No. 1-09-3270

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).

SIXTH DIVISION
May 6, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AUSTIN 1900 BUILDING LP, Plaintiff-Appellant and Cross-Appellee, v. MIDWEST EXCHANGE ENTERPRISES, INC. and ALEJANDRO CASILLAS, Defendants-Appellees and Cross-appellants.	))))))))))))))	Appeal from the Circuit Court of Cook County 02 L 7570 Honorable Dennis Burke, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Cahill and R. E. Gordon concurred in the judgment.

ORDER

HELD: The circuit court's finding of constructive eviction was not against the manifest weight of the evidence where the record shows that the landlord repeatedly withheld heat from the tenant. The landlord may not appeal the denial of its motion to strike the tenant's affirmative defense of constructive eviction where the doctrine of aider by verdict precluded review of that issue on appeal. The court's award of attorney fees to the landlord was not an abuse of discretion where the landlord failed to provide a transcript of the proceedings. The court did not err by dismissing the tenant's counterclaim for recoupment where that claim was effectively abandoned by a subsequent pleading. The court's finding that the landlord made a demand upon the

tenant for late fees was not against the manifest weight of the evidence. The judgment of the circuit court of Cook County was affirmed.

_____The claims underlying this litigation are based upon a commercial lease for warehouse and office space (the premises) in an industrial park. The lease, which commenced on April 1, 2001, and extended for a term of sixty months, was entered into by the landlord, Austin 1990 Building (Austin), and the tenants, Midwest Exchange Enterprises and its president, Alejandro Rodriguez (Midwest).

_____The lease provided for a monthly rent that increased annually pursuant to an agreed schedule and also provided for a fee in any month that the rent was late by at least five days in the amount of ten percent of that month's rent. The lease called for Midwest to pay a fractional share of Austin's expenses in operating the industrial park, such as insurance and property taxes, and specified such payments as additional rent. The lease further granted Midwest the option to extend the lease term for two additional five-year periods, with the first option to run from April 1, 2005, through March 31, 2010. The option was to be deemed automatically exercised unless Midwest informed Austin of its intent not to exercise the option by April 1, 2003. Finally, the lease obligated the landlord to maintain heating systems for the premises at its own expense.

Austin filed a third amended complaint against Midwest on November 21, 2005, alleging that it had breached the lease by failing to make full rental payments on or after March 1, 2002, including operating expenses and late charges. Austin further alleged that the lease was automatically renewed for a five-year period because Midwest did not provide timely notice that it did not intend to exercise the option, that Midwest did not make rental payments after March 1, 2004, and that it vacated the premises in April 2004. Finally, Austin alleged that Midwest

failed to leave the premises in the condition required under the lease and that it was required to spend $23,000 on repairs and other work.

Austin sought damages in the form of all rent and other sums payable to it by Midwest along with the future value of the lease minus the amount of rental loss that could be reasonably avoided. Austin sought $222,465.20, the amount of rent it claimed was due and unpaid as of April 5, 2004, plus late charges of ten percent per month from April 2004 until the time of judgment. It further sought $809,172.78, the amount of rent due under the remaining term of the original lease and under the term of the first option period. Finally, Austin sought $23,000 for repairs it made after Midwest vacated the premises, expenses of at least $5,000 to rent the premises to another tenant, and attorney fees.

Midwest filed a fourth amended response to the third amended complaint in which it raised certain affirmative defenses and counterclaims. Midwest alleged that there was insufficient heat in the premises throughout the winters of 2000 through 2004 and that it had made numerous complaints to Austin about the lack of heating. Midwest withheld rent beyond the due date during these months in order to force Austin to supply heat but ultimately paid rent each month. According to Midwest, Austin would supply heat to the premises in response to these complaints but would discontinue heating the premises upon receiving rent. Finally, Midwest alleged that Austin installed a faulty heating and air conditioning unit in the premises on February 15, 2004, that caused its employees to become ill due to carbon monoxide poisoning and that Austin failed to correct this problem despite repeated requests from Midwest that it do so. Accordingly, Midwest claimed that it was forced to abandon the premises on the

weekend of March 20, 2004. Based upon these alleged facts, Midwest raised several affirmative defenses, including constructive eviction, and asserted counterclaims of recoupment and conversion.

