2014 IL App (1st) 131267-U

FIFTH DIVISION
March 14, 2014

1-13-1267

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MLCFC 2006-4 GOLF OFFICE, LLC, an Illinois limited liability company, Plaintiff-Appellee, v. YPI 1600 CORPORATE CENTER, LLC, a foreign limited liability company, Defendant-Appellant, and UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants.	)	Appeal from the Circuit Court of Cook County 12 CH 26044 Honorable Michael F. Otto, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justices Stuart Palmer and Bill Taylor concurred in the judgment.

ORDER

Held: In commercial mortgage foreclosure, where lender showed right to prejudgment possession of office building and borrower did not show good cause for denying lender's request, trial court's appointment of receiver to manage property for lender was affirmed. Where record on appeal was insufficient to review contention of an affiliated company that it was entitled to a substitution of judge, the order denying substitution was affirmed.

¶ 1 This is an interlocutory appeal from a mortgage foreclosure action involving commercial

property commonly known as 1600 West Golf Road, Rolling Meadows, Illinois, 60008. The alleged outstanding debt exceeds $16 million. The borrower appeals from the trial court's order appointing a receiver to collect the rent and manage the property. A company affiliated with the borrower appeals from the denial of its motion for substitution of judge as a matter of right. The borrower (1) contends there was insufficient evidence that the plaintiff is the lender's assignee and thus has a superior claim to possession of the property and (2) contends the borrower was taking good care of the property and demonstrated good cause for denying the receivership . The affiliated company contends it had an absolute right to one substitution of judge.

¶ 2 The verified complaint and attached exhibits indicate the following. In September 2006, the original lender, Countrywide Commercial Real Estate Finance, Inc., made a five-year loan of $132.4 million to YPI 1600 Corporate Center and four of its affiliates: YPI 6688 NCX, LLC; YPI Energy Square, LLC; YPI Kensington Corporate Center, LLC; and YPI Bannockburn, LLC. The five "YPI" entities, and a sixth one, YPI 200 N. La Salle LLC, are Delaware limited liability companies indirectly owned primarily by husband and wife Zaya S. Younan and Sherry S. Younan. The exhibits attached to the verified pleading include promissory notes, mortgage contracts, and assignments of various interests to the original lender such as leases that encumber the subject real estate in Rolling Meadows and other Illinois real estate owned by the affiliates. The aggregate loan amount was increased to $224 million in November 2006, when the original lender, the five original borrowers and a sixth borrower, YPI 200 N. La Salle, LLC, entered into an amended and restated loan agreement, as well as new assignments of underlying leases and other interests. All of the mortgages and assignments to the original lender were contemporaneously recorded with the Cook County Recorder of Deeds. The only mortgage debt at issue here is the

one undertaken by YPI 1600 Corporate Center. The mortgage debt of YPI Kensington Corporate Center, LLC is the subject of a separate foreclosure action, MLCFC 2006-4 Feehanville Office LLC v. YIT Kensington Corporate Center, 12-CH-26043. The mortgage debts of three YPI entities—YPI 6688 NCX, LLC, YPI Energy Square, LLC, and YPI 200 N. La Salle, LLC—were released when their properties were sold in 2011 and 2012 . The status of the mortgage debt incurred by YPI Bannockburn, LLC is not disclosed by the record on appeal.

