

No. 1-10-1012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIRST DIVISION
June 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MUHAMMED AMJAD,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
WIESLAW L. GIZYNSKI,)	
)	
Defendant-Appellee)	
)	No. 09 M3 00656
<hr/> HOME GALLERY PRODUCTS, LLC,)	
)	
Third Party Plaintiff-Appellee,)	
)	
v.)	
)	
MUHAMMED AMJAD,)	Honorable
)	Sandra L. Tristano,
Counter-Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concurred in the judgment.

O R D E R

HELD: Where plaintiff failed to show that the circuit court erred in entering judgment for possession of his property in favor of counter-plaintiff, in denying his claim for monetary damages for nonpayment of rent, and in finding no guaranty for payment of the lease, the circuit court's order was affirmed.

In this forcible entry and detainer action, plaintiff/counter-defendant Muhammed Amjad, a landlord, appeals from an order of the circuit court granting possession of his retail store premises in favor of his tenant, counter-plaintiff Home Gallery Products, LLC (HGP). The court also entered judgment in favor of defendant Wieslaw Gizynski, finding that he was not the guarantor on the lease. Plaintiff also appeals from the court's order granting his motion to reconsider in part, finding that the court had improper, rather than no, jurisdiction over plaintiff's complaint and amended complaint against HGP.

On appeal, plaintiff contends that the circuit court erred when it granted possession of the premises to HGP because the court had proper jurisdiction over his complaint against HGP where his manner of serving HGP with a five-day notice and demand for rent via certified mail complied with the Forcible Entry and Detainer Act. Plaintiff further contends that the court erred in granting possession to HGP because HGP was properly served with plaintiff's complaint and summons to appear, and it is undisputed that HGP failed to pay any rent during the year 2009. Plaintiff also contends that the court erred in denying his claim for

monetary damages against HGP for nonpayment of the rent because there was no ambiguity as to the amount owed. Finally, plaintiff argues that the court erred when it entered judgment in favor of Gizynski because Gizynski guaranteed payment of the lease when he signed it. We affirm.

Documents contained in the record show that on January 28, 2007, plaintiff and HGP entered into a five-year commercial lease for retail store space in a strip mall in Palatine, Illinois. The cover page of the lease lists Gizynski's name under HGP's name. The rent was \$2,100 per month for the first year of the lease, with a five percent increase for each of the following years. The lease stated that if HGP defaulted on its rent payments, and continued in default for five days after receiving written notice thereof, then plaintiff could elect to declare the term of the lease ended, enter the property, and repossess the premises. If HGP was 60 days behind in the rent, the lease would be automatically terminated. The lease provided that all notice from plaintiff to HGP would be in writing and served personally, or sent via certified or registered mail to HGP at the leased premises. In addition, if there was any litigation due to nonpayment of the rent, HGP was responsible for paying all court costs and attorney fees.

Gizynski signed and dated the lease on the signature line provided for the lessee. Beneath his signature was another line

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for a guarantor. Gizynski's name was typed, not signed, on the guarantor line, and the dateline for that entry was left blank.

On February 23, 2009, plaintiff filed a *pro se* complaint against Gizynski, individually, for possession of the store premises. Plaintiff also sought past due rent for the months of January 2009 and February 2009, claiming Gizynski owed him \$6,000 plus court costs. HGP was not named as a defendant in the complaint.

Plaintiff attempted to have Gizynski served with a summons and copy of the complaint at the store. The service of process form indicates that Gizynski was not served because the sheriff's deputy was unable to make contact with him. Only one attempt at personal service was made. Plaintiff subsequently completed a form and affidavit to effectuate service by posting, claiming that Gizynski was concealed within the state. Plaintiff listed the store's address as Gizynski's place of residence.

Following an April 21, 2009, hearing, the circuit court entered an order for possession of the store premises in favor of plaintiff, who was now represented by counsel. Gizynski did not appear for the hearing. On May 19, 2009, the court set the case for trial in July. The following day, Gizynski filed a *pro se* emergency motion for "Wrong Delivery" stating that the property was being leased by HGP, and that he no longer worked for the company. Gizynski stated that he missed the hearing because he

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was out of state, but he appeared at the next court date when the case was continued for trial.

