

THIRD DIVISION
NOVEMBER 13, 2013

No. 1-13-0165

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOARD OF DIRECTORS FOR)	Appeal from the
COUNTRYSIDE CONDOMINIUM)	Circuit Court of
ASSOCIATION II, an Illinois not-for-profit)	Cook County,
corporation,)	
)	
Plaintiff-Appellee,)	09CH30220
)	
v.)	
)	
JESSE DAVIS,)	The Honorable
)	Martin S. Agran,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *HELD*: Circuit court order denying lessee's motion for attorney fees affirmed where such recovery was not permitted by the operable language of fee-shifting provision contained in the parties' lease agreement.
- ¶ 2 Defendant Jesse Davis appeals an order of the circuit court denying his motion to have

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plaintiff, the Board of Directors for Countryside Condominium Associations II (the Board), assume responsibility for all of his attorney fees and costs. On appeal, Davis argues that pursuant to the plain language of fee-shifting provision contained in the parties' lease agreement, he is entitled to all of the fees and costs that he incurred during the litigation in the lower court. For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 On August 1, 2007, the Board and Davis entered into a "Standard Laundry Room Lease" agreement. As the lessee, Davis was to be responsible for the maintenance of all of the washers and dryers located on the premises of several condominium buildings and pay the Board \$720 every four months until the termination of the lease agreement. The lease also contained the following provision: "LESSOR shall be responsible for reasonable Attorney's fees, court costs, and witness fees incurred by LESSEE in enforcing this lease agreement, or for any costs incurred, by LESSEE, for defense of this lease Agreement."

¶ 5 On August 26, 2009, the Board filed a two-count complaint against Davis. Count I of the complaint was a breach of contract claim and count II was a claim for declaratory relief, in which the Board sought to have the laundry room lease agreement be declared void because Davis had been a member of the Board at the time that he entered into the lease agreement. The Board withdrew its breach of contract claim on November 8, 2010, and the cause proceeded to trial on the declaratory judgment claim. After hearing the evidence, the circuit court issued a detailed written order, finding in favor of Davis and awarding him the "costs of this suit."¹

¹ The transcripts of the trial do not appear in the record on appeal.

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¶ 6 Thereafter, on March 9, 2011, Davis filed a "motion for attorney's fees and costs." In support of his motion, Davis argued that pursuant to the express terms of the lease agreement, he was "entitled to the costs he incurred in enforcing and defending the lease agreement."

Defendant itemized the costs and fees he incurred as follows: "\$16,070.00 in attorney's fees, \$198.00 in court costs, \$1,543.65 in deposition costs, and \$160.12 in subpoena related costs."

Accordingly, Davis sought the court to issue an order awarding him a total of \$17, 971.77 in attorney fees and costs. An affidavit and time sheet completed by Davis' attorney were attached to Davis' motion.

¶ 7 The circuit court presided over a hearing on Davis' motion for attorney fees, the transcript of which does not appear in the record on appeal. Following the hearing, the court entered an order denying Davis' request for attorney fees. In a separate order, the court found that Davis "[wa]s only entitled to filing costs, witness fees and subpoena fees in the amount of \$358.12."

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, Davis argues that the circuit court erred in denying his motion for attorney fees that he incurred in defense of the lease agreement. Specifically, Davis contends he is "contractually entitled to attorney's fees" pursuant to the express terms of the lease agreement.

¶ 11 The Board responds that the "trial court applied the proper criteria when it determined that [Davis] was not entitled to attorney's fees." The Board argues that the fee-shifting provision in the lease agreement is inapplicable because the costs and fees that Davis incurred were part of a declaratory judgment action rather than an action involving the enforcement or defense of the

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lease agreement itself. Even if the lower court proceedings could be construed as an action that required Davis to "defend" the lease agreement, the Board argues that the fee-shifting provision limits him to "costs" and precludes him from recovering attorney fees.

