



Smith's brief on appeal to the extent that they are supported by the record.

¶ 4 On October 8, 2008, Smith entered into a lease with Kinji Waddy for a residence located at 301 High Street in Mound City. The tenancy was to begin on November 8, 2008, for a period of one year and at a monthly rent of \$275. The lease was renewable for one-year periods thereafter. From a review of the residential lease agreement, the landlords were listed as Duncan T. Smith and Myra Davis. For some reason, not specified in the record, Myra Davis is not a party in this litigation. The tenant was listed as Kenji Waddy. The tenant expressly agreed "to use said dwelling as living quarters only for 2 adults" and for 3 minor children on an intermittent basis.

¶ 5 On November 1, 2009, on letterhead labeled as being "from the desk of" Duncan T. Smith and Myra Davis, Smith wrote a letter to Waddy. A handwritten note on the top of the letter indicates that Smith sent the letter by certified mail. In this letter, he indicated that the lease was set to expire on November 8, 2009, and that Smith was not renewing the lease. He stated that Waddy had 30 days from this notification in which to vacate the premises—by December 8, 2009. Smith indicated that if Waddy had not vacated the premises by that date, the rent would be \$350 per month. In this letter, Smith indicated that there had been a problem related to a water heater. Smith restated the history of the water heater problem which began with a phone call from Waddy that the water heater was leaking. Smith claimed to have provided specific instructions about calling a designated maintenance man and turning off the power and the water on the unit. Smith claims that Waddy did not take any of these actions. Ultimately, Waddy replaced the water heater without first obtaining Smith's consent.

¶ 6 Smith filed his complaint in eviction on February 18, 2010, in which he alleged that Waddy and Amy Black-Kearce (Waddy's apparent paramour) were both residing at 301 High Street and that Waddy had not obtained Smith's consent for having Amy Black-Kearce live

at the home. He alleged that this failure of consent amounted to a violation of the lease. Smith alleged that as of the date the complaint was filed, Waddy and Black-Kearce continued to reside in the home without the payment of rent. In addition to the unpaid rent from November 8, 2009, through February 18, 2010, at the rate of \$350 per month, Smith alleged that the defendants damaged the yard at 301 High Street by parking vehicles on the grass. Smith signed his complaint under oath in the presence of a notary.

¶ 7 The complaint was served upon both defendants. The case was called for a hearing on April 8, 2010. Smith and both defendants appeared. The defendants represented to the court that they were no longer residing in the house. By docket entry, the court granted immediate possession of 301 High Street to Smith. The court noted that the defendants generally denied the remaining allegations of Smith's complaint. The case was set for a bench trial on May 20, 2010.

¶ 8 The docket entry for May 20, 2010, reflects that all three parties were present in court and that the bench trial was conducted. The record on appeal indicates that Smith offered various written documents as evidence. They are marked as exhibits, and from the Pulaski County exhibit list included in the record, we believe that not all were admitted. The only exhibit clearly listed by the court as "admitted" was a certified mail receipt offered by Smith showing that documents were sent by certified mail to both Waddy and Black-Kearce on February 17, 2010. It appears that this certified mail receipt relates to a notice of termination of tenancy signed by Smith and directed to Waddy and Black-Kearce (listed as "Black-Kersee" in this document), which is also dated February 17, 2010. This notice—which was apparently not entered into evidence—indicated that the defendants were in default of payment of the \$350 in rent for the preceding four months (for a total owed of \$1400) and that Smith was electing to terminate the lease. In this notice, Smith indicated that Waddy and Black-Kearce had 10 days in which to vacate—on or before March 1, 2010.

