

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).

NO. 4-10-0353

Filed 1/11/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

BANKIER APARTMENTS and BANKIER)	Appeal from
FAMILY LIMITED PARTNERSHIP,)	Circuit Court of
Plaintiffs-Appellees,)	Champaign County
v.)	No. 08LM1529
DAMINIBEN PATEL, Individually and)	
d/b/a MID EASTERN RESTAURANT, and)	Honorable
KANTIBHAI PATEL,)	Charles McRae Leonhard,
Defendants-Appellants.)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

Held: Where the appellants failed to cite authority in support of one of their arguments and failed to raise another issue in the trial court, the appellants forfeited appellate review of their relevant issues.

In November 2008, plaintiff, Bankier Apartments, filed a two-count complaint for forcible entry and detainer against defendants, Daminiben Patel, individually and doing business as Mid Eastern Restaurant, and Kantibhai Patel. Bankier Apartments later added the Bankier Family Limited Partnership as another plaintiff. After a lengthy bench trial, the trial court found in favor of plaintiffs and against defendants, granting plaintiffs possession of the premises at issue and ordering defendants to pay \$2,134 plus court costs.

Defendants appeals the judgment of the Champaign County circuit court, asserting (1) plaintiffs failed to give defendants

proper notice before filing its complaint, (2) they did not have a duty to pay rent because plaintiffs constructively evicted them from the premises, (3) the trial court erred by finding defendants committed the first material breach of the lease by not paying rent, and (4) the court erred by refusing to consider the parties' oral agreement regarding storage of defendants' personal property in determining who committed the first material breach. We affirm.

I. BACKGROUND

Daminiben entered into a lease agreement, as lessee, with Morris Hecker, Jr., as lessor, for the property commonly known as 623 East Green Street, Champaign, Illinois. The lease stated the lessee desired to lease the property for an Indian and American fast-food restaurant and restricted the lessee's use of the property to the stated purpose. The lease term was January 1, 2005, to December 31, 2009. The lease provided for its extension for another five years provided the lessee was not in default in payment or performance of the lease. Moreover, the lease provided it could not be modified unless the modification was in writing, signed by the parties, and stated it was a modification of the lease agreement. Kantibhai personally guaranteed Daminiben's performance of the lease and agreed to pay any of Daminiben's liabilities under the lease.

Pursuant to the lease, rent was \$2,073 per month (with

yearly rent adjustments) and due on the first of each month. A rental payment was considered delinquent if not paid by the tenth day after it was due. The lessee also had to reimburse the lessor for 30% of the real-estate taxes and special assessments for the property. Additionally, the lease required the lessee to keep and maintain the premises (building and grounds) in good condition. However, the lessor was to maintain the roof, exterior walls (except plate-glass windows), and structural components unless the damage was caused by lessee's negligence.

Paragraph 20 of the lease addressed default by the lessee and provided the lessee breaches the lease and is considered in default if, *inter alia*, the following take place:

"(d) Lessee fails to pay any rent when due and does not make the payment within ten (10) days after mailing of notice thereof from Lessor; or (e) Lessee fails to perform or comply with any of the agreements, covenants[,] or conditions of this Lease and such failure continues for a period of twenty (20) days after mailing of notice thereof from Lessor."

In the event the lessee breaches the lease, the lease gives the lessor the right to declare the lease terminated, recover possession of the premises, and exclude the lessee from the premises.

Under the lease, the lessor will have breached the lease and be in default if the lessor failed to comply with any of the lease's agreements, covenants, or conditions and such failure continues for a period of 20 days after the lessee mails notice of such failure. In the event of a lessor's breach, the lessee has the right to declare the lease terminated and vacate the premises without further obligation.

Moreover, the lease provided it could not be modified unless the modification was in writing, signed by the parties, and stated it was a modification of the lease agreement. The lease is dated December 21, 2004. However, Daminiben and Hecker signed a memorandum of lease on December 20, 2004, which stated they entered a lease on that date. Moreover, the memorandum listed a lease term of December 20, 2004, to December 31, 2009.

On December 20, 2004, Daminiben assigned her right, title, and interest in the lease to Busey Bank as collateral security for a \$75,000 loan. That same day, Hecker signed a consent to the aforementioned assignment of the lease. The consent document stated Hecker agrees to give the assignor and the assignee 30 days written notice of any default under the lease's terms as a condition precedent to the termination of the lease before taking any action to terminate the lease based on the breach. If the default is cured within the 30-day period, then the lessor would not have the right to terminate the lease.

