2013 IL App (2d) 120426-U
Nos. 2-12-0426 & 2-12-1192 cons.
Order filed May 23, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RICHARD KUEMPEL, beneficiary of and agent for Chicago Title Land Trust Company, not individually but solely as Successor Trustee to LaSalle Bank National Association, as Successor Trustee to American National Bank and Trust Company of Chicago, under Trust Agreement dated February 16, 1998 and known as Trust Number 123814-06, and CHICAGO TITLE LAND TRUST COMPANY, as trustee,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs and Counterdefendants-Appellants and Cross-Appellees,	)	
v.	)	No. 09-L-1036
ETX TRANSMISSIONS, INC., f/k/a Mundelein Acquisition, Inc., and d/b/a Accurate Transmissions,	)	
Defendant and Counterplaintiff-Appellee and Cross-Appellant.	)	Honorable David M. Hall, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying plaintiffs' claim for rent from defendant, as it was not against the manifest weight of the evidence to conclude that plaintiffs accepted defendant's voluntary surrender of the premises, thereby relieving defendant of rent obligations. The trial court also acted within its discretion in denying defendant's motion for attorney fees and costs. Therefore, we affirmed.

¶ 2 Plaintiffs, Richard Kuempel and Chicago Land Trust Company, filed a two-count complaint against defendant, ETX Transmissions, Inc., a lessor of their commercial property. Plaintiffs sought unpaid rent and possession of the property. Defendant asserted various affirmative defenses and counterclaims. By agreement, the trial court entered a judgment for possession on count II. Following a bench trial, the trial court found in favor of defendant on count I and for plaintiffs on defendant's counterclaims. The trial court subsequently denied defendant's motion for attorney fees and costs.

¶ 3 On appeal, plaintiffs argue that the trial court erred in not ruling in their favor on count I, for unpaid rent. In their cross-appeal, defendant argues that it should have been awarded attorney fees and costs under the lease's fee-shifting provision. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Pleadings

¶ 6 Kuempel[1] filed a complaint against defendant on October 23, 2009, alleging as follows. Kuempel owned real estate located at 401 Terrace Drive in Mundelein. On October 1, 2007, Kuempel and defendant entered into an industrial building lease for the premises beginning on that day. The lease provided for a three-year term with a monthly rent of $48,247.92, plus taxes, utilities, insurance, and facilities maintenance charges. On June 8, 2009, defendant notified its employees

[1]As we subsequently mention, Chicago Title Land Trust Company was added as a plaintiff in an amended complaint.

via letter that it intended to permanently close the facility at 401 Terrace Drive on about September 30, 2009. During the month of July 2009, defendant began moving its fixtures, machinery, and equipment out of the premises. Defendant's agents assured Kuempel that defendant would honor the lease or find a suitable sublessee. On October 1, 2009, defendant failed to make a timely rental payment. Kuempel served a five days' notice upon defendant, but defendant failed to cure its default within the time permitted under the lease. Instead, on October 15, 2009, defendant returned the keys to the premises. Upon re-entering the premises, Kuempel found the property damaged and in disrepair, in violation of the lease.

¶ 7 In count I, alleging breach of the lease, Kuempel sought past due rent; all rent accruing through September 30, 2010; costs of repair and clean-up of the premises; and attorney fees and costs. In count II, Kuempel sought possession of the premises.

¶ 8 On November 4, 2009, the trial court entered an agreed order granting Kuempel possession of the premises.

¶ 9 On February 24, 2010, defendant filed an amended answer. It admitted the genuineness of the lease and that no payment had been made by October 1, 2009. Defendant asserted the following 13 affirmative defenses: (1) Kuempel's lack of standing; (2) failure to state a claim upon which relief could be granted; (3) laches; (4) unclean hands; (5) estoppel; (6) Kuempel's breach of the lease through the lockout notice, as the lease permitted the landlord's reentry only after written notice and a five-day grace period; (7) failure to mitigate damages; (8) failure to discount damages to present value; (9) interference with defendant's obligations under the lease through the lockout; (10) breach of the lease's implied covenant of good faith and fair dealing; (11) breach of the lease's covenant

of quiet use and enjoyment; (12) constructive eviction through the lockout; and (13) damages being offset by amounts due to defendant.