¶ 9 In a five-page order, the court entered its judgment on May 26, 2010. The court dismissed Amy Black-Kearce from the suit, claiming that Smith's attempted use of section 9-201(2) of the Code of Civil Procedure (735 ILCS 5/9-201(2) (West 2008)) to add Black-Kearce as a defendant, even though she was not a party to the lease, was improper. The court held that this section was inapplicable because the written agreement was in existence and Black-Kearce was not a party to that agreement. With respect to Smith's contention that Waddy was a wilful holdover tenant after the lease's expiration and that, therefore, Smith was entitled to double the rental amount pursuant to section 9-202 of the Code of Civil Procedure (735 ILCS 5/9-202 (West 2008)), the court found that Smith failed to establish by the preponderance of the evidence that Waddy was, in fact, a wilful holdover tenant. The court also found by a preponderance of the evidence that Smith did not establish his entitlement to double rent pursuant to section 9-203 of the Code of Civil Procedure (735 ILCS 5/9-203 (West 2008)). The court based these findings on the fact that Smith failed to comply with proper statutory rules relative to the termination of a one-year tenancy. The court acknowledged its review of both the November 1, 2009, letter and the February 17, 2010, notice relative to the termination of the lease and concluded that neither document was in compliance with the statutory requirements of section 9-203 of the Code of Civil Procedure and that, therefore, neither constituted a proper termination of the tenancy. Additionally, the court noted that the November 1, 2009, letter did not allege the nonpayment of rent and contained a date on which the lease was to expire that was different from that contained within the lease itself. The second notice on February 17, 2010, seemed to indicate to the court that the parties must have entered into a subsequent verbal agreement in light of the fact that there was a second notice of termination, when a second such notice would not have otherwise been required. The court noted that its belief that there was a verbal rental agreement at the expiration of the initial lease was confirmed by Waddy's testimony at the

trial.

¶ 10 At the trial, Smith alleged other damages related to having the bathroom cleaned after the defendants vacated the premises. In response, the defendants showed the trial court a video they recorded at the time they vacated the premises, and the trial court noted that in that video the bathroom appeared to be clean. The person hired to clean the trailer provided testimony at the trial that when he went to the trailer in early April 2010 the overall shape of the trailer was "not too bad" and that the defendants had completely moved out. Accordingly, the court concluded that Smith failed to establish by the preponderance of the evidence that the cleaning expenses he sought were proven.

¶ 11 At the trial, Waddy acknowledged that he owed rent for the months of December 2009 and January and February 2010. Smith alleged at the trial that rent was also owed for March and April 2010. Through evidence tendered by Waddy at the trial, which included a mold assessment he had conducted of the home in March 2010, the court concluded that Waddy clearly still had control of the home in March 2010 and that, thus, he owed rent for that month also. Smith's witness, who cleaned the bathroom, testified that he was in the home in "early April" and that Waddy and Black-Kearce were no longer residing there. Based upon this testimony, along with that of Waddy and Black-Kearce, the court determined that the home was not occupied by the defendants in April 2010 and that, therefore, they did not owe rent for that month. The court determined that Waddy owed Smith rent for the months of December 2009 and January, February, and March 2010—a total of four months.

¶ 12 The court then turned to the amount of rent. Based upon the testimony at the trial, the court determined that there had been a verbal agreement from the beginning of the leasehold that the monthly rental amount was \$250—rather than the \$275 written into the lease document. On that basis, the court determined that the total amount Waddy owed Smith for unpaid rent was \$1000.

¶ 13 To the \$1000, the court added the \$120 costs of suit. From that total of \$1120, the court subtracted the amount of the deposit paid by Waddy to Smith, which was \$450, and by the additional amount of \$230 that Waddy expended to pay for and install the water heater. The court entered a judgment against Waddy in the amount of \$440.

¶ 14 From this judgment, Smith appeals.

¶ 15 **LAW AND ANALYSIS**

¶ 16 Initially, we note that our consideration of the issues on appeal is hampered by the lack of a trial transcript. The responsibility for preparing a full and complete appellate record is the duty of the party seeking appellate review. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319, 789 N.E.2d 1248, 1251 (2003). If no transcript is available and if the parties do not or are not able to agree to a stipulation of facts pursuant to Supreme Court Rule 323(d) (eff. Dec. 13, 2005), the appellant can still prepare and obtain court certification of a bystander's report pursuant to Supreme Court Rule 323(c) (eff. Dec. 13, 2005). In this case, there is no bystander's report in the record on appeal. In the absence of a complete record on appeal, "the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis [citations]." *Midstate Siding & Window Co.*, 204 Ill. 2d at 319, 789 N.E.2d at 1252.