Austin filed a motion to strike and to dismiss Midwest's counterclaims and affirmative defenses. The trial court granted Austin's motion in part and dismissed, among other things, its counterclaim for recoupment, but denied the motion with respect to the affirmative defenses of constructive eviction and failure to mitigate. The case then proceeded to a bench trial, where the following evidence was presented.

Midwest took possession of the premises in April 2000. The premises consisted of a warehouse with an internal office. The office was heated by radiators and boiler units and there were no heating units in the warehouse. Alex Casillas, Midwest's president, testified that Midwest began to experience a lack of heat in the premises in October of 2000 and that the problem continued through March or April of 2001. Midwest had no control over the heat in the premises, and Casillas made repeated complaints to the landlord about the problem. Midwest sent three letters to Austin in February of 2001 complaining of the lack of heat in the premises in which it referenced office temperatures reaching between 32 and 44 degrees and threatened to withhold rent until heat was provided to the premises. According to Casillas, the heat was maintained at a proper level three to four days immediately prior to when rent was due and that it would be turned off again after Austin had received rent. Casillas also testified that Midwest's employees would call in sick due to the low temperatures in the premises.

Midwest experienced the same problems with a lack of heat in the premises during the

winter of 2001/2002. Casillas testified that Midwest would notify the landlord in person and via telephone and letter regarding the problem and was told that someone would look into it. Midwest sent three letters to Austin during a ten-day span in November and December 2001 complaining of a lack of heat in the office. The letters stated that the office temperature was between 58 and 60 degrees and that the maintenance staff was therefore required to continuously run electric heaters in the office. The letters also stated that Midwest would withhold a portion of its monthly rental payments as a result of the lack of heat. According to Casillas, Austin would turn on the heat for a week or a week and a half after receiving these complaints and then turn the heat off again.

On February 13, 2002, Austin sent a letter to Casillas advising that, pursuant to the lease, nonpayment of rent by the first of the month resulted in a ten percent late charge being levied against the tenant. The letter further stated that Midwest had paid its rent on time only once in 2001 and that both 2002 rent payments had been made late. The letter informed Casillas that management was no longer willing to waive its right to the ten percent late fee and it demanded that Midwest pay a late charge of ten percent of each monthly rental payment that had not been made on time.

The lack of heat in the premises was repeated in the winter of 2002/2003. Midwest sent two letters in the fall of 2002 complaining about the problem and advising Austin of its duty of provide heat to the premises. Austin sent a response letter to Midwest on October 24, 2002, advising Midwest that it was in default of the lease. The letter further stated that there were six space heaters heating the premises, that Midwest's current "inexpensive" rent made it

impossible for Austin to install a new system, and that any space improvements were contingent upon the tenant being in good standing. The letter also advised Midwest that rent deductions were not allowed under the lease. Midwest also sent a letter to Austin in March 2003 regarding the lack of heat and claiming that temperatures in the premises had reached as low as 30 degrees. Casillas testified that the problem would be resolved for several days after Midwest complained of the lack of heat but that the heat would subsequently be turned off again. Casillas also testified that Midwest employees became sick due to the low temperatures in the premises and would not show up to work. Casillas acknowledged that he paid rent in several installments in July and August 2003 and that this was not due to a lack of heat in the premises.

Midwest experienced the same heating problems in the winter of 2003/2004. It sent four letters to Austin in December of 2003 complaining about a lack of heat in the premises. One of those letters listed seven dates during November and December 2003 in which there was no heat being provided to the premises. Midwest also sent numerous letters in January 2004 complaining of the same problem and referencing office temperatures of between 40 and 55 degrees. The letters demanded that the heat be turned on immediately and stated that complaints had been filed with the City of Chicago. One of those letters, dated January 6, 2004, recites that the problem occurred every winter, that Austin assured Midwest the problem would be fixed near the time rent was due, but that the problem was not fixed once Midwest's monthly rent had been received. Accordingly, Midwest stated that it would withhold rent until the problem was fixed and that it would thereafter pay rent on a weekly basis to ensure that heat was provided to the premises. Casillas testified that he also complained orally to Austin about the problem and

that Midwest lost numerous man hours due to employees either being sent home or not coming to work because of the lack of heat.