¶ 10 Defendant further asserted four counterclaims. The first counterclaim alleged interference with defendant's customers, supply chain, and employees. The second counterclaim alleged that: Kuempel operated a business called Authorized Transmission Centers, LLC (Authorized); defendant had a judgment against Authorized; and Kuempel fraudulently caused Authorized's assets to be transferred to a new business that he had formed, Authorized Transmission Remanufacturing, Inc. (ATR). The third counterclaim alleged that Kuempel induced breaches of the contracts between defendant and its customers and suppliers. The fourth counterclaim alleged interference with prospective business relationships.

¶ 11 On November 18, 2011, plaintiffs filed an amended complaint. The allegations in the amended complaint remained the same, but the amended complaint added Chicago Title Land Trust Company as a plaintiff. Also on November 18, the trial court dismissed defendant's second counterclaim for failure to name a necessary party.

¶ 12 B. Trial

¶ 13 A bench trial took place from November 14 to 18, 2011. We summarize the testimony from the bystander's report of proceedings.

¶ 14 1. Richard Kuempel

¶ 15 Kuempel testified as follows. He was the sole beneficiary of a land trust, of which the trustee was Chicago Title Land Trust Company. They were the plaintiffs in the case. Before 2007, the commercial building at 401 Terrace Drive housed Accurate Transmissions, Inc. (ATC). ATC was a transmission rebuilding company that he founded in 1984. By 2005, he was ATC's sole owner and

chief executive officer. ATC had thousands of customers including Auto Zone and Advanced Auto Parts. ATC closed its operations in August or September 2007. At that time, ATC's principal lender, La Salle National Bank, forced ATC and a trucking company Kuempel owned (KTNN, LLC) into an assignment of their assets to benefit creditors. The assignee was Howard Samuels of Rally Capital. Mundelein Acquisition acquired most, if not all, of ATC's assets from the assignee. Some time later, Mundelein Acquisition changed its name to ETX, the defendant in this case.

¶ 16 Authorized was a company that Kuempel formed in 2003; Kuempel was either a 95% owner or sole owner. Authorized acted as an installation contractor for ATC and bought parts from it. It ceased doing business in October or November 2007, at which time it owed ATC over $250,000. Kuempel believed that the debt was one of ATC's assets assigned to Samuels/Rally Capital in September 2007. Mundelein Acquisition sued Authorized on that receivable and obtained a judgment against Authorized in September 2008 for $332,973.32. Authorized filed for bankruptcy in November 2008 and was dissolved by the secretary of state's office in December 2009.

¶ 17 In 2007, Kuempel organized ATR. He held a 100% interest in the company and was its president and chief executive officer. ATR engaged in basically the same business as defendant, except that ATR directed its marketing to businesses that operated fleets of trucks and other large vehicles. ATR may have ended up doing business with some of defendant's customers, but neither Kuempel nor ATR was under any non-compete agreement with defendant. Further, no property or other assets of Authorized were transferred to ATR.

¶ 18 The lease agreement between Chicago Title Land Trust Company as trustee and defendant was dated and effective October 1, 2007. Kuempel negotiated the lease with Alan Gatlin and Andrew Gasser, respectively the president and the CFO of Mundelein Acquisition. Plaintiffs'

mortgage debt service on the building totaled about $53,000 per month. The building was managed by RKDK Properties, which Kuempel and his wife, Deanna Kuempel, owned. Prior to the execution of the lease, the land trust had entered into a one-year lease with Mundelein Acquisition; the October 2007 lease replaced the one-year lease.

¶ 19 Within the first few weeks that defendant took over the property and began operations, Deanna visited the property once or twice to pick up the Kuempels' mail that was still being delivered there. One time, there was an alleged verbal altercation between herself and an employee of defendant, and the police were called. After that, Kuempel and Deanna agreed that she would no longer go over there to pick up mail.

¶ 20 On September 12, 2007, Kuempel sent an e-mail to an employee of defendant who used to be Kuempel's employee. Kuempel used an expletive to threaten the man because he failed to copy Kuempel on an e-mail at a time that Kuempel was still working in the building, before defendant took ownership. Specifically, the e-mail stated:

> "I guess you forgot to copy me on the email from Perry Johnson the ISO registrar on the late renewal!! 'THE NEW COMPANY WAS CONCERNED...' was your answer...you were not even going to be here but I told them to keep you...FUCKING RAT!! I SAW YOUR EMAIL TO MARY! ... You shouldn't have been here, AND YOU STILL MIGHT NOT BE HERE, SUCK ASS! ... Rich the one who always helped you with little league sponsorship, tickets, etc etc... BAD WAY TO LIVE YOUR LIFE!"