¶ 3 The verified complaint and attached exhibits further indicate that in 2006, the original lender assigned its right, title, and interest in the loans to La Salle National Bank Association, as trustee for the registered holders of ML-CFC Commercial Mortgage Trust 2006-4, Commercial Mortgage Pass-Through Certificates, Series 2006-4. More specifically, an endorsement attached to the promissory note states it is to be paid to La Salle National Bank Association, in its capacity as trustee. This first assignee subsequently assigned its right, title, and interest to U.S. Bank National Association, in its capacity as trustee for the registered holders of ML-CFC Commercial Mortgage Trust 2006-4, Commercial Mortgage Pass-Through Certificates, Series 2006-4. The second assignment document is entitled "Omnibus Assignment" and states that the first assignee "hereby sells, transfers, assigns, delivers, sets-over and conveys *** all right, title and interest of Assignor in and to the loan *** together with any other documents or instruments executed and/or delivered in connection with or otherwise related to the Loan." In turn, this second assignee assigned its right, title and interest to the current plaintiff, MLCFC 2006-4 Golf Office, LLC (hereinafter Golf Office). The record includes a document entitled "Assignment" that states the second assignee "does hereby grant, bargain, sell, assign, deliver, convey, transfer and set over *** all of the Assignor's right, title and interest in and to the mortgage described below, *** and all

other loan documents executed in connection therewith, as each such document may have been amended, assumed, consolidated, modified and/or assigned."

¶ 4 According to the pleading, the loan was not repaid in full by the maturity date of October 8, 2011, and on July 11, 2012, plaintiff Golf Office filed suit in the circuit court of Cook County against YPI 1600 Corporate Center. The plaintiff-appellee sought unpaid principal of $15.1 million and interest which was accruing daily on the defaulted loan and then exceeded a half-million dollars. The attached mortgage contract indicated that in event of default, the defendant-appellant waived any statutory right to redeem the property. The remedies section of the mortgage contract further provided:

> "[6.2](b) If an Event of Default shall have occurred, Mortgagee, to the maximum extent permitted by law, shall be entitled, as a matter of right, to the appointment of a receiver of the Property, without notice or demand, and without regard to the adequacy of the security for such appointment and waives notice of any application therefor."

The plaintiff quoted this contract language in the verified pleading and identified a specific individual to be court-appointed as receiver of the subject property.

¶ 5 It was shortly after the complaint was filed on July 11, 2012, and served on July 16, 2012, that the defendant entered an appearance on July 19, 2012. The case itself, however, did not proceed quickly, due to numerous motions and rescheduled deadlines. For instance, the summons specified that the defendant's answer or other pleading was due within 30 days of service, however, for no apparent reason, the defendant missed this deadline. When the plaintiff presented its motion on September 5, 2012, for appointment of a receiver, the trial judge granted

the defendant's request for 21 days to file a written response brief on or before September 26, 2012, and scheduled a hearing date of October 19, 2012. The judge also ordered the defendant to answer or otherwise plead by September 19, 2012, to the complaint for foreclosure. Instead of filing responses to the complaint and the motion for a receiver, on September 28, 2012, the defendant filed a motion for substitution of judge as of right (hereinafter SOJ), pursuant to section 2-1001(a)(2) of the Code of Civil Procedure. 735 ILCS 5/2-1001(a)(2) (West 2010).

¶ 6 When the motion to appoint a receiver was called for hearing on October 19, 2012, the defendant's SOJ motion was granted, the case was assigned to a different judge, and the plaintiff obtained the first available court date to present its motion to the new judge, which was January 22, 2013. Then, on January 22, 2013, the defendant asked for more time to respond to the motion to appoint a receiver and the second trial judge granted the request, giving the defendant a deadline of January 28, 2013, and scheduling the motion for hearing on February 1, 2013.

¶ 7 However, on January 25, 2013, an affiliate of the defendant filed an appearance through the same attorney who was representing the defendant and filed a motion for SOJ as a matter of right pursuant to section 2-1001(a)(2) of the Code. 735 ILCS 5/2-1001(a)(2) (West 2012). This affiliated company, Younan Properties, Inc. was not a borrower and had not been sued, but its name appeared on the "Organizational Chart of Borrower" that was attached to the 2006 loan documents. Instead of filing a motion to intervene, Younan Properites, Inc. simply stated in the appearance that it was an "unknown owner" of the Rolling Meadows property and in an amended version of its motion for SOJ indicated its status as an "unknown owner" was due to its lease with the defendant. The purported lease, however, was not attached to the motion, nor was it ever filed with the court. Nonetheless, the second trial judge granted the SOJ motion and the case was again

reassigned. It does not appear that the defendant complied with the second trial judge's deadline of January 28, 2013, to file a response memo to the motion to appoint a receiver.