Austin installed an HVAC unit in the premises on February 9, 2004. On March 10, 2004, Casillas sent a letter to Peter Arenson, Austin's president, advising him that the HVAC unit had not worked except for the day it was installed and that Midwest had therefore stopped payment on its March rent check. Casillas testified to the following sequence of events regarding the HVAC unit. Casillas was working late on the night of March 10, 2004, when the HVAC unit began to run continuously. He began to feel nausea and tired and lost consciousness at his desk. One of Midwest's employees discovered Casillas passed out at his desk and helped him out of the building. Casillas felt better after being outside and returned to the office. The HVAC unit reactivated and Casillas again felt ill. He noticed that the nausea corresponded to when the HVAC unit activated and he therefore went home for the night. The following day, Midwest purchased three carbon monoxide detectors and installed them throughout the premises. The detectors activated each time the HVAC unit began to operate.

On March 12, 2004, an Austin employee attempted to repair the HVAC unit. Casillas acknowledged that the carbon monoxide detectors did not activate on the day that Austin worked on the unit but testified that the unit was shut off that day. The carbon monoxide detectors went off again the following day and Midwest contacted the Chicago Fire Department. The fire department inspected the premises and determined that there was carbon monoxide contamination in the air. It also contacted the gas company and ordered Midwest to open all of its doors and to evacuate the premises. The fire department also contacted the gas company,

which sent a representative to inspect the HVAC unit. The inspector left a "Warning - Correction Needed" ticket on the HVAC unit. The ticket states that the "unit is producing unacceptable amount of carbon monoxide" and also notes that proper ventilation is required. The representative disconnected the HVAC unit and capped the fuel line. A representative of People's Gas testified to the authenticity of the ticket.

On March 16, 2004, Casillas sent a letter to Arenson memorializing the events regarding the HVAC unit, including the findings of the fire department and the gas company. He advised that Austin's employees had not fixed the problem with the unit and that rent was therefore still being withheld. Casillas testified that he had not made plans to vacate the premises as of the time this letter was sent. However, he did not receive a response from Austin about the problem and sent another letter to Austin on March 19. This letter reiterated the problem with the HVAC unit and events involving the fire department and gas company.

As a result of these events, Midwest vacated the premises on March 20, 2004. On April 1, 2004, counsel for Midwest sent a letter to Austin advising that Midwest had terminated the lease due to the repeated instances of insufficient heating in the premises and the danger presented to the health of Midwest's employees by the faulty HVAC unit.

Following closing arguments, the trial court found in favor of Austin with respect to the amounts claimed to have accrued through March 31, 2004, and entered judgment in the amount of $43,175.30 (minus a credit for the security deposit of $20,364). The court denied Midwest's request to have the interest on the past due amount deducted from the judgment, finding that Austin gave Midwest notice in February 2002 of its intent to apply the ten percent charge.

However, the court did not award Austin damages for repairs it allegedly had to make after Midwest vacated the premises. The court then found that the lease required Austin to supply heat to the premises and that Midwest had proven its affirmative defense of constructive eviction and discharged it from liability under the lease effective April 1, 2004. The court stated that "the chronic issue of the lack of heat in the wintertime just kept going and going and became cumulative. Cumulative to the point where I read in January there is a plea, 'Please give us the heat.'" The court noted that the unrebutted testimony established that it was cold in the premises, that employees were becoming sick and finding it difficult to work, and that this caused a corresponding lack of productivity and revenue. The court also referenced the issues Midwest encountered with the HVAC unit and found that although there was evidence that Austin "maybe" repaired the unit, there was no evidence that the unit ever worked again. The court concluded that the "cumulative effect of the lack of heat over these four years" resulted in Midwest being constructively evicted from the premises and found that Midwest was not liable for any subsequent rent payments after March of 2004.

Austin subsequently filed a petition for attorney fees and costs. Austin asserted that the lease obligated Midwest to pay its attorney fees for enforcing its rights under the lease and sought fees in the amount of $121,765.30. The trial court awarded Austin attorney fees of $12,000 and costs of $1,515.30. The order reflects that the total judgment against Midwest was $56,690.80 and that, after applying a credit for the security deposit, the remaining balance on the judgment was $36,326.08. This appeal followed.