¶ 21 On about September 25, 2007, in the course of defendant acquiring ATC's assets, an employee of defendant mistakenly delivered six transmissions and pods from the property to ATR.

Gatlin sent an e-mail requesting payment for those transmissions, and ATR paid defendant right away. ATR sold those transmissions to a customer that had formerly been a customer of ATC.

¶ 22 Beginning in June 2009, defendant began removing equipment and inventory from the building, and Kuempel began hearing from an employee of defendant that defendant was going to be shutting down its operations at the building.

¶ 23 Defendant paid its rent and generally performed its lease obligations up through and including September 2009. On occasion, defendant paid its rent as late as the fifth day of the month. Kuempel did not receive a check for payment of the October 2009 rent before October 1, 2009. At no time prior to that date did defendant assert any wrongdoing against the lessor as a justification for getting out of the lease.

¶ 24 On October 2, 2009, Kuempel sent Gatlin an e-mail stating: "We will be locking the building down because of your game you are playing on the rent...Alan your name is on the lease...Good luck!" A few days later, Kuempel read a letter from defendant's attorneys stating that they viewed the lease to be terminated based on Kuempel's October 2 e-mail. However, Kuempel could not lock defendant out because he did not have keys to the building. Kuempel could have changed the locks or used a chain, but he did not believe that was necessary.

¶ 25 Two to three weeks after defendant vacated the building, it returned its keys, and Kuempel retook possession of the building. He and Deanna then began cleaning and repairing the building to make it more rentable. On behalf of the land trust, they also began making efforts to lease or sell the property by posting signs on the building and advertising the property. They then listed the property with a broker, but they did not receive any lease offers. They received two offers to purchase the building, but one was a verbal offer for $1 million less than the existing indebtedness.

The second was a written offer for $1.5 million less than the existing indebtedness. They could not afford to accept either offer. In late 2010, they moved ATR from its Vernon Hills location to the property in order to mitigate damages. They thought they might have an easier time leasing or selling ATR's smaller facility, but that facility was still vacant.

¶ 26 Defendant never made a rent payment after it paid the September 2009 rent. It failed to pay: the final year's base rent, totaling $578,975;[2] the final year's real estate taxes as required under the lease, which totaled over $120,000; and tens of thousands of dollars in unpaid utility bills.

¶ 27 2. Alan Gatlin

¶ 28 Gatlin provided the following testimony. At all relevant times, he was the president of Mundelein Acquisition, later renamed ETX (defendant). The company was formed in mid-September 2007 for the purpose of acquiring ATC's assets from Rally. Gatlin signed the original lease and the October 2007 lease because the company did not have enough time to look for another suitable property from which to operate after the acquisition.

¶ 29 The Kuempels were angry that ATC had failed, believed that defendant "stole" their business, and had ill will toward defendant and Gatlin. Gatlin believed that Kuempel had an obligation to his tenant to not put it out of business using the improper means he employed, though Gatlin was unaware of any non-compete agreement. Gatlin described the delivery of the six transmissions from defendant's inventory to ATR, and he testified that it was done at Kuempel's request. Kuempel later paid for the transmissions, but he did not reimburse defendant for the loss of good will and customer relationship. On several other occasions, Kuempel directed defendant's

[2]Kuempel later testified that plaintiffs may have retained one month's base rent as security deposit, in which case defendant owed only 11 months' rent.

employees to deliver product to him while they were working for defendant, which Gatlin considered to be further interference by the landlord with the quiet enjoyment of the premises. He believed that Kuempel also took a customer list and other business files that were assets defendant acquired, and that Kuempel hired employees away from defendant.

¶ 30 During the first few weeks after defendant occupied the property, Gatlin was copied on some threatening e-mails between the Kuempels and a supplier. A message in the exchange from Deanna to the supplier stated:

> "First of all loser!! You can put my husband[']s balls in your mouth and choke on them!! Bring it on spineless whimp [*sic*], Rich (not Rick, Idiot) will fuck your wife while I watch. Piece of dirt get your facts straight before you start trouble, anytime come to Chicago we'll make sure we show you a real good time!! So who ever is getting you to try and manipulate information out of us you can stick it in your ass!! Eventually we will find out who it is; so tell your little bitch boy that, pussy!"

