damages.

¶ 36 H. Steps Toward Litigation

¶ 37 The next day (May 9, 2017), MCJ's counsel wrote a letter to Iconic's counsel indicating that Bedi signed the second amendment to the contract without reading it or understanding its terms. MCJ's counsel thus requested that this amendment to the contract "be destroyed." MCJ's counsel declared that "Bedi would still like to explore the possibility of the solar panels and would like to work with your client and the County of DeKalb toward that end." Bedi testified that, after May 9, 2017, he tried many times to call Iconic about pursuing the project, but Dickey did not answer his phone.

¶ 38 On May 30, 2017, Iconic's counsel wrote a letter to MCJ's counsel. The letter indicated that Iconic "no longer has an interest in doing any kind of a modified project," as MCJ kept making proposals and then changing those proposals. Iconic considered MCJ to be in breach of contract. Iconic asserted that it would pursue litigation if it did not receive the agreed-upon liquidated damages of $1,038,601.91 on or before June 8, 2017.

¶ 39 I. Commencement of Litigation

¶ 40 On June 8, 2017, MCJ and Bedi filed a one-count complaint for declaratory judgment against Iconic alleging, in relevant portion, as follows. Because the contract required Iconic to provide "all permits," Iconic was required to obtain a special use permit to fulfill the terms of both the contract and the first amendment to the contract. The moratorium imposed by De Kalb County prevented the issuance of a special use permit for the project, rendering it impossible for Iconic to perform its duties under the contract. Moreover, the liquidated damages clause in the contract was an unenforceable penalty, given that Iconic performed no work in furtherance of the contract and ordered no materials. MCJ and Bedi requested declaratory judgments that the contract and its

amendments were null and void and that the liquidated damages clause was unenforceable. MCJ and Bedi sought attorney fees in accordance with the "prevailing party" clause in the contract.

¶ 41 In its answer to the complaint for declaratory judgment, Iconic asserted numerous "affirmative defenses" in 17 paragraphs. Most of these technically were not affirmative defenses. See *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 25 (an affirmative defense gives color to the plaintiff's claims but asserts a new matter that defeats the plaintiff's apparent rights).

¶ 42 Iconic filed a two-count countercomplaint. In count I, Iconic alleged that MCJ was in breach of contract for failing to pay Iconic $1,038,601.91 on or before June 8, 2017, as provided in the second amendment to the contract. Iconic requested attorney fees in accordance with the "prevailing party" clause of the contract. In count II, Iconic alleged that Bedi was personally liable under the guaranty for $650,000, plus fees and costs.

¶ 43 Bedi and MCJ raised four affirmative defenses to the countercomplaint. They alleged that, because of the moratorium, the contract was unenforceable due to frustration of purpose and/or legal impossibility. Bedi and MCJ further alleged that there was no consideration supporting the second amendment to the contract. They also alleged that the liquidated damages clause was unenforceable. Their final affirmative defense was that Iconic committed fraud. In support of their fraud defense, Bedi and MCJ alleged that (1) Iconic failed to apply for necessary permits despite being paid $7545 to do so, (2) Dickey altered Hiland's April 3, 2017, email before forwarding it to Bedi, and (3) Dickey told Bedi that both parties would be released from their obligations under the contract but then presented Bedi with the second amendment to the contract, which was inconsistent with Dickey's prior representations.

¶ 44 After this litigation was underway, De Kalb County lifted the moratorium. This litigation continued nonetheless. MCJ then contracted with another company, Green Circuit Holdings, to install solar panels at Suburban Apartments.

¶ 45 J. Trial

¶ 46 During trial, Iconic moved to file an additional breach-of-contract count against MCJ based on its breach of the first amendment to the parties' contract. The court granted that motion over MCJ's and Bedi's objections.

¶ 47 Bedi and Dickey both testified at trial. As noted above, they provided contradictory testimony about their various interactions.