The next week, on May 28, 2009, HGP, as an intervenor, filed a verified emergency motion to quash service of summons and vacate the default judgment for possession arguing that service of process was invalid. HGP stated that it was plaintiff's tenant pursuant to the lease, and that it had been paying the rent since the lease began. HGP further stated that it was solely owned by Aldona Rzeszotarska, who was also the company's registered agent. HGP noted that it was not named in plaintiff's lawsuit, and that Rzeszotarska was never served and never received a five-day notice to quit. HGP argued that its motion to quash should be granted due to plaintiff's failure to use the sheriff's office for service, failure to appoint a special process server, and for using an interested party in an attempt to serve HGP. In addition, HGP stated that on May 20, 2009, it was locked out of the store premises by plaintiff, halting its business, and that was when Rzeszotarska first learned about these proceedings.

Alternatively, HGP asked the court to vacate the default judgment for possession pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). HGP asserted that it had a meritorious defense because plaintiff failed to use the sheriff to forcibly detain the premises as

required by law. It further claimed that if it had known of the lawsuit, it had enough funds to pay any past due rent. HGP argued that it acted diligently as soon as it learned of the suit. It explained that the only reason it defaulted in court was because plaintiff failed to name it in the lawsuit, and instead, served a former employee. HGP asked the court to order plaintiff to immediately unlock the premises and grant possession to HGP.

The circuit court denied HGP's motion to vacate the April 21, 2009, possession order finding that the forcible detainer against it was proper. The court continued the case for prove-up and for consideration of Gizynski's pending *pro se* motion.

On July 2, 2009, HGP and Gizynski, jointly, through counsel, moved to quash service of the summons and vacate the default judgment for possession. The parties argued that plaintiff's affidavit for service by posting was severely defective because it was not signed or notarized, it requested only Gizynski to appear, and it listed the property's address as Gizynski's residence. The parties further argued that there was no evidence to support the unsigned affidavit. The parties noted that the lawsuit was not filed against HGP and that service of process was never made on HGP. They further asserted that service was not proper on Gizynski because the summons was not returned stating that service could not be obtained, but merely that the sheriff

was unable to make contact with him on the only attempt. In addition, the parties argued that the court should vacate the order for possession because the order was against HGP, but HGP was never named in the complaint or served. The parties acknowledged that HGP's prior motion to quash had been denied, but explained that the denial was based on lack of standing. They asserted that standing was now sufficient because the motion was filed on behalf of both HGP and Gizynski, a named party.

On July 17, 2009, HGP filed a motion to intervene in the case and a counterclaim against plaintiff for possession of the property. HGP stated that Gizynski was formerly an officer with the company, but resigned in September 2008. It asserted that HGP had paid the rent from its checking account since the lease began, and that it had occupied the premises until plaintiff changed the door locks without notice. HGP claimed that by virtue of its lease, it had a possessory interest in the premises and should be allowed to intervene and file its counterclaim.

In its counterclaim, HGP maintained that plaintiff wrongfully entered the premises and changed the locks without naming it in the cause of action or providing it with service of process. HGP argued that plaintiff's entry without a court order terminating HGP's right of possession executed by the sheriff was unlawful, a breach of the peace, and a violation of the Forcible Entry and Detainer Act (the Act) (735 ILCS 5/9-101 *et seq.* (West

2008)). HGP claimed that plaintiff wrongfully withheld possession of the property and asked the court to enter a judgment for possession in its favor. The court granted HGP's motion to intervene and allowed it to file its counterclaim.

On December 4, 2009, plaintiff was granted leave to amend his original complaint on its face by naming HGP as a party defendant. Documents in the record indicate that the circuit court also held a trial in this case on that date. There is no report of proceedings from the trial.

On December 8, 2009, HGP submitted a posttrial memorandum in support of its counterclaim arguing that the lease, which was drafted by plaintiff, was ambiguous and should be construed in HGP's favor. HGP noted that the signature page of the lease had a line for the lessee's signature without any further designation of who the tenant was. It further noted that beneath that line was a signature line for a guarantor on which Gizynski's name had been typed without a signature. HGP argued that substantial evidence had been presented at trial showing that it was the tenant. It also maintained that plaintiff's conduct of locking it out of the premises violated the Act. In addition, HGP argued that service of plaintiff's five-day notice and demand for rent had been defective because it was addressed to Gizynski and served upon an unidentified HGP employee whose authority to accept service for the company had not been established.