Around the same time as the e-mails, Gatlin learned of the verbal altercation with Deanna. The Kuempels also specifically threatened an employee of defendant with violence, saying that she should be careful riding her motorcycle home because they knew where she lived. Gatlin therefore became concerned with the safety of the company's employees and hired armed security personnel for months at a significant cost.

¶ 31 Initially defendant's business was "okay," but it "turned bad" within a couple of months. A decision was made to consolidate defendant's Illinois transmission remanufacturing operations into its Michigan operations, and defendant issued a notice to employees in June or July 2009. Also during that time, defendant began moving machinery, inventory, and equipment from 401 Terrace

Drive. Gatlin had discussions with Kuempel about the notice defendant had sent to its employees and the various options defendant was considering for the building, such as using the space for other purposes or subletting.

¶ 32 By September 30, 2009, all items necessary for defendant's business operations had been removed from the premises. Defendant paid all rent obligations through September 2009 and intended to pay rent for October 2009 as well. However, before defendant could send its rent payment for October 2009, Kuempel sent what Gatlin understood to be a lockout notice that he was denying defendant access to the building. Also, based on his history of dealings with Kuempel and his perception of his violent and threatening nature, Gatlin thought that attempting to access the building after the lockout would be dangerous. To memorialize defendant's understanding that it was locked out and that its lease was terminated, defendant's attorneys sent Kuempel a letter on October 5, 2009. Gatlin did not recall receiving any response to the letter. Defendant made no rent payments after receiving the October 2, 2009, e-mail. Gatlin directed an employee to return the keys to Kuempel a couple weeks later.

¶ 33 3. Deanna Kuempel

¶ 34 Deanna testified that even though defendant did not pay the October 2009 rent, they never locked anyone out of the building until after they got the keys back in mid-October. Deanna also testified regarding the property taxes on the building and utility bills defendant failed to pay from the end of its occupancy and for the remaining year of the lease.

¶ 35 Deanna acknowledged copying Gatlin on e-mails to a supplier that she intended to be harassing to the supplier. She also acknowledged having "words" in October 2007 with an employee of defendant who used to work for ATC.

¶ 36 4. Trial Court's Findings

¶ 37 We summarize the trial court's findings. On August 30, 2007, ATC and KTNN, LLC, assigned certain assets to Samuels for the benefit of creditors. Kuempel was the sole shareholder of these companies. On September 20, 2007, Samuels assigned these assets to Mundelein Acquisition, Inc., later known as ETX Transmissions, Inc. (defendant).

¶ 38 Kuempel was the beneficiary of a trust agreement dated February 16, 1998, and known as trust number 123814-06. Chicago Title Land Trust Company, as trustee, entered into a lease dated October 1, 2007, with Mundelein Acquisition for the subject property, 401 Terrace Drive. The parties performed their obligations under the lease during the first 24 months of the lease. Defendant removed all of its property from the premises prior to October 1, 2009.

¶ 39 Rent was due on or before October 1, 2009, for the month of October. Kuempel sent an e-mail to defendant on October 2, 2009, stating that "[w]e will be locking the building down because of your game you are playing on the rent." Defendant's counsel sent a letter to plaintiffs on October 5, 2009, noting receipt of the e-mail "locking the Company out of the Premises." The letter stated that defendant "has no alternative than to cease making rent payments under the lease and consider(s) the lease terminated *** and tender(s) possession to the Landlord." Kuempel did not respond to the letter or respond in writing clarifying his lock-down reference. Plaintiffs took possession of the property and took reasonable steps to attempt to mitigate damages by attempting to sell or lease the property. Defendant did not take any efforts to sublet the property.

¶ 40 Defendant did not prove the existence of any trade secrets or confidential information in the assets it purchased from Rally Capital. Defendant also failed to prove that Kuempel was prohibited

from using his industry knowledge, including the names of customers and suppliers, and information relating to products or pricing.

¶ 41 Kuempel engaged in a business known as ATR following September 20, "2009" [*sic*]. ATR competed in some regards with defendant, but it was under no obligation to refrain from doing so. Defendant failed to sustain its burden of demonstrating that Kuempel had knowledge of or intentionally and unjustifiably induced a breach of any contracts that defendant had with its customers and suppliers. Defendant also failed to demonstrate that Kuempel interfered with any expectation of entering into valid business relationships with prospective customers. The evidence of e-mails from Kuempel or his agents, as well as evidence of the six transmission cores delivered to ATR, did not demonstrate any improper or harmful effect on defendant's business. Defendant's business ultimately failed, but no wrongful conduct of Kuempel or his agents led to the failure. Also, prior to October 2, 2009, Kuempel took no actions which interfered with defendant's quiet enjoyment of the property.