¶ 48 Although Iconic sought liquidated damages in its countercomplaint, Iconic introduced evidence attempting to establish its actual damages. Dickey prepared a "loss profit spreadsheet," which the court considered solely for demonstrative purposes. In that spreadsheet, Dickey calculated that Iconic lost profits in the amount of $1,863,244.84 in connection with MCJ's breach of contract. Dickey arrived at that conclusion by subtracting itemized expenses totaling $2,291,162.78 from the contract price of $4,154,407.62. The expenses consisted of $1,260,403.20 for solar panels, $259,444.58 for inverters, $360,000 for solar racking, $278,655 for wire and necessary connectors, $67,212 for labor, $18,640 for excavation, $8750 for engineering, $36,408 for permitting and utility interconnection, and $1650 for freight costs. Dickey conceded that he did not have documentation for the quotes that he received for the cost of some items that were reflected on his spreadsheet.

¶ 49 Elsewhere in his testimony, Dickey estimated his lost profits as approximately $1,785,000. He also believed that Iconic's economic loss due to time was $3.5 million. However, Dickey was unable to identify any specific opportunity that Iconic lost due to its work on the Suburban

Apartments project. Dickey testified that it was difficult to calculate lost profits with any certainty because of unforeseen events as well as the fluctuating cost of materials.

¶ 50 Dickey testified that he placed and paid for a "tentative order" for materials in connection with this project. He acknowledged, however, that he was able to use those materials for a different project. Dickey testified that he made more than 60 trips from Rockford to DeKalb in connection with this project, driving upwards of 4000 miles for that purpose. He claimed that he spent eight months working on strategic planning, which eliminated his ability to work on other projects. He also attended meetings with potential subcontractors. Dickey further explained that he paid hourly employees for their work in connection with this project, including for design and site evaluation. Nevertheless, Dickey did not specify how much he expended in labor costs, and it is clear from his testimony that much of the work that Iconic put into this project predated the original contract.

¶ 51 Other witnesses at trial included Brett Robinson (the owner and manager of Green Circuit Holdings), Gary Dudzik (a former employee of STC Capital Bank), and Hiland. For purposes of this appeal, it is unnecessary to detail the testimony of these witnesses. The record indicates that Charles Gardner, an employee of Iconic, also testified. However, the record does not contain a transcript of his testimony.

¶ 52 K. Judgment

¶ 53 At the conclusion of the trial, the court entered judgment in Iconic's favor on the declaratory judgment complaint, at least insofar as MCJ and Bedi requested a declaration that the contract was null and void. However, the court entered judgment in favor of MCJ and Bedi on Iconic's countercomplaint, though the court rejected some of MCJ's and Bedi's affirmative defenses. The court denied all parties' requests for attorney fees, and the parties were to be responsible for their own costs.

¶ 54 The court provided the following rationale for its judgment. The court rejected many of the affirmative defenses that the parties asserted against each other. For example, with respect to Iconic's affirmative defenses to the declaratory judgment complaint, the court noted that many of the alleged defenses were not true affirmative defenses. The court also rejected MCJ's and Bedi's arguments that the contract was unenforceable due to impossibility of performance or frustration of commercial purpose. The court reasoned that, although the moratorium imposed by De Kalb County "applied to this property" (*i.e.*, the project constituted a "commercial" solar farm), the moratorium was not permanent. MCJ and Bedi also failed to meet their burden with respect to their affirmative defense of fraud because Dickey's testimony and actions went "to his credibility only," not to fraud.

¶ 55 The court determined that the parties' original contract was valid. The first amendment to the contract likewise was valid and enforceable, as the change in payment terms outlined therein was "sufficient consideration." The court found that MCJ "failed to perform its obligations" under the first amendment to the contract. The court rejected MCJ's proffered excuses for failing to pay Iconic, such as that MCJ could not procure financing or that obtaining the necessary permits was a precondition to payment. Thus, MCJ breached the contract and the first amendment by failing to comply with paragraph four, which specified MCJ's obligation to pay Iconic.

¶ 56 Nevertheless, the court determined that the second amendment to the contract was unenforceable for lack of consideration. In the court's view, the second amendment "basically reiterates and recites what the underlying contract says."