The consent further indicated the aforementioned was an amendment to the lease and would govern if in conflict with any of the lease's provisions. The consent document is only signed by Hecker, the lessor.

On June 15, 2007, Hecker assigned his interest in the December 2004 lease to Jeffrey Wampler. That same day, Wampler assigned his interest in the lease to Sterling Management, L.L.C. On June 18, 2007, Sterling Management, L.L.C., assigned its interest in the December 2004 lease to the Leon Bankier Family Limited Partnership.

On July 19, 2007, Daminiben and Leon Bankier entered into an agreement, under which the lessee would vacate the premises prior to July 23, 2007, for the purposes of renovation and expansion of the building. The lessee was to "reoccupy the space effective January 23, 2008, or upon completion of the construction." During the construction period, the lessee did not have to pay rent, and the lessor was to pay \$80,000 to lessee for loss of inventory and income. The agreement further provided the following:

"Lessor also agrees to restore the restaurant to as close to the current floor plan as possible, per building code requirements. Lessor further agrees to replace ceiling tiles[;] lighting[;] and [heating, ventilat-

ing, and air conditioning] equipment[;] and make any necessary electrical, plumbing, wall[,] and floor repairs. The interior of the premises will be repainted, per Lessee's color choice."

In a September 26, 2008, letter, Bankier Apartment's general manager, Miriam Booth, informed Daminiben the construction on the property had been completed per the terms of the July 2007 agreement and rent was due beginning October 1, 2008. Enclosed with the letter was a key to the property. On October 16, 2008, Booth mailed a five-day notice of termination of tenancy to Daminiben. The termination notice listed the following amounts as due: (1) \$2,134 in October rent; (2) \$253.57 for the Sixth Street alley project; (3) \$242.43 for the streetscape project; and (4) \$789.42 for 2007 taxes. The notice explained the last three amounts were 30% of the total amount for the period of January 1, 2007, to June 30, 2007. The notice declared that legal action would be taken if the payment was not made in full by October 21, 2008. The return receipt for the letter stated H. Patel received the letter on October 20, 2008.

On November 21, 2008, Bankier Apartments filed its suit for forcible entry and detainer against Daminiben and Kantibhai, as guarantor of the lease. The complaint sought, *inter alia*, \$3,419.42 for past-due rent, late charges, and damages and

possession of the premises. In their March 2009 answer, defendants denied they had possession of the premises and owed rent. Defendants also filed a statement of defenses, asserting the premises was still not ready for occupancy and noting their interest in opening their restaurant on the premises when "'renovation and expansion'" are complete.

On September 11, 2009, Bankier Apartments filed a motion for leave to amend the *ad damnum* clause *instanter* or, in the alternative, for leave to file a supplemental complaint, seeking past-due rent and rent accruing through the date of defendants' possession of the premises. At the beginning of the bench trial, the trial court addressed the aforementioned motion. After hearing the parties' arguments, the court granted plaintiff leave to file a supplemental complaint and commenced the trial on the November 2008 complaint. Without objection, the court also granted Bankier Apartment's request to add the Bankier Family Limited Partnership as a plaintiff. Bankier Apartments is the name under which the Bankier Family Limited Partnership manages its property.

At trial, plaintiffs presented the testimony of Booth; Sarah Michaels with the Champaign-Urbana health department; Jody Myrum, Bankier Apartment's office manager; and Kirstie Eugenia Davis, Bankier Apartment's property manager. Defendants presented the testimony of Troy Doehring, a home inspector; Anil

Patel, Daminiben's son-in-law; Sashi Patel, Daminiben's brother-in-law; Pratap Patel, Daminiben's husband; and Daminiben. Both parties presented numerous exhibits, including photographs and videotapes.

The trial court concluded the bench trial on February 9, 2010. While the parties made oral closing arguments, the court allowed the parties to file a written supplement to their closing arguments, which they did. On April 7, 2010, the trial court entered a memorandum of opinion and order in favor of plaintiffs and against defendants. The court found that, based on *McArdle v. Courson*, 82 Ill. App. 3d 123, 125-26, 402 N.E.2d 292, 295 (1980), plaintiffs' failure to remedy alleged defects in the premises did not absolve defendants of their duty to pay rent. In the alternative, the court held any threshold breach by plaintiffs of the duty to repair the premises was not a material breach of the lease and thus did not warrant defendants withholding their rent payments. The court's order directed plaintiffs to prepare a written order of possession and awarded plaintiffs \$2,134 plus court costs. The court reserved all other monetary claims and made a finding no just reason existed to delay enforcement or appeal under Supreme Court Rule 304(a) (eff. Feb. 26, 2010). On April 28, 2010, the court entered the order of eviction.