¶ 42 The trial court found in favor of defendant on both counts of plaintiffs' complaint; it found that defendant's sixth, ninth, eleventh, and twelfth affirmative defenses had been demonstrated as of October 2, 2009. The trial court found in plaintiffs' favor on defendant's first, third, and fourth counterclaims.[3]

¶ 43 C. Attorney Fees

¶ 44 On December 8, 2011, defendant filed a motion for attorney fees. It argued that under the lease, it was entitled to such fees as a prevailing party in the lawsuit. The trial court denied the

[3]As stated, the trial court previously dismissed defendant's second counterclaim on November 18, 2011.

motion on December 20, 2011, finding that neither party was a "prevailing party" under the lease. It further declined to award fees "under governing statutes or Supreme Court Rules."

¶ 45 D. Motion to Reconsider the Judgment

¶ 46 Plaintiffs filed a motion to reconsider the judgment. In arguing the motion on March 7, 2012, plaintiffs stated that the October 2, 2009, e-mail was effectively a "nullity" because it did not satisfy the notice requirement of the lease, making the October 5 response a "nullity" as well. The trial court denied the motion, stating:

> "The landlord elected not to respond to [defendant's October 5] letter that they acknowledged receiving. I'm content, given the fullness of the information I was able to get from the very extensive fact-finding and presentation to the court, that the appellate court would not decide this based on some technical reading about whether or not this communication sent and received between the principals would be considered a nullity."

Plaintiffs timely appealed, and defendant timely cross-appealed.

¶ 47 II. ANALYSIS

¶ 48 On appeal, plaintiffs argue that the trial court erred in concluding that they locked out and constructively evicted defendant.

¶ 49 A. Standard of Review

¶ 50 We initially address the applicable standard of review. After a bench trial, we will not disturb the trial court's judgment unless it is against the manifest weight of the evidence. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 14. We defer to the trial court's credibility determinations because the fact finder is in the best position to evaluate witnesses' conduct and demeanor. *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. A judgment is against

the manifest weight of the evidence only if the opposite conclusion is apparent or the finding is arbitrary, unreasonable, or not based on the evidence. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 14.

¶ 51 Plaintiffs argue that we should review the trial court's ruling *de novo* because the witnesses did not contradict each other on any material facts, and the case involves applying the law to undisputed facts. Plaintiffs further argue that the trial court's conclusion that they locked out and constructively evicted defendant was based solely on Kuempel's October 2 e-mail.

¶ 52 The record contradicts plaintiffs' assertion that the trial court based its decision solely on its legal interpretation of the October 2 e-mail. In discussing count I during the hearing on plaintiffs' motion to reconsider, the trial court referenced "the fullness of the information [it] was able to get from the very extensive fact-finding and presentation to the court," and it specifically stated that it was not applying a "technical reading" of the October 2 e-mail. Accordingly, we review its ruling under the manifest-weight-of-the-evidence standard.

¶ 53 B. Lockout/Constructive Eviction

¶ 54 Plaintiffs argue that they proved every element for a cause of action for unpaid rent. A lease agreement is a contract, so rules of contract interpretation apply. *Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 13. The elements of breach of contract are the existence of a valid and enforceable contract; performance by the plaintiff; breach by the defendant; and damages or injury to the plaintiff. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. Further, landlords have a duty to mitigate damages recoverable against a defaulting lessee. 735 ILCS 5/9-213.1 (West 2008). Plaintiffs argue that they proved these elements, as: defendant admitted the genuineness of the lease giving rise to plaintiff's right to rent; it is uncontradicted that defendant never made a

monthly rent payment after September 2009; plaintiffs proved the amount of damages sustained; and plaintiffs proved its reasonable efforts to mitigate damages.