Austin contends that the trial court erred by finding that Midwest was constructively

evicted from the premises. Austin also contends that the trial court erred by denying its motion to strike or dismiss Midwest's affirmative defense of constructive eviction pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 2–615 (West 2006)).

We first address whether the trial court's finding that Midwest was constructively evicted was erroneous. Austin claims that Midwest waived its right to claim constructive eviction because it remained in the premises after the landlord failed to provide heat and that the trial court erred by considering the "cumulative effect" of the various instances when heat was not provided to the premises.

A constructive eviction requires that the landlord have done something of a grave and permanent character with the intention of depriving the tenant of enjoyment of the premises. *Home Rentals Corp. v. Curtis*, 236 Ill. App. 3d 994, 998 (1992). There can be no constructive eviction, however, without the vacating of the premises. *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 148 (1988). Constructive eviction does not require a finding that the landlord had the express intention of depriving the tenant of enjoyment of the premises because persons are presumed to intend the natural and probable consequences of their acts. *Home Rentals Corp.*, 236 Ill. App. 3d at 998. Instead, all that is required is that the landlord committed wrongful acts or omissions which rendered the leased premises useless to the tenant or deprived the tenant, in whole or in part, of the possession and enjoyment or the premises. *Home Rentals Corp.*, 236 Ill. App. 3d at 998.

A constructive eviction discharges the tenant's liability to pay rent or otherwise comply with the terms of the lease and permits the tenant to abandon the premises. *Automobile Supply*

Co. v. Scene-In-Action Corp., 340 Ill. 196, 200-01 (1930). However, the tenant may not abandon the premises before allowing the lessor a reasonable opportunity to remedy the problem. *Metropolitan Life Insurance Co. v. Nauss*, 226 Ill. App. 3d 1014, 1020 (1992). The question of whether a tenant has been constructively evicted is one of fact, and the decision of the trier of fact will not be reversed unless it is against the manifest weight of the evidence. *Home Rentals Corp.*, 236 Ill. App. 3d at 998. "A finding is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010).

In this case, we find that there was sufficient evidence to support the trial court's judgment. Austin relies upon *Automobile Supply Co.* to support its assertion to the contrary. In that case, the tenant alleged that it was constructively evicted when the landlord failed to provide heat to the premises during the heating season. The tenant complained of a lack of heat during two months of the winter season but the landlord was "indifferent" and made no attempt to fix the problem. The tenant remained in the premises and the same problem arose two months later. The tenant then gave notice to the landlord that due to its failure to comply with the terms of the lease, it would terminate the lease and vacate the premises in approximately two months. The landlord made no attempt to correct the problem and, approximately two months later and immediately prior to the date the tenant had indicated it would terminate the lease, the heating problem arose again. The tenant vacated the premises approximately three weeks after this date. *Automobile Supply Co.,* 340 Ill. at 199-200.

On appeal, our supreme court stated that "the failure of a landlord to furnish heat for the demised premises in accordance with the terms of his covenant in the lease justifies the tenant in removing from the premises, and if he does so he is discharged from the payment of rent thereafter." *Automobile Supply Co.*, 340 Ill. at 201. The court further stated that the tenant need not vacate the premises immediately and instead has a reasonable amount of time in which to do so. *Automobile Supply Co.,* 340 Ill. at 203. The tenant has the burden of demonstrating that it vacated the premises within a reasonable time after the landlord's breach, and the amount of time that is reasonable is a question of fact. *Automobile Supply Co.,* 340 Ill. at 203. The court then reasoned that the tenant had a right to vacate the premises after it initially experienced heating problems and its complaints to the landlord were unheeded. *Automobile Supply Co.,* 340 Ill. at 202. However, because it remained in the premises, the tenant waived its right to terminate the lease for those breaches. *Automobile Supply Co.,* 340 Ill. at 203. The court recognized, however, that the tenant did not waive its right to terminate the lease for subsequent breaches. *Automobile Supply Co.*, 340 Ill. at 202. The court reasoned that the tenant had a right to vacate the premises after the heating problem arose approximately two months later but that it did not appear that the tenant did so within a reasonable amount of time. *Automobile Supply Co.,* 340 Ill. at 203. Finally, the court stated that the tenant had failed to prove that it vacated the premises within a reasonable amount of time after the final instance in which the landlord allegedly breached the lease by failing to provide heat. *Automobile Supply Co.,* 340 Ill. at 203-04.