¶ 57 The question then became whether Iconic was entitled to damages due to MCJ's breach. The court essentially determined that the liquidated damages clause in the contract was never implicated by MCJ's and Bedi's conduct. In reaching that conclusion, the court analyzed in detail

three words used in the liquidated damages clause: "abandonment," "terminated," and "cancellation."

¶ 58 The court noted that the liquidated damages clause was titled "abandonment of project." Black's Law Dictionary defines "abandonment" as "[t]he relinquishing of a right or interest with the intention of never reclaiming it": "one party's acceptance of the situation that a nonperforming party has caused." Black's Law Dictionary (11th ed. 2019). According to Black's Law Dictionary, abandonment should be distinguished from "rescission," which is "a termination or discharge of the contract for all purposes." Black's Law Dictionary (11th ed. 2019). In the court's view, the evidence did not show that MCJ abandoned the project.

¶ 59 The court noted that the liquidated damages clause in the contract also used the word "terminated." Black's Law Dictionary defines "termination" as "[t]he act of ending something" or "[t]he end of something in time or existence; conclusion or discontinuance." Black's Law Dictionary (11th ed. 2019). The court recounted that Iconic argued that MCJ's act of termination was a "non-act"—*i.e.*, nonpayment. However, Black's Law Dictionary defines "act" as "[t]he process of doing or performing; an occurrence that results from a person's will being exerted on the external world." Black's Law Dictionary (11th ed. 2019). Moreover, a "negative act" is "[t]he failure to do something that is legally required." Black's Law Dictionary (11th ed. 2019). With these definitions in mind, the court concluded that MCJ did not terminate the project. On this point, the court explained:

> "Can a non-act be an act[?] Does it require an express affirmative step[?] As used here 'terminate' is a transitive verb which means it has a direct object. The project is the object. The project is terminated; whereas, in an intransitive form an object is in play, to form an ending, to come to an end, no action is required.

> This Court has not heard any testimony of an affirmative act by MCJ which meets the definition of 'terminate' as it is used in [the liquidated damages clause]."

¶ 60 The court noted that the liquidated damages clause also used the word "cancellation." Black's Law Dictionary defines "cancellation" as "[a]n annulment or termination of a promise or an obligation." Black's Law Dictionary (11th ed. 2019). The court reiterated its conclusion that it did not hear any testimony that MCJ affirmatively terminated the project. Moreover, the court declared that it would strictly construe the contract against Iconic as the drafter. For these reasons, the court determined that "MCJ was in breach but it did not terminate the project as that term is used in [the liquidated damages clause]."

¶ 61 Assuming, however, that MCJ terminated the project, the court further ruled that the clause was unenforceable. The court reasoned as follows. To enforce this clause, Iconic was required to prove three elements. The first element was that "MCJ and Iconic intended to agree in advance to the settlement of damages that might arise from the breach." The court indicated that it "did not hear any credible testimony" on this element, so Iconic failed to meet its burden.

¶ 62 The second element was that "the amount provided as liquidated damages was reasonable at the time of contract inception, bearing some forecast of harm or reasonable relationship caused by the breach." The court noted that the liquidated damages clause called for MCJ to pay $1,038,601.91, and Dickey testified that Iconic's lost profits were $1,863,244.84. In other words, "Iconic would receive 55 percent of its lost profits if the liquidated damage clause was in force." In the court's view, this amount had "little or no nexus to just compensation for termination of the contract if, in fact, MCJ terminated the contract." The court added: "I fail to see how 25 percent of the contract price is reasonable compared to the actual damages which in this Court's opinion a proper analysis would include cost profits [*sic*] but that is 55 percent."

¶ 63 At any rate, the court doubted Dickey's calculations of Iconic's lost profits. With respect to Dickey's itemization of costs in the "loss profit spreadsheet," the court noted that (1) Dickey was not out-of-pocket for the solar panels or the inverters, (2) Dickey did not produce any paid receipts or invoices relating to the solar panels, the inverters, or the wire and necessary connectors, (3) there were no estimates or quotes for the costs of the inverters or the wires and necessary connectors, and (4) Dickey failed to produce evidence of payment of his alleged costs for labor, excavation, engineering, permitting and utility interconnection, and freight costs. Furthermore, although Dickey testified about the time that he expended on this project, "there was no proof as to expenditures." Under these circumstances, the court concluded that "Dickey has failed to meet his burden to establish any actual damages, lost profits or otherwise."

