

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).

2013 IL App (4th) 120553-U
NO. 4-12-0553
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
April 18, 2013
Carla Bender
4th District Appellate
Court, IL

LARRY BIELFELDT, d/b/a BIELFELDT)	Appeal from
ENTERPRISES,)	Circuit Court of
Plaintiff-Appellee and)	Champaign County
Cross-Appellant,)	No. 10L53
v.)	
BRIDLE BROOK ADULT COMMUNITIES, LLC, an)	
Illinois Limited Liability Company, d/b/a)	
BRIDLE BROOK ADULT COMMUNITIES,)	
Defendant-Appellant and)	
Cross-Appellee,)	
and)	Honorable
JOYCE LINDLEY,)	Jeffrey B. Ford,
Defendant.)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court correctly granted summary judgment for plaintiff because no genuine issue of fact existed as to whether defendant owed rent to plaintiff and failed to pay. While defendant asserted several affirmative defenses, including the need for plaintiff to mitigate his damages, no evidence was presented to the court in opposition to plaintiff's motion for summary judgment.

Plaintiff's motion for attorney fees was properly denied as the affidavit provided to the trial court was not specific nor did it differentiate between work done on the count of plaintiff's complaint for which summary judgment was granted and the count on which summary judgment was not granted.

¶ 2 In February 2012, the trial court granted plaintiff Larry Bielfeldt's motion for summary judgment against defendant, Bridle Brook Adult Communities, LLC (Bridle Brook),

for damages for breach of a real estate lease. The same day, the court denied plaintiff's motion for summary judgment against defendant, Joyce Lindley, one of the officers of Bridle Brook, for breach of a contract to personally pay the debt on the same real estate lease.

¶ 3 In March 2012, the trial court denied plaintiff's motion to award attorney fees and expenses as well as Bridle Brook's motion to reconsider granting the summary judgment order. In April 2012, the court denied a motion to reconsider the motion for attorney fees. In May 2012, the court found defendant's request for an Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding should be made and in June 2012 entered a written order finding no just reason to delay enforcement or appeal of the rulings of the court.

¶ 4 I. BACKGROUND

¶ 5 In 2006, plaintiff, Lindley and Carrie Boone, formed Bridle Brook Adult Communities, LLC. Each was an equal member of Bridle Book and owned a one-third share. Plaintiff is a real estate developer. Boone is a residential and commercial real estate agent with experience in the construction industry. Lindley was involved because of her expertise in retirement and assisted living communities.

¶ 6 On or about July 5, 2006, plaintiff, as lessor, and Bridle Brook, as lessee, entered into a lease agreement for offices owned by plaintiff. The agreement was signed by Lindley and Boone on behalf of Bridle Brook. The lease was for a term of five years, commencing September 1, 2006 and terminating on August 30, 2011. Rent to be paid was \$99,960 at a rate of \$1,666 per month. Bridle Brook began to occupy the premises around September 1, 2006.

¶ 7 On or about March 12, 2007, a member vote resulted in Bridle Brook moving its office to another location. Both plaintiff and Boone formed the two-thirds vote over Lindley.

Plaintiff and Boone wanted to move for business reasons as a way to generate more money for Bridle Brook. Bridle Brook moved out of the premises leased from plaintiff around the end of March 2007. No member of Bridle Brook ever attempted to terminate the lease with plaintiff. Plaintiff did not make any statement representing the lease was terminated. Since the move, Bridle Brook has not paid any rent to plaintiff despite the terms of the lease agreement.

¶ 8 No other tenant occupied the space vacated by Bridle Brook until March 2010 despite plaintiff entering into a lease agreement with Justin Peoples, d/b/a People Wireless Express (Peoples). Peoples never took possession of the property and never paid any rent. Peoples later filed for bankruptcy. Other possible tenants were pursued but the property was not rented until rented by Smith Law Office on March 8, 2010. At no time between March 2007, when Bridle Brook moved out, and March 2010, when Smith Law Offices moved in, did Bridle Brook pay any rent to plaintiff.