The principles set forth in *Automobile* support the trial court's decision in this case.

Foremost, a landlord's failure to provide heat as required in a lease can form the basis of a claim of constructive eviction. See *Automobile Supply Co.*, 340 Ill. at 201. In this case, Austin raises no challenge to the trial court's finding that Austin repeatedly failed to provide heat to Midwest's premises, as required by the lease. Instead, Austin claims that Midwest unreasonably delayed in vacating the premises. However, *Automobile* states that this is a question of fact and in this case the trial court found that Midwest did not unreasonably delay in vacating the premises. Unlike in *Automobile*, where the landlord never promised or made efforts to fix the problem after the tenant complained about the heat, in this case Austin told Midwest it would look into the problem after Midwest complained about the lack of heat and the evidence established that the heat would then be activated for a certain number of days but would thereafter be turned off. The testimony given at trial also established that the heat would be turned on during the days immediately prior to when rent was due but that it would be turned off after Austin received rent.

A tenant must give a lessor a reasonable time to remedy a problem, and a delay in abandoning a premises may be excused where a tenant relies upon a landlord's promise to fix the problem. See *Dell'Armi Builders, Inc.*, 172 Ill. App. 3d at 149. Under the circumstances of this case, the trial court could have reasonably concluded that Midwest was excused from any delay in vacating the premises because it justifiably relied upon the fact that Austin represented it would look into the problem and upon the fact that after several complaints Austin attempted to fix the heating issue.

Specifically, the record shows that Midwest sent a letter to Austin complaining of the

lack of heat on January 30, 2004. In response to this complaint, Austin installed a new HVAC unit in the premises on February 9. Midwest then sent a letter on March 10, 2004, complaining about the lack of heat and that the HVAC unit did not work. Casillas also testified that on that same date he became ill March 10 after the heat came on and subsequently passed out at his desk. On March 12, Austin made efforts to repair the unit. However, on March 13, carbon monoxide detectors went off and the Chicago Fire Department evacuated the premises. On that same date, the gas company disconnected the HVAC unit because it was "producing [an] unacceptable amount of carbon monoxide." Casillas sent a letter to Austin on March 16 detailing the problem with the HVAC unit and complaining of a lack of heat. Afer receiving no response, Midwest sent another letter on March 19 reiterating the information stated in the March 16 letter. Midwest vacated the premises the following day, March 20.

Under these circumstances, the trial court's finding that the cumulative effect of the heat being turned on and off amounted to Midwest being constructively evicted from the premises in late March of 2004 was not against the manifest weight of the evidence. Here, Midwest justifiably relied on Austin's efforts to fix the heating problem. However, after the events regarding the HVAC unit and the danger that was presented to its employees, Midwest concluded that the heating problems would continue and that it could no longer rely upon Austin to correct the problem. Midwest then vacated the premises within a reasonable time. Therefore, the trial court's finding that the lack of heat deprived Midwest of the use and enjoyment of the premises and constituted a constructive eviction was not against the manifest weight of the evidence.

Austin further claims that even if it breached the covenant to provide heat, the lease stipulated Midwest's remedy and the court therefore erred in finding constructive eviction. Again, we disagree.

The portion of the lease that Austin refers to states, "[l]andlord's liability with respect to any defects, repairs or maintenance for which Landlord is responsible under any of the provisions of this lease shall be limited to the cost of such repairs or maintenance or the curing of such defect." However, Midwest complained about the lack of heat over a number of winters and gave Austin numerous opportunities to repair the problem. Austin did not do so. Instead, as the trial found, Austin breached the lease and constructively evicted Midwest by failing to provide heat to the premises. Where a party is constructively evicted, it is no longer bound by the terms and conditions of the lease and it may abandon the premises. *Automobile Supply Co.*, 340 Ill. at 201; *Dell'Armi Builders, Inc.*, 172 Ill. App. 3d at 148. Therefore, once Midwest was constructively evicted from the premises, it was no longer bound by the terms of its lease with Austin, including the provision limiting the landlord's responsibility to the cost of repairs.