¶ 17 Smith raises the following issues on appeal:

1. The court erred in dismissing Black-Kearce as a defendant.
2. The court's determination that the monthly rent was \$250 was erroneous when the lease indicated \$275 and the termination letter indicated that for any month past the termination date, the monthly rental would be \$350.
3. The court erred in not awarding late fees, as contemplated by the lease.
4. The court erred in not considering the defendants as wilful holdovers pursuant to section 9-202 of the Code of Civil Procedure and thereby responsible for

double rents for the duration of their holdover.

5. The trial court erred in reducing the amount of the judgment by the amount of the water heater repair when Waddy did not have the proper authorization to repair it.
6. The trial court erred in crediting Waddy for the full amount of the security deposit against the judgment when the defendants did not clean the carpets at the termination of the leasehold as required by their lease.

¶ 18 Because the trial judge was able to assess each witness's credibility, we will not disturb a judgment following a bench trial unless the trial court's judgment is clearly contrary to the manifest weight of the evidence. *Jackson v. Bowers*, 314 Ill. App. 3d 813, 818, 731 N.E.2d 1252, 1257 (2000). A judgment is contrary to the manifest weight of the evidence if a conclusion opposite to that reached by the trial judge is clearly evident. *Comm v. Goodman*, 6 Ill. App. 3d 847, 853, 286 N.E.2d 758, 763 (1972).

¶ 19 Dismissal of Amy Black-Kearce as a Defendant

¶ 20 Amy Black-Kearce was not named on the lease as a tenant. Nonetheless, the lease clearly provided for two adults living in the home. Was Amy Black-Kearce the second adult as contemplated by that contractual provision? Smith does not acknowledge this provision of his lease, nor does he otherwise provide information about who the second adult was as of the date Waddy and Smith executed the lease. Additionally, there is no transcript of the testimony received at the trial, and so we do not know if that matter was addressed.

¶ 21 Smith argues that Black-Kearce was liable as a defendant in light of the provisions of section 9-201(2) of the Code of Civil Procedure. Section 9-201(2) provides as follows:

"The owner of lands \*\*\* may sue for and recover rent[,] \*\*\* for the use and occupation thereof, by a civil action in any of the following instances:

\*\*\*

2. When lands are held and occupied by any person without any special agreement for rent." 735 ILCS 5/9-201(2) (West 2008).

¶ 22 The trial court declined to hold Black-Kearce responsible pursuant to this section, finding that there was a written contract governing the leasehold and that the contract was between Smith and Waddy. We agree with the trial court's legal interpretation of section 9-201(2). That section is an alternative available when there is no rental lease. See 735 ILCS 5/9-201(1) (West 2008) (dealing with unpaid rent pursuant to a lease). In addition to this legal interpretation, we conclude that the provisions of the lease also seem to contemplate the presence of a second adult. Smith, as the drafter of the lease, could have easily added the name of this second adult, but for reasons unknown to this court, he neglected to do so.

¶ 23 Accordingly, the trial court's order dismissing Black-Kearce as a defendant is not contrary to the manifest weight of the evidence.

¶ 24 Amount of Rent Due

¶ 25 The trial court's determination of the monthly rental amount incorporated two determinations. First, the court recognized a verbal modification to the written lease that lowered the monthly rent from \$275 to \$250. Second, the court determined that the first of Smith's two notices terminating the tenancy, which purported to raise the rent to \$350 monthly effective November 8, 2009, was not in compliance with the statutory requirements for the termination of a tenancy and that therefore the rental increase was ineffective.

¶ 26 1. Written Lease. We first address the written contract. To the extent that our analysis engages in contractual interpretation, our review of the matter would be *de novo*. *Farmers Automobile Insurance Ass'n v. Wroblewski*, 382 Ill. App. 3d 688, 696, 887 N.E.2d 916, 923 (2008). Generally, if there is a written contract in effect, the terms of the contract must be enforced as written. *Farmers Automobile Insurance Ass'n*, 382 Ill. App. 3d at 697, 887 N.E.2d at 923. However, in Illinois, unless the written agreement is governed by the