¶ 55 Plaintiffs argue that all that remains is defendant's affirmative defenses effectively alleging lockout and constructive eviction. The party asserting an affirmative defense bears the burden of proof. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 366 (2008). "Constructive eviction is something of a serious and substantial character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises." *Shaker & Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 134 (2000). Constructive eviction relieves the tenant of the responsibility to pay rent after the tenant vacates the premises. *Id.* A landlord does not need an express intent to deprive the tenant, as a person is presumed to intend the natural and probable consequence of his or her acts. *Id.* Rather, the landlord must have committed acts or omissions causing the premises to be useless to the tenant, or the landlord must have deprived the tenant, in whole or part, of the possession and enjoyment of the premises, making it necessary for the tenant to move. *Home Rentals Corp. v. Curtis*, 236 Ill. App. 3d 994, 998 (1992). A tenant may not abandon the premises under the theory of constructive eviction without first allowing the lessor a reasonable opportunity to correct the property's defects. *Id.* at 998.

¶ 56 Plaintiffs argue that defendant failed to meet the burden of proof on its affirmative defense of lockout and constructive eviction. Plaintiffs maintain that the plain and ordinary meaning of "We will be locking the building down" is that the lockdown is going to occur at an unspecified time in the future, and it is not indicative of present conduct. Plaintiffs argue that the mere threat of a lockout or constructive eviction, with no demonstrable force or other overt act, is insufficient to constitute an unlawful forcible entry.

¶ 57 Plaintiffs further argue that the trial court erred in construing the October 5, 2009, letter as proof of a lockout and constructive eviction. That letter, from defendant's counsel, stated that the October 2 communication "advised [defendant] that it was locking [defendant] out of the Premises." The letter continued, "Due to the Landlord's breach of the Lease and [defendant's] related inability to access the Premises, [defendant] has no alternative than to cease making rent payments under the Lease and consider the Lease terminated and of no further force or effect and tender possession to the Landlord." Plaintiffs argue that the letter was merely an attempt by defendant to take advantage of the situation and unilaterally characterize the October 2 e-mail as a lockout. Plaintiffs contend that no matter how one characterized the October 5 letter, there was still no forcible entry, no constructive eviction, and no lockout. Plaintiffs argue that the evidence was uncontested that they never took any overt action to lock defendant out and that they waited until defendant returned the keys on October 15, 2009, before physically re-entering the building.

¶ 58 Plaintiffs cite *Perry v. Evanston Young Men's Christian Ass'n*, 92 Ill. App. 3d 820 (1981). There, the landlord wrote a letter to lessee Stuart Perry that he would be evicted in three days at a specified hour due to his violation of rules. *Id.* The landlord had previously "plugged" Perry's lock, preventing him from entering, and Perry thought the landlord might do so again. Therefore, Perry vacated the premises by the appointed time. *Id.* A few weeks later, the landlord informed lessee Clifton Amos that he would be evicted the following day due to a noise violation, and that if he did not leave, his door would be plugged. Amos likewise vacated his room. *Id.*

¶ 59 The lessees brought suit against the landlord, arguing that the threats to plug the locks constituted forcible entry. *Id.* at 824. The appellate court held that the landlord's actions did not

constitute a forcible entry because the lessees already vacated the property before the landlord entered. *Id.* at 826.

¶ 60 The appellate court also addressed Amos's implicit argument that the landlord's threat to plug the lock amounted to a constructive eviction. *Id.* The court stated, "A constructive eviction requires conduct or acts on the part of the landlord, not mere words." *Id.* at 827. The court stated that simple notice to the tenant to vacate the premises does not constitute an eviction. *Id.* Instead, if a landlord tells a tenant to leave and the tenant complies, there is no eviction but rather a voluntary surrender. *Id.*

¶ 61 Plaintiffs argue that the requisite demonstrable force or other overt act lacking in *Perry* is similarly lacking here. Plaintiffs argue that the "silly" e-mail was mere words threatening some future conduct, but it did not amount to a lockout, constructive eviction, or forcible entry.

¶ 62 Defendant argues that the evidence showed that plaintiffs locked it out of the premises and voluntarily accepted possession of the premises, effectively terminating the lease and excusing any additional rent payments. Defendant maintains that it was meeting all of its obligations under the lease until Kuempel unilaterally locked it out by sending his October 2 e-mail. Defendant notes that the evidence showed that plaintiffs never responded or objected to defendant's October 5 letter and instead accepted possession of the premises when it was tendered, demonstrating through their actions that plaintiffs viewed the lease as terminated "based on the Parties' agreement."