We also find that Austin may not appeal the trial court's denial of its motion to strike Midwest's affirmative defense of constructive eviction. As a general rule, after an evidentiary trial has been held, a prior order denying a motion for summary judgment is not reviewable on appeal because the result of that denial merges with the trial that follows. *Robinson v. Tellabs, Inc.*, 391 Ill. App. 3d 60, 64 (2009); *Mansmith v. Hameeduddin*, 369 Ill. App. 3d 417, 425 (2006). The doctrine of merger has been extended to the denial of a motion to dismiss pursuant to section 2-619 of the Code, which is analogous to a motion for summary judgment. See

Paulson v. Suson, 97 Ill. App. 3d 326, 328 (1981). The rationale for this doctrine is that "it would be unjust for a verdict reached after trial, where the evidence was completely presented to the trier of fact and subject to cross-examination, to be overturned on less evidence, that is, evidence obtained only from the pleadings and affidavits." *Paulson,* 97 Ill. App. 3d at 328.

Moreover, when a trial court denies a defendant's motion to dismiss, and the defendant files an answer, the defendant waives any defect in the pleading. *Adcock v. Brakegate*, 164 Ill. 2d 54, 60 (1994); *Labate v. Data Forms*, 288 Ill. App. 3d 738, 740 (1997). A corollary to this principle is the doctrine of aider by verdict, which provides that where a defendant allows an action to proceed to verdict, that verdict cures all formal and purely technical defects as well as "any defect in failing to allege or in alleging defectively or imperfectly any substantial facts which are essential to a right of action." *Adcock*, 164 Ill. 2d at 60-61; *Lasko v. Meier*, 394 Ill. 71, 73-74 (1946). An exception to this rule provides that a defendant may raise at any time a claim that a complaint fails to state a recognized cause of action. *Adcock*, 164 Ill. 2d at 61. The exception does not apply when the complaint contains an incomplete or otherwise insufficient statement of a recognized cause of action. *Adcock*, 164 Ill. 2d at 61-62.

In *Labate*, 288 Ill. App. 3d at 739, the court considered whether a defendant could challenge the sufficiency of a plaintiff's complaint after being found liable by a jury. In that case, the plaintiff claimed tortious interference with his business expectation and the trial court denied the defendant's section 2-615 motion to dismiss and later denied defendant's motion for summary judgment. *Labate*, 288 Ill. App. 3d at 741. On appeal, the defendant claimed that the plaintiff's complaint failed to state a cause of action for tortious interference because an

essential element of that cause of action was neither pled nor inferable from the allegations in the complaint. *Labate*, 288 Ill. App. 3d at 741. The court reviewed the decision in *Adcock* and reasoned that where the complaint "sets out or infers the elements of the [cause of] action, it is immune for post-verdict attack." *Labate*, 288 Ill. App. 3d at 741. The court then reviewed the allegations in the plaintiff's complaint and found that it set forth facts that would establish every element of a tortious interference cause of action. *Labate*, 288 Ill. App. 3d at 742. The court therefore declined to review the trial court's refusal to dismiss the complaint. *Labate*, 288 Ill. App. 3d at 742.

We find the doctrine of aider by verdict applicable to this case. There is no dispute that constructive eviction is a cause of action, which in this case was raised as an affirmative defense by Midwest. Instead, Austin claims that Midwest failed to allege that any of the harm it suffered from carbon monoxide poisoning was the fault of the landlord or that the landlord intended to deprive Midwest of the beneficial enjoyment of the premises. However, we have reviewed the affirmative defense as set forth in the record and we find that it was factually sufficient to withstand the motion to strike. In order to find a constructive eviction, is not necessary that there be an express intention of the landlord to deprive a tenant of the enjoyment of the premises because persons are presumed to intend the natural and probable consequences their acts and, therefore, the commission of acts that make it necessary for the tenant to abandon the premises constitute constructive eviction. See *Dell'Armi Builders*, 172 Ill. App. 3d at 148. Here, Midwest alleged all of the circumstances surrounding the lack of heat during the winters of 2000 through 2004 as well as the allegedly improperly installed HVAC unit. Midwest claimed that

these circumstances deprived it of the possession and enjoyment of the premises, which it was ultimately forced to abandon. We find that Midwest alleged the commission of acts that made it necessary to abandon the premises and from which the requisite intent of the landlord could be inferred. Accordingly, we decline to review the trial court's refusal to strike Midwest's affirmative defense of constructive eviction. See *Labate*, 288 Ill. App. 3d at 742.