¶ 9 By January 2008, Bridle Brook had bought out plaintiff's interest in the company and plaintiff was no longer involved in the development project. On or about January 11, 2008, plaintiff and Lindley entered into a written agreement whereby plaintiff promised to pay a finder's fee of \$15,138 for the sale of real estate in exchange for Lindley promising to pay \$18,121.06 for Bridle Brook's debt to plaintiff no later than March 1, 2008. A disputed portion of the agreement adds a handwritten "agreement" for Lindley to also pay the remaining rent for the lease term under the lease agreement.

¶ 10 On September 22, 2008, plaintiff filed a two-count complaint. Count I was against Bridle Brook for rent due under the lease agreement. Count II was against Lindley under the written agreement between plaintiff and Lindley. The complaint alleged plaintiff paid her the

specified finder's fee but Lindley had not paid plaintiff any of the amount owed him under the agreement.

¶ 11 On March 16, 2010, an amended complaint was filed alleging the same two counts except the amounts requested were increased to reflect unpaid rent up until the subject property was rented by Smith Law Offices. Under count I, plaintiff requested \$59,822.75 in unpaid rent and additional sums for unpaid utility bills. Under count II, plaintiff requested the same amount in damages. On October 10, 2010, Bridle Brook filed its answer to the amended complaint and included affirmative defenses described as "unclean hands," misconduct, and bad faith due to his voting as a member of Bridle Brook to move the offices and now suing to enforce the lease after the company moved. On October 27, 2010, Lindley, by separate counsel, also filed an answer to the amended complaint and asserted the same affirmative defenses as Bridle Brook.

¶ 12 Discovery depositions were taken of plaintiff, Lindley, and Boone. On November 1, 2011, Lindley filed a motion for summary judgment as to count II of the amended complaint. On November 9, 2011, Lindley filed a motion to add the additional affirmative defense of failure on the part of plaintiff to mitigate damages.

¶ 13 On November 29, 2011, plaintiff filed his motion for summary judgment as to both counts I and II of the amended complaint. In addition to a memorandum of law in support of his motion, plaintiff also filed copies of the discovery depositions of plaintiff, Lindley, and Boone.

¶ 14 On December 16, 2011, Bridle Brook filed its response to plaintiff's motion for summary judgment as to count I, admitting or denying each paragraph of plaintiff's motion.

Bridle Brook also asserted the existence of affirmative defenses in its defensive pleadings as raising factual issues which needed to be decided by a trier of fact. On January 6, 2012, Lindley filed a memorandum in opposition to plaintiff's motion for summary judgment as to count II and reasserted her claim of plaintiff's failure to mitigate damages. She also filed a second motion for summary judgment in her own behalf as to count II. She included relevant excerpts from discovery depositions.

¶ 15 On February 7, 2012, a hearing was held on the pending motions for summary judgment. The trial court considered the documentation provided and arguments of counsel. Plaintiff's motion for summary judgment as to count I was granted. Both motions for summary judgment as to count II were denied. No written order was required and no transcript of the proceedings is included in the trial record.

¶ 16 On February 13, 2012, plaintiff filed a motion for attorney fees, which the trial court denied on February 24. The court found the exhibit attached to the motion listing fees charged included time spent by counsel on count II on which summary judgment was denied. Further, there was no showing the amounts billed were reasonable especially with regard to work listed as performed by "Legal Assistants."

¶ 17 On March 1, 2012, Bridle Brook filed a motion to reconsider the grant of the summary judgment order. Bridle Brook argued plaintiff failed to take reasonable measures to mitigate damages and the question of what is reasonable is for the jury. Bridle Brook cited to portions of deposition testimony in support of its position.