¶ 63 In response to plaintiffs' argument that, under *Perry*, a constructive eviction requires actions by the landlord and not just words, defendant argues that the statement applies only to an affirmative claim for damages by a tenant under the Illinois Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq.* (West 2010)). Defendant argues that *Perry* actually supports its position because in that case

the lockout notice was enough to terminate the tenant's possession of the property such that no future rent obligations were owed. Defendant further maintains that *Perry* did not involve any physical threats, but here the trial court had the benefit of personally observing the Kuempels' demeanor on the stand and hearing evidence about their inappropriate, violent, and threatening nature. Defendant argues that this context was not necessary to support the trial court's conclusion as a matter of law, but the trial court's assessment of these facts supported its judgment as the circumstances impacting the manner in which defendant viewed the lockout e-mail and the potential consequences of attempting to visit the premises.

¶ 64 We note that while the trial court largely focused on whether defendant was constructively evicted, we review the trial court's judgment rather than its reasoning, and we may affirm the judgment on any basis provided by the record. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62; see also *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998) ("A trial court may be affirmed on any basis that appears in the record without regard to whether the trial court relied upon such ground or whether the trial court's rationale was correct"). Therefore, the ultimate issue before us is whether the trial court's determination that defendant was not obligated to pay rent for the period in question is against the manifest weight of the evidence. We conclude that the ruling was not against the manifest weight of the evidence when the situation is viewed in terms of a voluntary surrender.

¶ 65 As defendant points out, *Perry* discusses the concept of voluntary surrender. The *Perry* court stated that mere notice to the tenant to vacate the premises is insufficient to constitute a constructive eviction. *Perry*, 92 Ill. App. 3d at 827. The court continued, "Where the landlord tells the tenant to leave and the tenant replies that is all right and removes his possessions, there is no eviction but

only a voluntary surrender." *Id.* To constitute a surrender, there must be both an abandonment or relinquishment of possession of the premises by the tenant and acceptance of that by the landlord. 26 Am. Jur. 2d 525 *Proof of Facts* § 1 (1981).

¶ 66 Although Kuempel may not have expressly intended to evict defendant or terminate the lease through his October 2 e-mail, the natural and probable consequence of telling a tenant that it will be locked out due to failure to pay rent is that the tenant will presume that the lockout is imminent. See *Shaker & Associates,* 315 Ill. App. 3d at 134 (a person is presumed to intend the natural and probable consequence of his or her acts). Defendant's counsel sent a letter to plaintiffs days later, on October 5, 2009, characterizing the e-mail "locking the Company out of the Premises." The letter stated that defendant "has no alternative than to cease making rent payments under the lease and consider(s) the lease terminated *** and tender(s) possession to the Landlord." Plaintiffs did not clarify their position, deny defendant's assertions, or otherwise respond to the letter; the trial court specifically mentioned plaintiffs' decision to not respond to the letter in denying their motion to reconsider. Further, when defendant returned the keys to the building a couple of weeks after the letter, plaintiffs accepted the keys and reentered the premises. The evidence also indicated that the parties' relationship was contentious at times, especially from defendant's perspective. A written lease may be surrendered by agreement inferred from the parties' conduct. See *Wabash Realty & Loan Co. v. Krabbe*, 145 Ill. App. 462, 464 (1908). Considering the e-mail in conjunction with the parties' history and what transpired after the e-mail was sent, a determination that defendant voluntarily surrendered the premises as a direct response to Kuempel's threatened lockout, and plaintiffs accepted that surrender, is not against the manifest weight of the evidence. That is, such a finding cannot be labeled as arbitrary, unreasonable, or not based on the evidence. Accordingly, defendant

was excused from subsequent rent obligations. See *id.* (where lease and premises are surrendered to the landlord and the landlord accepts it, the tenant is released from further liability under the lease).

¶ 67 C. Abandonment of Property

¶ 68 Plaintiffs alternatively argue that they had a right to reenter the premises and lock out defendant because defendant had already abandoned the premises and relinquished possession before the e-mail was sent. Plaintiffs cite: the July 2009 notice defendant sent to its employees advising them that it would be closing its facility on about September 30, 2009; defendant's acts of moving its machinery, inventory, equipment in July and August 2009; the fact that the building was empty, with no employees, before October 1, 2009; defendant's failure to pay rent by October 1; and defendant's failure to attempt to sublet the premises. Plaintiffs argue that these factors acted as a waiver by implication of defendant's right of possession of the property. Plaintiffs argue that even though defendant may have paid rent late on some prior occasions, that did not change its contractual obligation to pay rent on or before the last day of the preceding month.