Austin next contends that the trial court erred by not awarding it all of the attorney fees it requested. In its petition, Austin claimed it was entitled to have its attorney fees paid by Midwest and sought attorney fees and costs in the amount of $121,765.30. Austin relied upon the following attorney fee provision in the lease:

> "If on account of any breach or default by Tenant in Tenant's obligations under the terms and conditions of the lease, it shall become necessary or appropriate for Landlord to employ or consult with an attorney concerning or to enforce or defend any of Landlord's rights and remedies thereunder, Tenant agrees to pay any attorney's fees including Court Costs and Fees."

Austin submitted affidavits and records in support of its claim that the fees requested were reasonable and also asserted that it had to expend fees for efforts to "fight off" Midwest's counterclaims and affirmative defenses, which it claimed were filed to delay and make the case "untenable" for Austin. The trial court awarded Austin attorney fees of $12,000 and costs of $1,515.30.

Austin claims that the court erred in not awarding it all the attorney fees it sought

because it "improperly applied the contractual language between the parties and misconstrued the significance of the drawn out history of this litigation in light of that contractual term."

Generally, a party is responsible for his own attorney fees. *Abdul-Karim v. First Federal Savings & Loan Ass'n of Champaign*, 101 Ill. 2d 400, 412 (1984). An exception exists when a contract provides for an award of attorney fees. *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 488 (1999). Contractual provisions for an award of attorney fees must be strictly construed, and the court must determine the intention of the parties regarding the payment of fees. *Mirar Development, Inc.*, 308 Ill. App. 3d at 488. The burden of proof is on the attorney to establish the value of his services. *In re Estate of Callahan*, 144 Ill. 2d 32. To properly determine the reasonable value of an attorney's services, the following factors should be considered:

> "the skill and standing of the attorney employed, the nature of the case and the difficulty of the questions at issue, the amount and importance of the subject matter, the degree of responsibility involved in the management of the case, the time and labor required, the usual and customary fee in the community, and the benefit resulting to the client." *Callahan*, 144 Ill. 2d at 44.

Austin claims that the trial court misinterpreted the attorney fee provision in the lease, and points out that where a trial court merely interprets a lease, the reviewing court's interpretation is a question of law and may be made independently of the trial court's judgment. See *RNR Realty, Inc. v. Burlington Coat Factory Warehouse of Cicero, Inc.*, 168 Ill. App. 3d

210, 215 (1988). However, our standard of review is not *de novo*. As a general rule, a trial court has broad discretionary powers in awarding attorney fees and its decision will not be reversed on appeal unless the court has abused its discretion. *Callahan*, 144 Ill. 2d at 43-44. An abuse of discretion only occurs when the trial court's decision is "arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view." *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1055 (2009). In this case, the trial court did not award Austin the full amount of attorney fees it sought and instead awarded an amount that it determined was reasonable.

The trial court's order awarding attorney fees states that the order was entered after the court heard arguments of counsel and "for the reasons stated in open court." However, Austin has not provided a transcript of the hearing on the petition for attorney fees or a transcript of the trial court's decision explaining the reasons for its specific award.

Austin, as the appellant on this issue, has the burden of providing a sufficiently complete record to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Absent such a record, a reviewing court will presume that the trial court's ruling was in conformity with the law and had a sufficient factual basis, and any doubts arising form the incompleteness of the record will be resolved against the appellant. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005).

In this case, without a transcript of the proceedings, we have no way to examine the reasons for the amount the trial court awarded and therefore we have no basis upon which to evaluate whether that amount was an abuse of discretion. Accordingly, we must assume that the

court's judgment on this issue had a sufficient factual basis and was in conformity with the law.

Midwest raises two issues on its cross-appeal. First, it contends that the trial court erred by dismissing its counterclaim for recoupment contained in its third amended response to Austin's third amended complaint. This is a question of law and therefore our review is *de novo*. See *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004).