¶ 64 The court noted that the third element for enforcing a liquidated damages clause was that "the actual damages would be uncertain an [*sic*] amount and difficult to prove." The court failed to see "any difficulty whatsoever" here. For all these reasons, the court determined that the liquidated damages clause in the contract was unenforceable.

¶ 65 The court then turned to Bedi's guaranty. The court explained that there was no evidence that Iconic extended "financial accommodation" to MCJ. To that end, the court received no "evidence of a note, an extension of a note, a line of credit, a credit agreement or any other evidence of indebtedness." In the court's view, paragraph four of the original contract, which set forth that Iconic would extend financing to MCJ in the amount of $650,000, was effectively deleted by the first amendment to the contract. Accordingly, the court determined that "Iconic has failed to meet its burden of establishing a valid and enforceable guarantee."

¶ 66 Finally, the court determined that no party was a "prevailing party" in this litigation. Therefore, the court declined to award attorney fees.

¶ 67 Both sides moved for reconsideration. The court denied those motions. In addressing the postjudgment motions, the court emphasized that it found Dickey not to be credible "on a number of key issues." The court also declined to consider the new arguments that Iconic raised in its postjudgment motion. (The record on appeal does not contain the parties' opening statements or closing arguments from the trial, so it is not possible for us to confirm which arguments were first raised in Iconic's motion to reconsider.) Iconic filed a timely notice of appeal, and MCJ and Bedi filed a timely notice of cross-appeal.

¶ 68 II. ANALYSIS

¶ 69 Iconic challenges the court's findings that (1) MCJ's and Bedi's conduct did not implicate the liquidated damages clause, (2) the liquidated damages clause was otherwise unenforceable, (3) there was no consideration supporting the second amendment to the contract, (4) Bedi's guaranty was unenforceable, and (5) Iconic was not entitled to attorney fees as the prevailing party. In their cross-appeal, MCJ and Bedi contend that the court erred in (1) allowing Iconic to add a second breach-of-contract count mid-trial and (2) not awarding them attorney fees.

¶ 70 As an initial matter, MCJ and Bedi ask us to strike or disregard portions of Iconic's brief that do not comply with the supreme court rules. The alleged violations do not inhibit our review, so we decline to strike or disregard any portion of Iconic's brief. See *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 15 (striking a brief in whole or in part is "a harsh sanction" that is warranted "only when the violations of procedural rules hinder our review."). However, Iconic does cite inapposite cases in its opening brief to try to invoke less deferential standards of review than are warranted. Iconic asks that we apply *de novo* review across-the-board, except for one issue, which Iconic claims is governed by the clearly-erroneous standard. Asserting that an issue involves a "question of law" does not allow Iconic to distance itself from the trial

court's findings of fact and assessments of witness credibility. Moreover, the clearly-erroneous standard plainly does not apply, as it generally is reserved for administrative review actions. Iconic does correctly acknowledge in its reply brief that many of its arguments effectively challenge the sufficiency of the evidence.

¶ 71 A. MCJ Did Not "Abandon," "Terminate," or "Cancel" the Project

¶ 72 Iconic first argues that MCJ and Bedi terminated the project, thereby implicating the liquidated damages clause. According to Iconic, there is no doubt that MCJ and Bedi terminated the project, as the second amendment to the contract expressly stated as much. Iconic proposes that, even if the second amendment to the contract was unenforceable, this amendment was "at least an expression of the Plaintiff's intent to terminate." Iconic argues that non-payment effectively terminated the contract. We note that Iconic cites no authority in this section of its brief.

¶ 73 MCJ and Bedi respond that the court's findings were not against the manifest weight of the evidence. They further assert that Iconic forfeited its contention that the signing of the second amendment to the contract triggered the liquidated damages clause, as Iconic did not raise that point until its motion for reconsideration.