¶ 8 Before the third trial judge, the plaintiff again obtained the first available court date to present its motion to appoint a receiver and the matter was noticed for hearing on April 16, 2013.

¶ 9 One day before the hearing date, another affiliate of the defendant filed an appearance through the same attorney who was representing the defendant and Younan Properties, Inc., and filed a motion for SOJ as a matter of right pursuant to section 2-1001(a)(2) of the Code. 735 ILCS 5/2-1001(a)(2) (West 2012). This new entity, Younan Investment Properties, L.P., indicated it was an "unknown owner" of the property pursuant to a lease with the defendant. Once again, however, defense counsel did not attach the purported lease to the SOJ motion or otherwise file it in the circuit court. This third motion for SOJ is the one at issue on appeal and additional facts regarding it will be set out as relevant below. The trial judge denied the third motion for SOJ, concluding that the only entity with an interest in the lawsuit was the named defendant and that this entity had already requested and been granted an SOJ.

¶ 10 Next, the judge granted the plaintiff's motion to strike the defendant's amended affirmative defenses, because, for the second time, they were not verified as required by statute, and gave the defendant leave to refile within seven days. When the judge indicated the next item was the motion to appoint a receiver, the defendant's attorney stated that the matter was not actually scheduled to be heard and should be continued to a later date. The plaintiff's attorney countered that he had given notice of the hearing date, that the motion had been put off for eight or nine months, and that the matter was fully briefed. The defendant's attorney then asked for additional time to file evidentiary materials in support of his contention that there was good cause to deny a

receivership. The judge was familiar with the parties' written briefs and asked defense counsel to explain the need for an evidentiary hearing, but he was not persuaded by the attorney's reasoning and denied the request for an evidentiary hearing. The judge went on to grant the motion to appoint a receiver, finding that the plaintiff had shown a reasonable probability of success on the merits of its complaint for foreclosure and that the defendant did not show good cause to deny the appointment. This interlocutory appeal followed.

¶ 11 The defendant-appellant contends the motion to appoint a receiver should have been denied because the plaintiff failed to show it had been assigned the mortgage and was authorized to take possession of the Rolling Meadows commercial property. The plaintiff responds that the defendant has not disputed the essential facts and law indicating the receivership was appropriate and has failed to cite any case law or legal principle indicating the plaintiff should have produced additional evidence of the assignment.

¶ 12 The Illinois Mortgage Foreclosure Law (hereinafter Foreclosure Law) has mandatory language that drastically curtails a trial court's discretion in deciding motions to appoint a receiver in nonresidential mortgage foreclosure actions. *Bank of America, N.A. v. 108 N. State Retail,* LLC, 401 Ill. App. 3d 158, 164, 928 N.E.2d 42, 48-49 (2010) (hereinafter *108 N. State Retail*). Section 15–1702(a) of the Foreclosure Law provides that "[w]henever a mortgagee entitled to possession so requests, the court *shall* appoint a receiver" (emphasis added) (735 ILCS 5/15–1702(a) (West 2006)) and according to section 15–1105 of the Foreclosure Law, " 'shall' " means "mandatory and is not permissive" (735 ILCS 5/15–1105(b) (West 2006)). Section 15-1701(b)(2) of the Foreclosure Law provides that in nonresidential mortgage foreclosure actions, the mortgagee (lender) is entitled to be placed in possession of the property prior to the