¶ 18 On March 5, 2012, the trial court denied Bridle Brooks' motion to reconsider. The court entered a written order and found Bridle Brooks' original response to plaintiff's motion for

summary judgment did not provide any affidavits or transcripts of depositions. Nor did Bridle Brook refer to any facts outside the pleadings or motion for summary judgment. Further, Bridle Brook did not argue failure to mitigate damages. The court noted the purpose of a motion to reconsider was to bring the court's attention to evidence not available at the time of the original hearing, changes in the law, or errors in the court's previous application of existing law. Bridle Brook did not allege any newly discovered evidence but simply highlighted evidence not mentioned before. It did not allege any changes in the law. Instead, Bridle Brook went back to facts known prior to the February 7, 2012, hearing on the motion for summary judgment and argued under these facts and law, now provided, the court must reconsider its ruling. The court stated it would not do so.

¶ 19 On March 21, 2012, plaintiff filed a motion to reconsider the trial court's ruling denying attorney fees and a motion for a finding no just reason exists to delay enforcement or appeal of the grant of summary judgment on count I of the complaint. On April 2, 2012, the motion to reconsider was denied. On May 22, 2012, the trial court made a Rule 304(a) finding of no just reason to delay enforcement or appeal as to its ruling on count I.

¶ 20 This timely appeal and cross-appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Bridle Brook's Appeal: Grant of Summary Judgment as to Count I

¶ 23 Plaintiff filed a motion for summary judgment based on the facts: (1) a valid written lease between himself, as landlord, and Bridle Brook, as lessee, and (2) Bridle Brook stopped paying rent under the lease while the lease term was still in force. Bridle Brook occupied the premises and never made any attempts to terminate the lease. Plaintiff never

represented to Bridle Brook the lease was terminated. On appeal, Bridle Brook argues summary judgment was inappropriate in this context as genuine issues of material fact remained in regard to the affirmative defenses it pleaded and plaintiff failed to show he mitigated his damages.

¶ 24 The standard of review for an order granting summary judgment is *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149, 153 (2007).

¶ 25 A landlord has a duty to take reasonable measures to mitigate damages recoverable against a defaulting lessee under section 9-213.1 of the Code of Civil Procedure. 735 ILCS 5/9-213.1 (West 2010). Bridle Brook did not argue or present any evidence of a failure to mitigate damages in response to plaintiff's motion for summary judgment. Evidence from the various discovery depositions filed with plaintiff's motion for summary judgment indicated both members of Bridle Brook and plaintiff advertised for tenants for the disputed property. Plaintiff responded to all inquiries regarding renting the property and looked into renting to a tattoo parlor, a restaurant, a flower shop, a chiropractor, a coffee shop, and a pharmacy. He attempted to enter into a lease with Peoples.

¶ 26 Bridle Brook submitted no facts showing plaintiff did not attempt to mitigate damages. Because defendant Lindley alleged failure to mitigate damages, plaintiff included evidence of his efforts at mitigation. The mere statement by Bridle Brook, and particularly the fact it was made after the summary judgment motion was granted, that an affirmative defense of

failure to mitigate damages existed does not substitute for factual evidence tending to prove the defense.

¶ 27 Bridle Brook also argues the evidence shows (1) plaintiff engaged in business activities with regard to Bridle Brook's lease constituting "unclean hands," misconduct, and bad faith; (2) plaintiff is seeking to enforce a contract he voted to terminate and should be precluded from seeking compensation for his own actions; (3) plaintiff rescinded the lease by his actions as a voting member of Bridle Brook and he cannot profit by his own dealings; (4) Bridle Brook's lease was rescinded when plaintiff entered into a lease for the same premises with Peoples; and (5) plaintiff committed fraud by his vote to move the offices of Bridle Brook.

¶ 28 The doctrine of "unclean hands" prohibits "one seeking equity [from] tak[ing] advantage of his own wrong." (Internal quotation marks omitted.) *Brown v. Ryan*, 338 Ill. App. 3d 864, 875, 788 N.E.2d 1183, 1192 (2003). To prove unclean hands, the burden of proof is on the party making the contention and proving the contention requires evidence of fraud, bad faith, or lack of fair dealing. *Id.*

¶ 29 Bridle Brook asserts plaintiff's decision to vote as a member of Bridle Brook to move out of the leased offices was sneaky, deceitful, or otherwise fraudulent. However, Bridle Brook presents no facts showing plaintiff took any action to misrepresent or hide what he was doing. His vote was within his member powers. He had a valid business reason for agreeing with Boone the move should be made. He did not try to delude the other members to believe Bridle Brook would not remain liable for future rent. The other members, Boone and Lindley, were aware of his actions as they occurred. They could have outvoted him on the issue of moving.