¶ 12 Before proceeding to the merits of the instant appeal, we initially observe that Davis has not provided a transcript of the hearing that the court conducted on his motion for attorney fees and costs or a suitable alternative permitted by Illinois Supreme Court Rule 323 (Ill. S. Ct. R. 323(c), (d) (eff. Dec. 15, 2005)). Given that Davis is the appellant, this court will resolve any inconsistencies and doubts arising from the incomplete record against him. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984) ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant"). Keeping these principles in mind, we now address the substantive merit of Davis' appeal.

¶ 13 When it comes to the payment of attorney fees, Illinois courts generally follow the "American Rule," which requires each party involved in litigation to be responsible for its own attorney fees and costs unless there is express statutory or contractual language to the contrary. *Sandholm v. Kueker*, 2012 IL 111443, ¶ 64; *Morris Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572 (2000); *Negro Nest, LLC v. Mid-Northern Management, Inc.*, 362 Ill. App. 3d 640, 641-42 (2005). Because they are the exception to the general rule, statutes and contractual provisions that provide for the payment of another party's attorney fees are strictly construed.

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Chapman v. Engel, 372 Ill. App. 3d 84, 87 (2007); *Negro Nest*, 362 Ill. App. 3d 641-42. This means that a reviewing court will interpret fee-shifting provisions " ' to mean nothing more—but also nothing less—than the letter of the text ' "(*Chapman*, 372 Ill. App. 3d at 87, quoting *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004)) and will "not award attorneys fees as a matter of contractual construction in the absence of *specific* language" (*Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005)). The rationale for strictly construing fee-shifting provisions is that "attorney fees can be a substantial expense and are an important consideration when entering into contracts," and thus, "contracting parties must make clear their desire to deviate from the rule so the parties have notice of their potential liability when entering into or disputing a contract." *Negro Nest*, 362 Ill. App. 3d at 651. The construction of a fee-shifting provision in a contract involves a question of law, and as such, is subject to *de novo* review. *Bjork v. Draper*, 381 Ill. App. 3d 528, 544 (2008); *Chapman*, 372 Ill. App. 3d at 87.

¶ 14 The fee-shifting provision at issue in this case provides as follows:

"LESSOR shall be responsible for reasonable Attorney's fees, court costs, and witness fees incurred by LESSEE in *enforcing* this lease agreement, *or* for any costs incurred, by LESSEE, for *defense* of this lease Agreement." (Emphasis added.)

¶ 15 Pursuant to the plain language of the parties' contract, a lessee is entitled to reasonable attorney fees and costs incurred in an action to enforce the lease agreement *or* any costs associated with any action to defend the lease agreement. Without any citation to relevant authority, Davis maintains that all of the costs and attorney fees that he incurred in the lower court were in "defense" of the lease agreement. The Board, in turn, argues that the underlying action was an

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action for declaratory judgment, which is inherently different than actions to enforce or defend a lease agreement. Because the underlying cause of action involved neither enforcement nor defense of the lease agreement, the Board maintains that the fee-shifting provision is inapplicable.

¶ 16 When construing fee-shifting provisions, Illinois courts have consistently declined to interpret fee-shifting provisions that are limited by their terms to actions to "enforce" or "defend" a contract to apply to declaratory judgment actions. In doing so, courts have reasoned: "In declaratory judgment actions, rights are being declared; obligations are not being enforced [or defended]." *Arrington v. Walter E. Heller Corp.*, 30 Ill. App. 3d 631, 642 (1975); see also *Chapman*, 372 Ill. App. 3d at 88 ("[A] fee-shifting provision tied to an action 'to enforce' a lease does not apply in a declaratory judgment claim asking that the parties' rights under the lease be declared. The reason? Declaring rights is not the same as enforcing obligations"). Here, some but not all, of the attorney fees that Davis incurred and which he sought to recover, were for the declaratory judgment action. Given that declaratory judgment actions involve neither the enforcement nor defense of a contract, Davis is precluded from recovering such fees by the plain language of the parties' fee-shifting provision. See, e.g., *Arrington*, 30 Ill. App. 3d at 642 (finding that the landlord was not entitled to attorney fees in a declaratory judgment action because the plain language of the parties' contract only provided for the payment of fees and costs that were incurred 'in *enforcing* any of the obligations of Tenant under this lease"). (Emphasis added).