Finally, HGP argued that monetary damages against it and Gizynski should not be allowed, or alternatively, limited to \$4,200. HGP asserted that plaintiff's complaint against Gizynski sought only \$4,200, and that plaintiff never amended that amount. It further asserted that HGP had no knowledge plaintiff was seeking damages against it until closing arguments at trial when plaintiff requested \$20,000 in damages.

Plaintiff also submitted a posttrial memorandum arguing that possession had already been granted to him and was not at issue. He further claimed that damages had to be assessed in the amount of the rent due totaling \$24,813.25, which was unquestionably correct. Plaintiff argued that his five-day notice and demand for rent, and service of that notice, complied with the Act, and that Gizynski was clearly an agent of HGP. Plaintiff also asserted that the Act did not prohibit him from locking HGP out of the premises after the court had granted him possession.

On January 14, 2010, the circuit court entered an order based upon the evidence presented at trial and the posttrial memoranda. On plaintiff's complaint, the court entered judgment in favor of Gizynski "specifically finding that there was no guaranty by Mr. Gizynski in the subject lease." On HGP's counterclaim, the court entered judgment for possession of the premises in favor of HGP without prejudice to plaintiff to pursue money damages for nonpayment of rent. The court also

specifically found that it had no jurisdiction over plaintiff's complaint or amended complaint against HGP, plaintiff's five-day notice was sufficient at law, HGP did not sufficiently prove that it paid cash for any portion of the rent due, and plaintiff had a duty to mitigate its damages including re-letting the store. The court expressly stated that it made no finding regarding the issue of plaintiff changing the locks on the store.

Plaintiff moved for reconsideration arguing that the circuit court erred in finding that it did not have personal jurisdiction over HGP as to plaintiff's complaint due to plaintiff's failure to properly serve HGP with a summons. Plaintiff argued that HGP waived any such claim and submitted itself to the court's jurisdiction when it moved to intervene into the case and filed its counterclaim. Plaintiff also claimed that the issues of possession and damages had to be decided in his favor because jurisdiction over HGP was proper.

On March 17, 2010, the circuit court granted in part plaintiff's motion to reconsider by amending the language of the January 14, 2010, order to state that "the Court had improper jurisdiction as of the 4-21-2009 order of possession," rather than stating that it had no jurisdiction over plaintiff's complaint against HGP. The court denied plaintiff's motion to reconsider in all other respects.

On appeal, plaintiff first contends that the circuit court erred when it granted possession of the premises to HGP because the court had proper jurisdiction over his complaint against HGP where his manner of serving HGP with a five-day notice and demand for rent via certified mail complied with the Act. Plaintiff further argues that the court erred in granting possession to HGP because HGP was properly served with plaintiff's complaint and summons to appear when the documents were sent to Gizynski at the store's address via certified mail. Plaintiff also claims that HGP waived any challenge to proper service by appearing in court and filing its motion to intervene and counterclaim. In addition, plaintiff claims that the court erred in granting possession to HGP because it is undisputed that HGP failed to pay any rent during the year 2009.

The Act provides a process for peacefully adjudicating possession rights in the trial court and constitutes the complete remedy for settling real property disputes. *Circle Management, LLC v. Olivier*, 378 Ill. App. 3d 601, 608 (2007). The purpose of a proceeding under the Act is to determine only who should be in rightful possession of the property. *Id.* at 609. It is plaintiff's burden to prove his right to possession (*Harper Square Housing Corp. v. Hayes*, 305 Ill. App. 3d 955, 963 (1999)) and that right must be established by a preponderance of the evidence (*Circle Management*, 378 Ill. App. 3d at 609, citing 735

ILCS 5/9-109.5 (West 2004)). On appeal, this court will not disturb the trial court's order for possession unless it is against the manifest weight of the evidence. *Harper Square*, 305 Ill. App. 3d at 963.

"An action to recover possession of a premises is a special statutory proceeding and, *** a party seeking this remedy must strictly comply with the requirements of the statute." *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39, 56 (2009). To initiate proceedings under the Act, the party claiming possession of the premises must file a complaint in the circuit court stating that he is entitled to possession of the subject premises, "and that the defendant (naming the defendant) unlawfully withholds the possession thereof from him." 735 ILCS 5/9-105 (West 2008). For over 100 years this court has held that the filing of a written complaint in a forcible entry and detainer action is jurisdictional. *Russell v. Howe*, 293 Ill. App. 3d 293, 297 (1997), citing *Redfern v. Botham*, 70 Ill. App. 253 (1897). If plaintiff fails to comply with the jurisdictional requirements of the Act, then the circuit court lacks jurisdiction over the dispute and has no authority to award possession. *Russell*, 293 Ill. App. 3d at 297.

