



Construction Law

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Municipality Not Liable for Property Damage Following the Movement of a Sewer Main Because Plaintiff Was in Material Breach of the Agreement

In this case, the appellate court upheld the trial court's judgment in favor of the city of Rock Island in a breach of contract action where plaintiff Anchor Properties breached the agreement first.

A bench trial occurred on January 27, 2025. The following facts were admitted into evidence at the trial. Anchor Properties contracted with Rock Island on August 14, 2019, after construction on the property began in June 2019. *Anchor Properties, LLC v. The City of Rock Island*, 2025 IL App (4th) 250497-U, ¶ 4. When construction began, the sewer main running along the property was at subgrade level, meaning that it was essentially even with the top of the soil. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 6. Anchor Properties' owner raised concerns that the freezing of the pipe may occur, as it was not below the frost line. *Id.* ¶ 7. Additionally, Rock Island refused to move the sewer main because doing so would be very expensive. *Id.* The assistant engineer for the City stated in an email that the City would repair any damage to the parking lot for Anchor Properties necessitated by sewer repairs for leaving the sewer in place. *Id.* ¶ 8. Following this email, Anchor Properties and Rock Island entered into a contract on August 14, 2019. *Id.* ¶ 9. In pertinent part, there were 3 aspects of the contract in consideration: (1) should the subject sewer line need repair, the City would conduct necessary repairs at its own cost; (2) such repairs would be due to any damage to Anchor's driveway and parking lot necessitated by (a) sewer repairs, (b) rupture of the sewer line as a result of freezing, or (c) any other occurrence related to the sewer line and not caused by Anchor's gross negligence or intentional act; and (3) "[t]o the best of its ability, in accordance with its plans to construct a building at the Anchor property as determined by [Anchor] in its discretion, it will raise the grade in the area surrounding the sewer line, and place fibre [sic] board insulation over the pipe trench." *Id.* ¶ 10.

During the construction of the building and parking lot, an issue emerged in that the concrete subcontractor had already poured the foundation for the building while the parking lot needed to be elevated to ensure that the sewer main was properly installed. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 12. Specifically, the concrete subcontractor indicated that the footings, foundations, and floor of the building were poured in July 2019, before the sewer pipe was discovered. *Id.* ¶ 13. No tradesmen raised the grade or added insulation over the sewer pipe prior to pouring the concrete for the parking lot. *Id.* Had the tradesmen raised grade by a foot and a half, the parking lot would have been above the finished floor of the building, which meant that the overhead door to the building would not have been able to be utilized, and water would have been directed towards the building. *Id.* Additionally, raising the foundation of the building would have been expensive. *Id.* ¶ 14. The assistant municipal engineer for Rock Island testified that while the above was true, there could have been a workaround by building a retaining wall, and Anchor Properties should have located the sewer main and its depth before they solicited bids or began the design process. *Id.* ¶ 15.

The parking lot was poured in November and December 2019. *Id.* ¶ 17. In January 2021, Anchor Properties’ personnel informed individuals of Rock Island that the concrete parking lot had cracked along the sewer line. *Id.* Personnel from Rock Island testified that they believed that the concrete cracked because of a temperature differential between the sewer pipe and the surrounding ground which allowed frost into the surrounding subgrades and caused the concrete to heave. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 15.

The trial court made its ruling on February 14, 2025. *Id.* ¶ 18. The judge determined that (1) the contract covered damage and repairs necessitated by the failure of the sewer line and (2) that Anchor Properties was not negligent. *Id.* ¶ 19. That said, Anchor Properties did not fulfill its contractual obligation in that it did nothing to the best of its ability. *Id.* ¶ 19. For that reason, Anchor breached the agreement with Rock Island first, and it was not entitled to recover from a breach of contract action. *Id.*

On appeal, three issues received consideration from the reviewing court: (1) whether the third aspect of the contract was ambiguous; (2) whether the agreement required Anchor Properties to raise the grade and add insulation to the sewer pipe; and (3) whether Anchor Properties materially breached its agreement rendering it unenforceable against the City. *Id.* ¶ 23.