entry of a judgment of foreclosure upon request, provided that the mortgagee shows (1) that the mortgage or other written instrument authorizes such possession and (2) that there is a reasonable probability that the mortgagee will prevail on a final hearing of the cause. *108 N. State Retail*, 401 Ill. App. 3d at 164, 928 N.E.2d at 49. "[A] proven default establishes a reasonable probability of success in a mortgage foreclosure action." *Centerpoint Properties Trust v. Olde Prairie Block Owner, LLC*, 398 Ill. App. 3d 388, 392, 923 N.E.2d 878, 883 (2010). Thus, the Foreclosure Law creates a presumption in favor of the mortgagee's right to possess nonresidential property during a mortgage foreclosure proceeding and generally a mortgagor can retain possession only if it can show "good cause" for being permitted to do so. *108 N. State Retail*, 401 Ill. App. 3d at 164, 928 N.E.2d at 49. See also *Mellon Bank, N.A. v. Midwest Bank & Trust Co*., 265 Ill App. 3d 859, 866, 638 N.E.2d 640, 645 (1993) (indicating section 1701 created a "statutory presumptive right to possession in favor of the mortgagee in nonresidential real estate foreclosure actions"); *Travelers Insurance Co. v. La Salle National Bank*, 200 Ill. App. 3d 139, 143, 558 N.E.2d 579, 581-82 (1990) (stating that in nonresidential mortgage foreclosure cases, the defendant bears the burden of showing they are entitled to retain possession of the mortgaged premises).

¶ 13 Given that the trial judge's exercise of discretion was curtailed by the Foreclosure Law and there was no evidentiary hearing, we will review these proceedings under the *de novo* standard. *108 N. State Retail*, 401 Ill. App. 3d at 164, 928 N.E.2d at 49.

¶ 14 Our non-deferential review of the record leads us to conclude that the plaintiff satisfied the two requirements entitling it to possession/receivership during the pendency of its foreclosure allegations. First, it was agreed in section 6.2(b) of the amended and restated mortgage contract that:

> "If an Event of Default shall have occurred, Mortgagee, to the maximum extent permitted by law, shall be entitled, as a matter of right, to the appointment of a receiver of the Property, without notice or demand, and without regard to the adequacy of the security for the Loan Obligations or the solvency of the Mortgagor. Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor."

Further, in paragraph 8.1(b) it was agreed that failure to pay all principal, interest or other amounts due on or before the "Maturity Date" of the loan would constitute an "Event of Default." The defendant has not disputed that the contract plainly provides for the pre-judgment appointment of a receiver.

¶ 15 Second, there is a reasonable probability that the plaintiff will prevail at a final hearing on the merits of its foreclosure action. We reach this conclusion partly because attached to the verified complaint is the affidavit of Bjorn Borgenhard, asset manager of LNR Partners, LLC, a Florida limited liability company, which is a member of LNR Illinois Partners, LLC, which in turn is the manager for the plaintiff company. Borgenhard's sworn statement indicates that in disregard of its contractual obligation, the defendant "failed to make payment of the entire amount due" by the maturity date of the loan in 2011. We also note that the defendant is not disputing that the maturity default occurred.

¶ 16 Instead, the defendant incorrectly claims that the plaintiff failed to prove that it was an assignee of the original lender's rights. The defendant acknowledges that the exhibits to the verified complaint include three assignment documents that begin with the original lender and conclude with the assignment to the plaintiff. The defendant does not identify any discrepancies

in these assignments or relate any facts that cast doubt on their effectiveness. Instead, the defendant emphasizes that the first two assignments were to trusts and contends that the plaintiff should have tendered the trust agreements in order to prove that the trusts had authority to assign their rights in the mortgage and ultimately convey the rights to the plaintiff. According to the defendant, the original lender "may have been" authorized by the mortgage contract to take pre-judgment possession of the real estate, but this plaintiff failed to prove that it was the recipient of the original lender's rights.