The counterclaim for recoupment contained in Midwest's third amended response consists of three paragraphs. Paragraph one incorporates factual allegations previously set forth in the third amended response that are based upon a second lease amendment Midwest claimed was forwarded to it on June 21, 2001, and duties imposed upon Austin pursuant to that amendment, such as installation of an HVAC unit. Paragraph two alleges that Austin breached its duty pursuant to the second lease amendment with respect to the premises. Paragraph three alleges that Midwest was injured as a result of this breach in an amount to be determined at trial. After the trial court dismissed this counterclaim, Midwest filed a fourth amended response to the complaint which reasserted the counterclaim for recoupment. This version was no longer based upon the alleged second lease amendment but was instead based upon the lease entered into on April 1, 2000.

Midwest now claims that its counterclaim for recoupment contained in its third amended response was improperly dismissed. Midwest acknowledges that this counterclaim was based upon the alleged second lease amendment. However, this second lease amendment, including the duties that it allegedly imposed, was not contained in the counterclaim for recoupment set forth in Midwest's fourth amended response to the complaint. That counterclaim also did not

attempt to preserve the recoupment counterclaim contained in the third amended response to the complaint. Therefore, that version of the counterclaim was effectively abandoned and Midwest may not appeal its dismissal. See *Shaker & Associates, Inc. v. Medical Technologies Group*, 315 Ill. App. 3d 126, 133 (2000), quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963) ("'Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn'").

We also note that Midwest does not appeal from the dismissal of its counterclaim for recoupment contained in its fourth amended response to the complaint. Midwest does argue that the second lease amendment that is the basis of the counterclaim it is appealing "was not effective because several preconditions to the amendment were not met." Midwest asserts that this error was corrected in the recoupment counterclaim contained in its fourth amended response, but argues that "this should have no bearing on whether there were sufficient facts pled in the [counterclaim contained in the third amended response] to state a cause of action for recoupment." We fail to see how this argument addresses the issue before us or preserves for purposes of appeal the counterclaim for recoupment in the third amended response. Midwest essentially argues that the counterclaim for recoupment it claims was improperly dismissed was based upon a second amendment to the lease while simultaneously asserting that the second lease amendment was not effective. Contrary to Midwest's assertion, this does not indicate that it stated a valid claim for recoupment.

Midwest next claims that the trial court erred by holding that Austin made a demand on

Midwest for late charges on past-due rent. The trial court's finding that Austin made a demand for late fees was a factual determination and therefore it will not be reversed on appeal unless it is against the manifest weight of the evidence. *Southwest Bank of St. Louis*, 401 Ill. App. 3d at 890.

The record shows that in the letter dated February 13, 2002, Austin advised Midwest that, pursuant to the lease, late rental payments were subject to a late charge and that Midwest has repeatedly paid its rent after the due date, including its February 2002 rent. The letter stated that "ownership is no longer willing to waive its right to charge Midwest Exchange with a 10% late fee." The letter requested that Midwest pay the late charge for its February rent immediately. At trial, Austin's president, Peter Arenson, testified that the letter was sent to advise Midwest of its obligations to pay rent on time and that Austin was no longer willing to waive the late fee. He also explained that it was standard practice to notify any tenant in person and by telephone if its rent was late and to advise the tenant of the ten percent late charge. With respect to Midwest, Austin had elected to not charge the late fee until February 2002 because it was attempting to work with Midwest. The letter was hand delivered to Midwest by one of Austin's employees.

The trial court found that this letter provided notice to Midwest of the late charge and constituted a demand for a late fee on all subsequent late rental payments until Midwest vacated the premises. The court also stated that there was evidence that Casillas was notified orally and that he was given and had knowledge of statements reflecting the charge. Neither party disputes that the lease provided for a ten percent charge on late rental payments or that the lease required

that Midwest be given notice before the late fee could be charged. Instead, Midwest claims that the letter only acted as a demand for a late charge for February 2002 but not for any future rental payments made after the due date.

Contrary to Midwest's argument, the letter clearly advised Midwest that late rental payments were subject to a ten percent charge. This put Midwest on notice of the late fee. The language in the letter stating that Austin was "no longer willing to waive" imposition of the late fee could reasonably be interpreted as providing notice to Midwest that Austin intended to charge the late fee for all future rental payments that were not made on time. Accordingly, the trial court's finding on this factual issue was not against the manifest weight of the evidence.

For the reasons stated, we affirm the judgment of the circuit court of Cook County on appeal and cross-appeal.

Affirmed.