statute of frauds,<sup>1</sup> a subsequent oral agreement can modify the written provisions. *Tadros v. Kuzmak*, 277 Ill. App. 3d 301, 312, 660 N.E.2d 162, 170 (1995). Verbal modifications must be proven to be definite and certain. *Estate of Kern v. Handelsman*, 142 Ill. App. 3d 506, 514, 491 N.E.2d 1275, 1280 (1986). The party who claims the verbal modification bears the burden of proof. *Id.* All the aspects of such a verbal modification, including the terms and conditions, as well as the intent of the parties, present questions of fact for the court. *South Shore Amusements, Inc. v. Supersport Auto Racing Ass'n*, 136 Ill. App. 3d 284, 287, 483 N.E.2d 337, 340 (1985). Because we do not have a record of the trial proceedings and because the trial court had the opportunity to assess the witnesses when they testified, we must presume that the court determined that Waddy met the burden of proof relative to the modification of the rental amount to \$250. Accordingly, that aspect of the court's judgment must be affirmed.

¶ 27 2. Wilful Holdover and Increased Monthly Rent. We next turn to Smith's efforts by way of his written letter of November 1, 2009, to raise the monthly rental to \$350. Smith's letter indicated that the lease was scheduled to end on November 8, 2009. By this notice, he was terminating the lease and providing 30 days for Waddy to vacate the premises—on or before December 8, 2009. According to the terms of this letter, if Waddy remained in the home past December 8, 2009, he intended to view Waddy as a wilful holdover tenant and hold Waddy responsible for an increased monthly rental of \$350.

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<sup>1</sup>Contracts that must be written include a contract to be responsible for a debt from the executor's own estate, a contract to accept the debt of another, a contract in consideration of marriage, a contract that cannot be performed within one year, a contract for the sale of realty, and a contract for the sale of goods in excess of \$500. 740 ILCS 80/1, 2 (West 2008); 810 ILCS 5/2-201(1) (West 2008).

¶ 28 Section 9-202 of the Code of Civil Procedure provides, "If any tenant \*\*\* wilfully holds over any \*\*\* tenements \*\*\* after the expiration of his or her term \*\*\* and after demand made in writing, for the possession thereof, by his or her landlord, \*\*\* the person so holding over, shall, for the time the landlord \*\*\* is so kept out of possession, pay to the person so kept out of possession \*\*\* at the rate of double the yearly value of the \*\*\* tenements \*\*\* so detained to be recovered by a civil action." 735 ILCS 5/9-202 (West 2008).

¶ 29 Section 9-205 of the Code of Civil Procedure (735 ILCS 5/9-205 (West 2008)) provides the statutory requirement for the termination of a tenancy from year to year. That section mandates that the landlord must provide written notice of the termination 60 days before the end of the year's term "at any time within 4 months preceding the last 60 days of the year." 735 ILCS 5/9-205 (West 2008).

¶ 30 The lease at issue was a year-to-year lease in that, after the expiration of the first year, it was slated to renew for another year unless either party elected to terminate the leasehold. Accordingly, Smith was required to comply with the statutory requirements for a termination of his lease with Waddy. Because the lease was set to expire on November 8, 2009, written notice to terminate had to have been received on or before September 9, 2009—60 days prior to the expiration of the year's term. This notice could have been provided anytime between May 9, 2009, and September 9, 2009. While Smith did issue his November 1, 2009, notice of the termination of the lease in a written format as required by statute, he failed to comply with the statutory time for the notice required for the termination of a year-to-year lease.

¶ 31 Consequently, we conclude that the trial court's ruling was correct. Waddy could not be considered a wilful holdover tenant because the termination of his leasehold was not in statutory compliance. Because Waddy was not a wilful holdover tenant, we agree with the trial court's conclusion that Waddy was not responsible for the increased monthly rental of

\$350. By the express wording of Smith's letter to Waddy, he described the increase rental of \$350 per month as "liquidated damages for any illegal holdover." Because the termination of the lease was not properly accomplished, Waddy was not a "wilful holdover" tenant and therefore his rent did not increase after November 8, 2009.

¶ 32 3. Late Fees. Waddy claims that the trial court erred in not awarding his late fees, to which he claims entitlement by the terms of his written lease. From a review of the written lease, it appears that late fees accrue at the rate of \$30 per day.