¶ 30 Bridle Brook also asserts that plaintiff, by voting as a member of Bridle Brook to move out of the premises leased from himself, is precluded from asserting his rights as a landlord under the lease. Under section 15-3(e) of the Limited Liability Company Act, a member of a member-managed LLC, like Bridle Brook, whose conduct furthers his own interest does not violate the duties of loyalty or care to the LLC. 805 ILCS 180/15-3(e) (West 2010). The fact plaintiff voted for Bridle Brook to move out of the building it rented from him does not violate any duty of loyalty or care just because, as landlord, plaintiff continues to claim future rent due as it accrued.

¶ 31 Nor did signing a lease with Peoples rescind the lease with Bridle Brook as the landlord has a duty to mitigate damages and that is what plaintiff was trying to do by leasing the property to Peoples. Peoples was bankrupt and not a suitable lessee and plaintiff's duty as a landlord extended only to accepting suitable subtenants when offered. See *Reget v. Dempsey-Tegeler & Co. Inc.*, 96 Ill. App. 2d 278, 281, 238 N.E.2d 418, 419 (1968).

¶ 32 In summary, Bridle Brook attempted to rely on its pleadings of possible affirmative defenses to attempt to create an issue of material fact which would prevent the granting of summary judgment. It supplied no affidavits, depositions, exhibits or other form of evidence to show a factual dispute. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opposing party cannot rest on its pleadings to create a genuine issue of material fact." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257, 811 N.E.2d 670, 674 (2004). Defendant can not merely rely on pleading an affirmative defense; he must show some facts which create a genuine issue of material fact. We affirm the trial court's order granting plaintiff's motion for summary judgment as to count I.

¶ 33

B. Plaintiff's Cross-Appeal: Attorney Fees

¶ 34

The lease agreement between plaintiff and Bridle Brook provided in paragraph 13E: "Lessee agrees to pay all costs of collection including but not limited to court costs and reasonable attorney's fees incurred by Lessor." Plaintiff filed a motion to enter an order and award attorney fees and attached an affidavit detailing his attorney's experience and claiming his hourly rates were reasonable and customary for Champaign County attorneys to charge. He then attached a second exhibit listing legal services provided while working on this case. Bridle Brook raised no objection as to reasonableness of the fees.

¶ 35

The amount of fees to be awarded is a factual question the trial court usually leaves to further evidentiary presentation and argument after finding liability on summary judgment. See *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill. App. 3d 743, 758, 681 N.E.2d 552, 562 (1997). The court should consider time and labor required, novelty and difficulty of the issues, the skill required, the preclusion of other employment necessary to accept the case, the customary fee charged in the community, the amount of money involved in the case, the results obtained, and the attorney's reputation, experience, and ability. See *McHugh v. Olsen*, 189 Ill. App. 3d 508, 514, 545 N.E.2d 379, 382 (1989). The court has broad discretionary powers in awarding attorney fees sought and its decision will not be reversed unless the court has abused its discretion. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984, 518 N.E.2d 424, 428 (1987).

¶ 36

No hearing was requested of the trial court on the issue of attorney fees. The court found, without a hearing, it could not differentiate between work done by plaintiff's attorney on count I, where summary judgment was granted, and count II, where summary

judgment was denied. No attorney fees could be granted for work done on count II before it was determined plaintiff had prevailed on that count. Further, the court stated it could not value work done by legal assistants and marked as such on the exhibit provided by plaintiff's attorney.

Plaintiff cross-appeals this judgment. We find no abuse of discretion in the court's decision to deny an award of attorney fees under these circumstances.

¶ 37

III. CONCLUSION

¶ 38 We affirm the trial court's judgments granting summary judgment to plaintiff on count I of his complaint but denying plaintiff's motion for an award of attorney fees.

¶ 39

Affirmed.