¶ 69 Whether a lessee intended to abandon the premises and whether there has been a surrender and acceptance of a lease is a question of fact to be determined by the trial court. *National Bank of Albany Park in Chicago v. S.N.H., Inc.*, 32 Ill. App. 3d 110, 118 (1975). The trial court's lack of finding that defendant had abandoned the premises and relinquished possession as of October 2, 2009 (*before* the e-mail was sent), was not against the manifest weight of the evidence. Defendant continued to pay rent even after it issued the July 2009 notice to its employees and even after it moved its belongings in July and August 2009. Gatlin testified that he had discussions with Kuempel about the notice defendant had sent to its employees and the options defendant was

considering for the building, such as using the space for other purposes or subletting. The provisions of the lease contemplated a default by the tenant only if the tenant failed to pay rent within five days after written notice of default. Finally, defendant retained possession of the keys until mid-October, when it returned them to Kuempel. Therefore, plaintiffs' argument that defendant waived possession of the premises by the end of the day on October 1 is without merit.

¶ 70 D. Bystander's Report

¶ 71 Defendant alternately argues that the trial court erred in granting plaintiffs' motion to approve a bystander's report of proceedings that provided inaccurate versions of several areas of testimony, including the deletion of Kuempel's testimony that he intended to lock defendant out of the premises. As we have affirmed the trial court's decision in defendant's favor based on the certified bystander's report, we need not address the argument that the report was deficient.

¶ 72 E. Attorney Fees

¶ 73 In its cross-appeal, defendant argues that the trial court erred in denying it attorney fees and costs under the lease's prevailing party provision. That paragraph states: "The party which does not prevail will pay and discharge all reasonable costs, attorney's fees and expenses, that shall be made and incurred by the prevailing party in enforcing the covenants and agreements of this Lease."

¶ 74 In general, the losing party in a lawsuit is not required to pay attorney fees to the winning party. *Chapman v. Engel*, 372 Ill. App. 3d 84, 87 (2007). However, courts will enforce contractual "fee-shifting" provisions that provide for the award of attorney fees. *Id.* We use an abuse of discretion standing in determining whether a party was a prevailing party under a contractual fee-shifting provision. See *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 29.

¶ 75 Defendant argues that the trial court abused its discretion in not applying the lease's prevailing party provision, because it was the prevailing party on the only significant issue in the case, namely whether it breached the lease. Defendant maintains that while it also asserted counterclaims and sought damages for plaintiffs' alleged breaches, the "issues were at most secondary and were being asserted primarily as alternative bases for arguing that [defendant] did not owe rent to Plaintiffs."

¶ 76 A party can be considered a "prevailing party" for the purposes of a fee-shifting provision when it succeeds on any significant issue in the action and obtains some benefit in bringing suit, when it receives a judgment in its favor, or when it achieves an affirmative recovery. *Id.*, ¶ 29. However, where the case involves multiple claims and the parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party. *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 227-28 (2007). That is the situation here. While defendant prevailed on plaintiffs' claims, the trial court entered an agreed order granting plaintiffs possession under count II. Moreover, the trial court found in favor of plaintiffs on all four of defendant's counterclaims. Defendant attempts to characterize its counterclaims as simply alternative bases for arguing that it did not owe rent, but at least three of the counterclaims were completely independent of the subject of rent and eviction. Again, defendant's second counterclaim alleged that Kuempel fraudulently caused the assets of Authorized, a company against which defendant had a judgment, to be transferred to ATR; the third counterclaim alleged that Kuempel induced breaches of the contracts between defendant and its customers and suppliers; and the fourth counterclaim alleged interference with prospective business relationships. The trial court found that defendant failed to meet its burden of proof on all of its counterclaims. Accordingly, the trial court acted within its

discretion in determining that neither party was the prevailing party and denying defendant attorney fees under the lease.

¶ 77 Defendant also very briefly argues that it is entitled to reimbursement of its court costs and expenses under section 5-109 of the Code of Civil Procedure (735 ILCS 5/5-109 (West 2010)) because the trial court entered two dismissals for want of prosecution against plaintiff. A trial court's ruling on a motion for costs is reviewed for an abuse of discretion. See *Riley Acquisitions, Inc. v. Drexler*, 408 Ill. App. 3d 397, 409 (2011). Both dismissals here were entered after plaintiffs allegedly inadvertently failed to appear for status hearings, and the dismissals were vacated soon after. Accordingly, we conclude that the trial court did not abuse its discretion in declining to award defendant costs.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 80 Affirmed.