On May 5, 2010, defendants filed a notice of appeal

from the trial court's April 7 and 28, 2010, orders in substantial compliance with Supreme Court Rule 303 (eff. May 30, 2008). Accordingly, this court has jurisdiction under Rule 304(a) (eff. Feb. 26, 2010).

II. ANALYSIS

A. Standard of Review

"'When a challenge is made to a trial court's ruling following a bench trial, the proper standard of review is whether the trial court's judgment is against the manifest weight of the evidence.'" *Strong v. City of Peoria*, 401 Ill. App. 3d 1096, 1098, 930 N.E.2d 561, 563-64 (2010) (quoting *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 277, 909 N.E.2d 255, 259 (2009)). A judgment is against the manifest weight of the evidence "if the opposite conclusion is apparent from the record" or it "is unreasonable, arbitrary, or not based on evidence." *Leith v. Frost*, 387 Ill. App. 3d 430, 434, 899 N.E.2d 635, 639 (2008). Additionally, we note one of our important tasks when beginning the review of a case is to determine if any issues have been forfeited. *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008).

B. Notice

Defendants first argue the trial court's judgments are erroneous because plaintiffs failed to give proper notice to defendants before filing their complaint. However, defendants

fail to cite authority in support of their argument as required by Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006). "'This court has often stated the failure to cite legal authority in the argument section of a party's brief forfeits the issue for review.'" *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 333, 815 N.E.2d 1251, 1256 (2004) (quoting *In re Marriage of Parr*, 345 Ill. App. 3d 371, 380, 802 N.E.2d 393, 401 (2003)). Accordingly, defendants have forfeited this issue.

C. Constructive Eviction

Defendants acknowledge the general rule that a landlord's failure to repair does not discharge a tenant's duty to pay rent as set forth in *McArdle*, 82 Ill. App. 3d at 125-26, 402 N.E.2d at 295. See also *Poulos v. Reda*, 165 Ill. App. 3d 793, 798-99, 520 N.E.2d 816, 820-21 (1987); *Zion Industries, Inc. v. Loy*, 46 Ill. App. 3d 902, 906, 361 N.E.2d 605, 608 (1977). However, they argue they did not have to pay rent because plaintiffs constructively evicted them from the premises. See *Zion Industries*, 46 Ill. App. 3d at 906, 361 N.E.2d at 608 (noting that, when the landlord evicts the tenant from the premises, a tenant's obligation to pay rent is dispensed and even a partial eviction is sufficient to suspend the payment of rent). Plaintiffs note defendants did not raise constructive eviction as an affirmative defense. See *Lindholm v. Holtz*, 221 Ill. App. 3d 330, 332, 581 N.E.2d 860, 862 (1991) (noting the defendant raised

the affirmative defense of constructive eviction). The failure to raise an issue in the trial court results in a waiver of the argument. See *Dowell v. Bitner*, 273 Ill. App. 3d 681, 692, 652 N.E.2d 1372, 1380 (1995) (noting each party has an obligation to raise and present its issues in the trial court and the failure to do so will result in the forfeiture of those issues on appeal). We note defendants did not argue constructive eviction in their answer or statement of defenses. In their oral closing argument, they only raise the improper notice and plaintiffs' noncompliance with the July 2007 lease addendum. In their written closing argument, defendants argued plaintiffs (1) committed the first material breach and (2) failed to give proper notice. Additionally, in its April 2010 memorandum opinion and order, the trial court did not address the issue of constructive eviction. Since constructive eviction was not addressed in the trial court, defendants are essentially asking us to make factual determinations that belonged to the trial court. We are a reviewing court, not a trier of fact. Accordingly, we find defendants also forfeited this argument.

D. Material Breach

Defendants further raise two challenges to the trial court's alternative reason for finding in plaintiffs' favor, which was any breach by plaintiffs of the duty to repair was not a material breach. However, defendants only challenge the trial

court's first basis for its judgment by asserting constructive eviction, which we have already rejected. Since we have not upset the trial court's first basis for its judgment, we do not address defendants' arguments regarding the court's alternative basis.

III. CONCLUSION

For the reasons stated, we affirm the Champaign County circuit court's judgment.

Affirmed.