¶ 74 Iconic essentially challenges the sufficiency of the evidence supporting the trial court's factual finding that MCJ's and Bedi's conduct did not implicate the liquidated damages clause. In its reply brief, Iconic expressly invokes the manifest-weight-of-the-evidence standard of review. Given the way that Iconic frames its argument, we agree that this is the appropriate standard of review. "A judgment is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent." *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 747 (1992).

¶ 75 The liquidated damages clause in the contract provided: "*ABANDONMENT* OF PROJECT. In the event that the project is *terminated* by MCJ it shall pay Iconic for all work performed to date and all materials plus a 25% of the total contract amount as a liquidated damages [*sic*] payable within thirty days of *cancellation.*" (Emphases added.) The trial court found that, although MCJ breached the first amendment to the contract by not paying Iconic, MCJ did not "abandon," "terminate," or "cancel" the project. We note that Iconic does not specifically challenge the trial court's interpretation of those words. Thus, we have no basis to question the trial court's conclusion that it was possible for MCJ to breach the contract without "abandoning," "terminating," or "cancelling" the project.

¶ 76 The trial presented a contest of credibility between Bedi and Dickey, who submitted conflicting accounts as to virtually all their interactions. Ultimately, "[i]t is the trial court's role to assess the credibility of the witnesses, and where findings of fact are based upon credibility determinations, we will generally defer to the trial court." *Pyramid Development, LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 40. Given that the trial court repeatedly mentioned that its findings were rooted in its assessment of credibility, it is apparent that the court generally deemed Bedi more credible than Dickey.

¶ 77 Against that background, we hold that the trial court's conclusion that MCJ did not "abandon," "terminate," or "cancel" the project was not against the manifest weight of the evidence. The parties signed the original contract on February 28, 2017. The contract, however, contained no specific deadline for MCJ to make the required down payment. On March 9, 2017, the parties signed the first amendment to the contract, which provided that MCJ would pay Iconic $20,000 that same day and then pay the balance of the down payment ($3,484,407.62) on or before March 21, 2017. MCJ did not make either payment in accordance with the terms of the first

amendment to the contract. Although this was a breach, as we shall explain, the parties' further interactions support a conclusion that MCJ did not "abandon," "terminate," or "cancel" the project.

¶ 78 For example, on April 11, 2017, Iconic's counsel wrote Bedi a letter indicating that Iconic considered the contract terminated by MCJ due to non-payment. Despite having done that, on April 26, 2017, both Dickey and Bedi spoke in support of the project at a meeting of the De Kalb County planning and zoning committee. Given that Bedi implored the committee to approve the project, it was reasonable for the trial court to conclude that MCJ had not "abandoned," "terminated," or "canceled" the project as of April 26, 2017.

¶ 79 Iconic proposes that, even if the second amendment to the contract was otherwise unenforceable for lack of consideration, Bedi's act of signing this amendment on May 8, 2017, was an expression of MCJ's intent to terminate the contract. Iconic cites no authority in support of this proposition. In fact, Iconic cites no authority in this entire section of its brief. Conclusory arguments unsupported by citations to authority do not warrant appellate review. *Hall*, 2012 IL App (2d) 111151, ¶ 13; Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Iconic's argument on this point is subject to forfeiture for the additional reason that Iconic apparently did not raise this issue until its postjudgment motion,[2] and the trial court refused to address any arguments that Iconic raised for the first time in its postjugment motion. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 39 (an argument raised for the first time in a motion to reconsider, which the trial court refused to address, was forfeited for purposes of appeal). "However, forfeiture is a limitation on the parties and not on the appellate court." *Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App

[2] As noted above, the parties' opening statements and closing arguments from trial are not included in the record.