¶ 17 With respect to the attorney fees incurred in response to the breach of contract claim, Davis asserts that those fees are recoverable as they were incurred in "defense" of the lease agreement, and thus fall squarely within the confines of the fee-shifting provision. The Board, in

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turn, does not dispute that attorney fees that Davis incurred as part of the breach of contract claim could be construed as fees incurred in "defense" of the lease agreement, but argues that such fees are not recoverable because the breach of contract claim was voluntarily dismissed and the claim was never litigated in the circuit court. The Board further asserts the fee-shifting provision only permits a lessee to recover "costs" that he incurred in defense of the lease agreement and maintains that the term "attorney's fees" cannot be equated to "costs." Without determining the effect that the Board's voluntary dismissal of the breach of contract claim, we agree with the Board that Davis is not entitled to attorney fees.

¶ 18 As set forth above, the fee-shifting provision in the parties' contract distinguishes between actions to enforce and actions to defend the lease agreement. While the fee-shifting agreement provides that the lessee is entitled to "reasonable Attorney's fees, court costs, and witness fees incurred" in an action to enforce the lease agreement, it provides that a lessee is entitled to "any cost incurred" in any action in defense of the agreement. Although Davis suggests that the phrase "any cost incurred" should be interpreted broadly to encompass "not only attorney's fees, court costs and witness fees, but any costs incurred by the lessee in defense of the lease," his position does not accord with well-established case-law. Courts have repeatedly held that the term "costs" is not synonymous with "attorney's fees" and have declined to award attorney fees in the absence of specific contractual language. See, *e.g.*, *Negro Nest*, 362 Ill. App. 3d at 651 (finding that contract provision allowing the prevailing party to "all collection costs" was not sufficient to allow recovery of attorney fees); *Qazi v. Ismail*, 50 Ill. App. 3d at 271 (1977) (contractual language stating that the party in default of the agreement would be "responsible for all costs and

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consequences" of litigation did not include the payment of attorney's fees); compare with *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC.*, 403 Ill. App. 3d 234, 254-55 (2010) (finding that the circuit court did not err in awarding prevailing party attorney fees where the lease agreement provided that the party found in default of the agreement was required to "reimburse the non-defaulting party for reasonable attorney fees incurred").

¶ 19 In addition to failing to accord with established case-law, to permit the recovery of attorney fees for actions in defense of the lease agreement would wholly disregard the distinction that the fee-shifting agreement makes between actions to enforce and actions to defend the lease agreement. Had the parties wished to allow for the recovery of attorney fees in actions to defend the lease, they could have done so. Instead, the parties chose to clearly distinguish between a lessor's responsibility in an action brought by the lessee to enforce the lease agreement and the lessor's responsibility in an action in which the lessee is required to defend the lease agreement. To abide by the interpretation that Davis ascribes to the fee-shifting provision would require this court to ignore the common rules of contract interpretation, which include giving meaning and effect to every term and provision in the contract and avoiding any interpretation that is illogical or that renders any provisions superfluous. See generally *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014, ¶ 31; *River Plaza Homeowner's Association v. Healey*, 389 Ill. App. 3d 389 Ill. App. 3d 268, 277 (2009). We thus find that the circuit court properly denied Davis' motion for attorney fees.

¶ 20 Finally, Davis argues that the circuit court erred in denying him all of the costs he requested, which amounted to \$1,901.77. We acknowledge that the fee-shifting provision

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provides that the lessee is entitled to "any cost incurred" in defense of the lease agreement.

However, given that we have neither a transcript of the hearing the court presided over on Davis' motion for fees and costs, and no evidence as to how the court calculated the costs to which it found Davis was entitled, we must resolve any doubts arising from the incomplete record against Davis and presume that the order entered by the court had a sufficient legal and factual basis.

Foutch, 99 Ill. 2d at 391. We therefore affirm the circuit's order awarding Davis \$355.12 in costs.

¶ 21

III. CONCLUSION

¶ 22 Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.