Here, the record shows that when plaintiff filed his *pro se* complaint for possession, he named only Gizynski, individually, as the defendant in this action. Plaintiff did not name HGP, his

actual tenant, as a defendant. It was not until December 4, 2009, the day of trial, when plaintiff amended his complaint on its face by naming HGP as a party defendant. Consequently, plaintiff failed to comply with section 9-105 of the Act when he did not name HGP as the defendant in his *pro se* complaint. Thus, the circuit court's finding that it had "improper jurisdiction as of the 4-21-2009 order of possession" was correct. It therefore follows that plaintiff's alleged act of sending a copy of the complaint and summons to Gizynski at the store's address via certified mail could not confer jurisdiction or constitute service of process upon HGP.

Furthermore, we find no merit in plaintiff's assertion that the circuit court had proper jurisdiction over his complaint against HGP because his manner of serving HGP with a five-day notice and demand for rent complied with the Act. Pursuant to section 9-209 of the Act, if the tenant does not pay the rent due after receiving a five-day notice and demand for rent, then the landlord may consider the lease ended and sue for possession under the Act. 735 ILCS 5/9-209 (West 2008). Accordingly, the five-day notice is a condition precedent for filing a suit for possession. Such notice has nothing to do with jurisdiction and cannot be relied upon to confer jurisdiction upon a party. The record before this court contains no documentation regarding the five-day notice, so we do not know if service of that notice was

proper or not. However, because such notice does not grant jurisdiction, it is irrelevant to the issue of whether the possession order in this case was proper.

We do agree with plaintiff that the circuit court obtained jurisdiction over HGP when HGP filed its motion to intervene and counterclaim against plaintiff. The circuit court granted that motion and allowed the counterclaim on October 5, 2009. There is no question that the court had proper jurisdiction over the parties at that time.

However, we reject plaintiff's claim that the court erred in granting possession to HGP because it is undisputed that HGP failed to pay any rent during the year 2009. There is no support for plaintiff's claim in the record.

An appellant has the burden of presenting a sufficiently complete record of the circuit court proceedings to support any claim of error, and in the absence of such a record, this court will presume that the circuit court's order conformed with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.*

In the appendix to his brief, plaintiff has included a handwritten note stating "[p]lease be advised, that no transcripts were available for this proceeding." However, pursuant to Supreme Court Rule 323 (eff. Dec. 13, 2005), in lieu

of a trial transcript, an appellant may file a bystander's report (Rule 323(c)) or an agreed statement of facts (Rule 323(d)). Here, the record does not contain a report of the circuit court proceedings in any format for either the trial or the hearing on plaintiff's motion for reconsideration.

Nevertheless, throughout his brief, plaintiff relies upon testimony, evidence and arguments presented at trial to support his contention that the circuit court erred when it granted possession of the premises to HGP. Plaintiff notes that Rzeszotarska testified at trial that she paid the January 2010 and February 2010 rent in cash, and that the trial court found insufficient proof of such claim. He further argues that HGP offered no defense for its failure to pay the rent, nor did it present any evidence at trial to show that the amount claimed was inaccurate or not due.

We find that our review of this issue is impeded by an incomplete record. The record before this court consists of one volume of common law documents. The record contains no evidence to support his claim that HGP failed to pay any rent in 2009.

Due to the lack of a trial transcript or substitute report of proceedings, there is no indication in the record of what occurred at trial or at the hearing on plaintiff's motion for reconsideration. Consequently, this court has no knowledge of what evidence was presented, what arguments were made, what

findings the court made, or the reasoning and rationale that provided the bases for the circuit court's rulings. All we have are the circuit court's orders indicating its findings and judgment for possession in favor of HGP. Under these circumstances, this court must presume that the circuit court acted in conformity with the law and ruled properly after considering the evidence before it. *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001); *Foutch*, 99 Ill. 2d at 391-92. Accordingly, we cannot find that the circuit court's judgment for possession in favor of HGP was against the manifest weight of the evidence.