(2d) 160811, ¶ 22. Forfeiture aside, in a letter that MCJ's counsel wrote to Iconic's counsel on May 9, 2017 (the day after the parties signed the second amendment), MCJ's counsel indicated that "Bedi would still like to explore the possibility of the solar panels and would like to work with your client and the County of DeKalb toward that end." This supports a conclusion that, irrespective of the language of the second amendment to the contract, as of May 9, 2017, MCJ still had no intention to "abandon," "terminate," or "cancel" the project.

¶ 80 On May 30, 2017, Iconic's counsel wrote a letter to MCJ's counsel. That letter documented that Iconic "no longer has an interest in doing any kind of a modified project," as MCJ kept making proposals and then changing them. The logical inference to be drawn from this letter is that it was not MCJ that decided that the project was no longer worth pursuing. Such conclusion is further bolstered by the fact that, once the moratorium was lifted, MCJ contracted with a different company to complete the project. Obviously, MCJ still wanted the solar project completed.

¶ 81 Based on the evidence, and considering that the trial court was tasked with evaluating testimony that conflicted at every turn, the court's conclusion that MCJ did not "abandon," "terminate," or "cancel" the project was not against the manifest weight of the evidence. Thus, the liquidated damages clause was never implicated.

¶ 82 B. Enforceability of the Liquidated Damages Clause

¶ 83 Given our holding that the liquidated damages clause was never implicated, we need not consider the parties' dispute as to whether that clause would have been enforceable had it been implicated.

¶ 84 We note that, in the conclusion section of its brief, Iconic asserts: "If the liquidated damages clause is held to be unenforceable, actual damages should be awarded in the full amount

of lost profits[,] which is $1,785,000.00." The problem is that the trial court found that Iconic failed to prove its actual damages, and Iconic does not explicitly challenge that finding on appeal.

¶ 85 Even had Iconic challenged this finding, we would be compelled to hold that the trial court's conclusion on this point was not against the manifest weight of the evidence. See *Union Tank Car Co. v. NuDevco Partners Holdings, LLC*, 2019 IL App (1st) 172858, ¶ 26 ("We review a trial court's damages award under the manifest weight of the evidence standard."). "Basic contract law requires that the plaintiff prove damages with reasonable certainty and precludes damages based on conjecture or speculation." *Pyramid Development*, 2014 IL App (2d) 131131, ¶ 39. The trial court did not credit Dickey's calculation of Iconic's lost profits, which forms the basis for Iconic's present claim to actual damages. The court was justified in considering that Iconic did not produce documentation substantiating many of the claimed estimated expenses associated with the project that factored into Dickey's calculation of lost profits. Iconic's Exhibit 37, the "loss profit spreadsheet," was a two-page document that Iconic used only as a demonstrative exhibit. On the first page of that exhibit, Dickey listed the estimated amounts for nine different categories of expenses associated with the project. Dickey totaled those expenses and then subtracted that sum from the contract price to calculate Iconic's lost profits. The second page of the exhibit was a quote from a supplier dated March 17, 2017. This quote appears to correspond to the amounts that Dickey claimed as estimated expenses for three of the categories of expenses: the solar panels, the inverters, and the solar racking. Assuming that this is the case, Iconic provided no documentation supporting the other six categories of expenses: (1) wires and necessary connectors, (2) labor, (3) excavation, (4) engineering, (5) permitting and utility interconnection, and (6) freight cost that is not included in product pricing.

¶ 86 We also note that Dickey was not consistent in the amount that he claimed as Iconic's lost profits. At one point, he estimated Iconic's lost profits as $1,785,000. Shortly thereafter, he testified regarding Exhibit 37, wherein he estimated Iconic's lost profits as $1,863,244.84.

¶ 87 Under these circumstances, even if Iconic had challenged the trial court's finding that Iconic failed to prove its actual damages resulting from the breach, we could not say that such finding was against the manifest weight of the evidence. Accordingly, Iconic is not entitled to $1,785,000.