¶ 33 Smith's complaint in the trial court did not seek a reimbursement for any late fees. The trial court's order does not address late fees. We are not able to determine whether Smith sought these damages by way of an oral amendment to his complaint or otherwise sought this relief from the trial court, because we do not have a transcript of the proceedings that took place at the trial.

¶ 34 It is well established in Illinois that "[i]ssues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Bigelow v. City of Rolling Meadows*, 372 Ill. App. 3d 60, 67, 865 N.E.2d 221, 227 (2007) (quoting *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996)).

¶ 35 We decline to consider this issue because the matter of late fees was not raised in the trial court and cannot be raised for the first time on appeal.

¶ 36 4. Wilful Holdover and Double Rent. Smith next contends that he was entitled to double rent pursuant to section 9-202 of the Code of Civil Procedure (735 ILCS 5/9-202 (West 2008)) due to Waddy's status as a wilful holdover tenant.

¶ 37 As earlier concluded, Waddy was not a wilful holdover tenant because the written termination of the year-to-year lease was not in compliance with the statute. Consequently, Waddy was not responsible for double rent payments.

¶ 38 5. Reduction of Judgment Amount for Tenant's Self-Repair. Smith claims on

appeal that the trial court erred in awarding Waddy a credit against the judgment for unpaid rent in the amount of \$230 for the installation and/or replacement of a water heater. The record contains no written response by the defendants to Smith's complaint. Apparently, this claim was made at the trial. Smith claims that he testified at the trial to a credit for the \$230 he made in Waddy's favor against the rent in October 2009. Again, we do not have a transcript of the trial but note that even if he did so testify, that question could have been a matter of credibility that the court resolved in favor of Waddy.

¶ 39 We do, however, agree with Smith that the dollar amount awarded against the judgment for unpaid rents was erroneous. Section 5 of the Residential Tenants' Right to Repair Act provides that if the landlord is notified of the defect and does not timely undertake repair, the repair amount that can be deducted from the rent cannot exceed the lesser of \$500 or one-half of the monthly rent. 765 ILCS 742/5 (West 2008). The amount of the repair at issue was \$230, which is obviously less than \$500. One-half of the stated \$250 rent from the written lease would be \$125. Accordingly, the maximum amount of credit for Waddy's self-repair would be \$125.

¶ 40 6. Failure to Reduce Amount of Security Deposit for Carpet Cleaning. Smith finally contends that the trial court's judgment was erroneous because the court failed to subtract the amount of money it would have cost to have the carpets cleaned as required for a tenant vacating the property. Smith's complaint does not allege unclean carpets but does reference cleaning costs expended to have the bathroom cleaned. At the trial, Smith allegedly testified that the carpets were not cleaned when Waddy vacated the home. Smith alleges that Waddy was particularly silent in his trial testimony on this matter. Smith alleges that he was seeking \$300 for carpet cleaning, which is what Sears would charge to clean three rooms. As far as we are able to determine, Smith did not have the carpets cleaned, because no invoice was included in the record on appeal. The written lease itself seems to

contain a possible conflict regarding carpet-cleaning costs. The lease says that the carpets must be cleaned at the time that the tenants vacate the property. However, the lease alternatively says that the tenant can elect either to pay \$185 as a charge for cleaning the carpets or to be billed for the actual costs incurred.

¶ 41 We have the same difficulty at determining the legitimacy of this issue on appeal because we do not have the ability to review the trial transcript. Accordingly, we find that the trial court's judgment was proper. The court's award of the full security deposit against the amount of unpaid rents was correct.

¶ 42 **CONCLUSION**

¶ 43 We exercise our authority under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) and hereby modify the judgment. Smith is entitled to four months of rent at the verbally modified lease amount of \$250 per month, for a total of \$1000. Smith is entitled to his costs of suit at the trial court level, which totaled \$120. From that total of \$1120, we subtract the \$450 security deposit, as well as \$125 for the statutorily allowed amount for Waddy's self-repair. We therefore modify the judgment in favor of Smith and against the defendant Waddy to the amount of \$545, from the \$440 awarded by the trial court.

¶ 44 For the foregoing reasons, the judgment of the circuit court of Pulaski County is hereby affirmed as modified in accordance with this order.

¶ 45 Affirmed as modified.