With regard to contractual interpretation and ambiguity, the court noted that the primary objective of an appellate court is to give an intention to the parties. *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011). The language in the contract is looked at to determine the parties intent. *Id.* When the words of the contract are clear and unambiguous, they are given their plain, ordinary, and popular meaning. *Id.* That said, if the contract is susceptible to more than one meaning, it is ruled ambiguous and a court can consider it extrinsic evidence to determine the party’s intent. *Id.* When determining whether a contract is ambiguous, rather than viewing a clause or provision in insulation, the entire agreement as a whole is considered, and each provision is viewed in light of the other provisions. *Id.*

The initial issue was whether the agreement was ambiguous in that it required Rock Island to repair the concrete when a temperature differential between the sewer pipe and the surrounding ground caused the ground to heave and cracked the concrete. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 28. The appellate court then noted that for a contract to be enforceable, the parties must mutually assent to the contract’s terms. *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 20. Only the parties’ overt acts and the communications can be considered in determining whether they have entered into a contract. *Id.* The most common way to demonstrate mutual assent is a signature on a contract, and a party who has signed the contract is ascribed with knowledge and assent to the terms of the contract. *Id.* ¶ 21. In this case, the court noted that the terms were written and both parties signed the agreement. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 30.

The appellate court then considered whether the contract clearly and unambiguously required Anchor Properties to raise the grade and add insulation. *Id.* ¶ 34. Anchor Properties argued that such clauses in the contract are for the protection of the sewer pipe and not Anchor’s concrete. *Id.* ¶ 34. It follows that an alternative interpretation would result in Anchor owing a duty to protect its own concrete. *Id.* Alternatively, Rock Island argued that the trial court properly determined that such clause in the contract was ambiguous and must be construed against Anchor as drafter. *Id.*

After considering the parties’ arguments, the court noted that in order to recover on a breach of contract claim, the party must have performed that part of the contract. *TML Development, LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 50. The first-to-breach rule excuses a party’s duty to perform under the contract if the other party materially breaches the agreement initially. *Id.* Alternatively, the party that breaches first cannot seek to enforce the contract against the injured party. *Id.* The court noted that the agreement was ambiguous because of the phrase “to the best of its ability.” *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 40. Illinois appellate courts have ruled that that phrase and similar analogies are too indefinite and uncertain to be an enforceable standard. *Penzell v. Taylor*, 219 Ill. App. 3d 680, 688

(1991); *Kraftco Corp. v. Kolbus*, 1 Ill. App. 3d 635, 639-40 (1971). The appellate court ruled that the language of the third point in the contract was poorly drafted, self-contradictory, and ambiguous. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 42. Because that part of the contract was ambiguous, extrinsic evidence was considered to determine the party's intent. *Thompson*, 241 Ill.2d at 441. If extrinsic evidence does not resolve the ambiguity, any ambiguity must be strictly construed against the drafter. Book citation, *Central Illinois Light*, 213 Ill.2d 141, 153 (2004).

The court then considered the duty of good faith and fair dealing in entering into the contract. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 45. The court noted that Anchor Properties did not satisfy its good faith obligation because they took very little action in exploring the possibility of raising the grade and adding insulation. *Id.* ¶¶ 46-47. That is, Anchor Properties chose not to take any action to protect the pipe or the concrete pouring in the concrete parking lot and therefore did not comply with that portion of the contract in good faith. *Id.*

Lastly, the court considered whether or not Anchor Properties' breach of the third part of the contract was material. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 54. A breach of material when it is so substantial and fundamental as to defeat the objects of the parties in making the agreement or when the failure to perform renders performance of the rest of contract different in substance from the original agreement. *Direct Auto Insurance Co. v. O'Neal*, 2022 IL App. (1st) 211568, ¶ 15. In making the determination that the breach was material, the court considered the alternative possibility. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 55. If Anchor Properties were allowed to take no action while forcing the City to repair the concrete at its own cost, potentially due to Anchor's failure to insulate the pipes despite promising otherwise, there would be a disproportionate prejudice to Rock Island and Anchor Properties would receive an unreasonably unfair advantage. *Id.*

In sum, the appellate court upheld the determination of the trial court after a bench trial in that Anchor Properties could not recover because it materially breached the agreement first.

About the Author

Kevin H. Young is a partner in the Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

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