¶ 88 C. Consideration Supporting the Second Amendment to the Contract

¶ 89 Iconic next argues that the trial court improperly determined that there was no consideration supporting the second amendment to the contract. According to Iconic, the consideration was that it gave MCJ and Bedi a 30-day extension "to pay the agreed upon $1,038,601.91." Iconic also contends that, per the terms of the original contract, it "would have been entitled to recover attorney's fees and pre-judgment interest." Iconic asserts that, by entering into the second amendment, it "expressly agreed to forfeit the right to recover any attorney's fees or pre-judgment interest in return for payment of the liquidated damage sum." Iconic invokes case law supporting the notions that extending the time to repay an existing debt, or otherwise settling a dispute, may constitute valid consideration for a contract. See, *e.g.*, *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1027-28 (2007) ("Forbearance, including the compromise of a disputed claim or a promise to forgo legal action, is also consideration.").

¶ 90 In defending the judgment, MCJ and Bedi argue that the plain language of the second amendment to the contract does not include the purported consideration that Iconic identifies. Furthermore, MCJ and Bedi maintain that, when the parties signed the second amendment to the contract, "there was no basis for Iconic to recover any attorney's fees or pre-judgment interest

since there was ultimately no termination, abandonment or cancellation of the Contract, as properly determined by the Trial Court." According to MCJ and Bedi: "That being the case, there was no obligation by MCJ or Dr. Bedi to pay liquidated damages nor was there a deadline by which to do so." In the absence of any such deadline, there could be no extension of the deadline. MCJ and Bedi further assert that Iconic overlooks the language of the "prevailing party" clause in the contract, which indicates that a party must prevail "through litigation in a court of competent jurisdiction" to be entitled to attorney fees and costs.

¶ 91 In its reply brief, Iconic submits that, irrespective of the specific language of the second amendment to the contract, it was "clearly the effect" of this amendment that Iconic agreed to forfeit recovery of its attorney fees and prejudgment interest in return for the payment of liquidated damages.

¶ 92 Modifications of existing contracts are valid and enforceable only when there is consideration for the modification. *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 112 (1999). "Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977). "Whether a contract contains consideration is a question of law, which we review *de novo*." *Dohrmann v. Swaney*, 2014 IL App (1st) 131524, ¶ 23.

¶ 93 The second amendment provided that: (1) Iconic would immediately terminate all further efforts to complete the terms of the contract;[3] (2) in consideration thereof, MCJ would pay Iconic

[3] According to the original contract and the first amendment, Iconic was not required to order materials or commence work until it received payment. Given that MCJ never paid Iconic, Iconic was never required to begin its performance under the contract. Thus, there were no

$1,038,601.91 on or before June 8, 2017; (3) upon receipt of such funds, Iconic, MCJ, and Bedi would be released from any further duty, performance, or liability under the contract; (4) until Iconic received such funds, the contract and Bedi's guaranty would remain fully enforceable; (5) MCJ and Bedi recognized that the amount to be paid pursuant to this amendment was in accordance with the liquidated damages clause of the contract; and (6) MCJ and Bedi agreed that the payment of such sum was made in consideration of Iconic's release of MCJ and Bedi from any further performance under the terms of the contract.

¶ 94 Iconic argues that the effect of the second amendment to the contract was that Iconic forfeited its right to recover attorney fees and prejudgment interest in return for the payment of liquidated damages. But when the parties signed the second amendment to the contract on May 8, 2017, Iconic was not entitled to contractual attorney fees, as Iconic had not prevailed through litigation. Additionally, neither the original contract nor the first amendment to the contract said anything about prejudgment interest. Thus, Iconic had no rights to attorney fees or prejudgment interest that it could have forfeited.

¶ 95 Iconic's contention that the second amendment to the contract granted an extension of time for MCJ to pay liquidated damages is equally unavailing. The parties' original contract indicated that, if MCJ terminated the project, then, within 30 days of cancellation, MCJ would "pay Iconic for all work performed to date and all materials plus a 25% [*sic*] of the total contract amount." In the second amendment to the contract, MCJ and Bedi purportedly terminated the project and agreed to pay liquidated damages within 30 days. Aside from the fact that the trial court reasonably found that MCJ never actually abandoned, terminated, or canceled the project, Iconic plainly never

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contractually required "efforts" for Iconic to "terminate" before it signed the second amendment.

granted any extension of time to pay liquidated damages. As was the case in the original contract, liquidated damages were still due 30 days after cancellation. Moreover, Iconic's theory that it granted MCJ a 30-day extension to pay liquidated damages is premised on the assumption that MCJ owed liquidated damages as soon as it breached the first amendment to the contract by not making the required down payment. As discussed above in section II.A., the liquidated damages clause was never implicated here, so the premise of Iconic's argument is incorrect.