Plaintiff next contends that the circuit court erred when it denied his claim for monetary damages for nonpayment of the rent by HGP. He again asserts that it is undisputed that HGP did not pay any rent during 2009, and claims HGP did not present a defense for its failure to pay. Plaintiff also argues that the court erred when it found that he had a duty to mitigate the damages. Our review of this issue is also impeded by the lack of a report of proceedings.

Without a trial transcript or substitute report of proceedings, we have no basis to find that the circuit court erred in rendering its judgment. As stated above, we must presume that the circuit court acted in conformity with the law and ruled properly after considering the evidence before it.

Webster, 195 Ill. 2d at 433-34; *Foutch*, 99 Ill. 2d at 391-92. Accordingly, we cannot find that the circuit court's judgment was against the manifest weight of the evidence.

Finally, plaintiff argues that the court erred when it found that Gizynski did not guarantee payment of the lease when he signed it. Plaintiff claims that by signing the lease on behalf of HGP, Gizynski guaranteed the lease. Plaintiff notes that under Gizynski's signature on the lessee's signature line, there is a signature line for a guarantor, and Gizynski's name is typed on that line. Plaintiff further argues that Gizynski should not be released from his obligations as guarantor even though he is no longer employed by HGP.

When interpreting the terms of a property rental lease, we employ general contract principles and give effect to the parties' intent as expressed in the contract language. *Fox v. Commercial Coin Laundry Systems*, 325 Ill. App. 3d 473, 475 (2001). For a fair and reasonable interpretation, consideration is given to all the language and provisions in the contract. *Id.* Any uncertainty or doubt as to the meaning of the language used in the lease is construed most strongly against the drafter. *Id.* The interpretation of a contract is a question of law which we review *de novo*. *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 447 (2009). However, where the trial court's ruling is made following a bench trial and is based in part upon factual

findings made by that court, we must give deference to those factual findings and will not disturb them unless they are against the manifest weight of the evidence. *Id.* at 447-48.

A guaranty is an agreement by one party to answer to another for the obligation or debt of a third party. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 620 (2007). However, "[l]abeling a document or a promise a 'guaranty' does not automatically make it a guaranty under the law and does not conclusively establish the obligations of the parties involved." *Campbell*, 391 Ill. App. 3d at 449. Instead, the parties' obligations must be determined from the terms of the lease and the circumstances under which the lease was made. *Id.*

Here, our review of the terms of the lease reveal that Gizynski did not undertake the obligation of being a guarantor of the lease. The cover page of the lease identifies plaintiff as the lessor, and HGP, with Gizynski's name listed under HGP, as the lessee. Throughout the lease, the parties are referred to as lessor and lessee with no use of names. Significantly, there is no mention of a guarantor or a guaranty anywhere in the lease. The only place where the term "guarantor" appears is on the signature page at the end of the lease, with a line for a signature and a separate line for a date. On this page, plaintiff signed and dated the lease on the lines provided for the lessor, and Gizynski signed and dated the lease on the lines

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provided for the lessee. The guarantor line appears directly beneath the lessee's signature. Gizynski's name was typed, not signed, on the guarantor line, and the dateline was left blank.

The default provision in the lease states that if the lessee fails to pay the rent, then the lessor may elect to end the lease and repossess the premises. Another provision of the lease states that the relationship of the parties "is strictly that of Lessor and Lessee," and that the lessor has no ownership in the lessee's business and the lessee is not an agent of the lessor. The lease also provides that "[t]his agreement contains all of the agreements and conditions made between the parties hereto and may not be modified orally or in any other manner other than [sic] by agreement in writing signed by all parties hereto [or] their respective successors in interest." None of the provisions in the lease mention a guaranty, nor do they identify when a guarantor would become obligated for the lease. Under these terms and circumstances, we find that no guaranty existed. Merely labeling Gizynski as a guarantor, especially without his signature, did not automatically make him a guarantor.

We note that there was a bench trial where the circuit court may have made other factual findings that led to its ruling that Gizynski did not guarantee payment of the lease when he signed as the lessee. Due to our lack of a trial transcript, we must defer to any such findings, and presume that the circuit court acted in

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conformity with the law and ruled properly after considering the evidence before it. *Webster*, 195 Ill. 2d at 433-34; *Foutch*, 99 Ill. 2d at 391-92. Accordingly, we find no error in the circuit court's ruling that Gizynski did not guaranty the lease.

For these reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.