¶ 96 Under these circumstances, we hold that the trial court correctly found that there was no consideration supporting the second amendment to the contract.

¶ 97 D. Bedi's Guaranty

¶ 98 Iconic next argues that the court erred when it found that Iconic failed to establish that Bedi's guaranty was valid and enforceable. Although the parties dispute the nature and extent of Bedi's guaranty, we need not reach that issue. The more pressing problem for Iconic is that it failed to prove its damages. A guaranty is "a contract in and of itself" and is "subject to traditional principles of contractual interpretation." *Union Tank Car Co.*, 2019 IL App (1st) 172858, ¶ 24; see also *Heller Financial, Inc. v. Johns-Byrne Co.*, 246 Ill. App. 3d 754, 760 (1992) (in an action for breach of a guaranty, the court noted that the essential elements were "the existence of a valid and enforceable contract, a breach thereof, plaintiff's performance, and damages"). "Damages are an essential element of a breach-of-contract claim, so a plaintiff's failure to prove damages entitles the defendant to judgment as a matter of law." *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 30. The trial court determined that Iconic did not prove that the liquidated damages clause was implicated. We affirmed that finding above. The trial court further found that Iconic did not prove its actual damages. Iconic does not explicitly challenge that finding. Given that Iconic failed to prove its damages, its claim against Bedi fails. Although the

trial court did not rely on this reasoning, we may affirm the judgment on any basis appearing in the record. *BankUnited, National Association v. Giusti*, 2020 IL App (2d) 190522, ¶ 14.

¶ 99 E. Attorney Fees

¶ 100 For its final issue, Iconic argues that it was entitled to its attorney fees as the prevailing party in this litigation. In their cross-appeal, MCJ and Bedi contend that *they* were the prevailing parties.

¶ 101 The general rule is that a party that is unsuccessful in a lawsuit is not responsible for the winning party's attorney fees. *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001). Parties may alter this rule by contract. *Powers*, 326 Ill. App. 3d at 515. "A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 280 (2001). In some cases, a court may decide that no party is entitled to fees, such as where "both parties were successful on significant issues in the action." *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861 (2000); see also *Powers*, 326 Ill. App. 3d at 515 ("[W]hen the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party and an award of attorney fees to either is inappropriate."). We apply the abuse-of-discretion standard when reviewing challenges to the trial court's findings as to the award of attorney fees. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 29.

¶ 102 We cannot say that the trial court's decision on this issue was an abuse of discretion. MCJ and Bedi were largely unsuccessful in their declaratory judgment action, even though the trial court deemed many of Iconic's affirmative defenses unavailing. On the other hand, Iconic ultimately was unsuccessful on its countercomplaint, as Iconic failed to prove its damages resulting from the

breach of contract. Under these circumstances, the trial court reasonably determined that no party was entitled to attorney fees. See *Med+Plus*, 311 Ill. App. 3d at 861-62 (where the defendant was in breach of contract, but the liquidated damages clause was unenforceable and the plaintiff failed to prove its actual damages, neither party was entitled to attorney fees as a prevailing party).

¶ 103 F. Leave to Amend the Countercomplaint

¶ 104 In their cross-appeal, MCJ and Bedi also argue that the trial court abused its discretion by allowing Iconic to amend its countercomplaint mid-trial. Our disposition of the other issues in this appeal renders it unnecessary to address the propriety of the decision to allow Iconic to amend its countercomplaint. Specifically, having affirmed the award of zero damages to Iconic, there is no further relief that we could grant to MCJ and Bedi based on this argument.

¶ 105 III. CONCLUSION

¶ 106 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 107 Affirmed.