¶ 17 It is an unprecedented contention that a litigant asserting rights as an assignee must tender not only the assignment contract or contracts that the litigant is relying upon, but also underlying contracts between predecessor non-parties which indicate those non-parties had the power to enter into binding agreements and thus effectively contract with each other and ultimately contract with the litigant. The appellant, however, has not stated any facts which call into question the trusts' power to enter into contracts; nor has this appellant cited and discussed authority such as the rules of civil procedure, general legal principles, or specific case law that indicates the trusts' capacity to contract was impaired and that the plaintiff needed to prove that these non-parties were capable of doing what they apparently did. We find that the contention is not adequately supported and has been waived.

¶ 18 The defendant next contends that even if the plaintiff established factual and statutory grounds for appointing a receiver, the defendant countered with "good cause" for not appointing a receiver, when it showed that there was "lockbox agreement" for tenants of the property to pay their rent "and income of the Property" directly into an account controlled by the plaintiff. Essentially, the defendant is arguing that the plaintiff's interests in the mortgaged property were

adequately protected by the lockbox arrangement and there was no need for a receiver. The defendant's only citation or discussion of authority is to *First Federal Savings & Loan Ass'n of Chicago v. National Boulevard Bank of Chicago*, 104 Ill. App. 3d 1061, 1063, 433 N.E.2d 1036, 1038 (1982), for the general proposition, "The principal purpose of appointing a receiver is to protect and preserve the property for the benefit of all and to secure the property so that it may be subjected to such order or decree as the court may make."

¶ 19 The plaintiff points out, however that a lockbox arrangement or the adequacy of the protection of the lender's interests is not a relevant consideration in a nonresidential foreclosure case. In *Travelers Insurance*, for instance, the defendants executed a $15.5 million promissory note and mortgaged a Chicago office building at 300 North Michigan Avenue that generated $150,000 monthly rental income. *Travelers Insurance*, 200 Ill. App. 3d at 141, 558 N.E.2d at 580. After the defendants defaulted on the note and the plaintiff filed a foreclosure action, the defendants agreed to deposit all the rent receipts into a joint account with the plaintiff and submit monthly reports of the office building's operating proceeds and expenses. *Travelers Insurance*, 200 Ill. App. 3d at 141, 558 N.E.2d at 580. The trial court approved of this arrangement and entered an agreed order that incorporated the parties' terms. *Travelers Insurance*, 200 Ill. App. 3d at 141, 558 N.E.2d at 580. Even so, the plaintiff next moved to be placed in possession of the building pursuant to section 15-1701 of the Foreclosure Act, citing the fact that the terms of the mortgage contract authorized the plaintiff to be placed in possession and the fact that the plaintiff would probably prevail on its foreclosure complaint. *Travelers Insurance*, 200 Ill. App. 3d at 141, 558 N.E.2d at 580. The defendants responded in part that the parties' agreement was adequate protection of the plaintiff's interests, but the trial court granted the plaintiff's request for

possession. *Travelers Insurance*, 200 Ill. App. 3d at 141, 558 N.E.2d at 580. On appeal, the defendants insisted they had demonstrated good cause for retaining possession of the property, because plaintiff had not alleged any fraud, mismanagement or dissipation of the mortgaged property. *Travelers Insurance*, 200 Ill. App. 3d at 144, 558 N.E.2d at 582. The appellate court rejected this argument, finding that it was nothing more than an attempt to shift the burden of making a good cause showing onto the plaintiff, which as a nonresidential mortgagee, was under no obligation to make such a showing and needed only demonstrate that the contract entitled the plaintiff to possession and that its foreclosure action would probably be successful. *Travelers Insurance*, 200 Ill. App. 3d at 144, 558 N.E.2d at 582. The appellate court also rejected the argument that the parties' agreement about the rent receipts and monthly accounting was reason to deny the plaintiff's request for possession, stating that whether the plaintiff was "adequately protected" was not relevant in a nonresidential foreclosure case. *Travelers Insurance*, 200 Ill. App. 3d at 144, 558 N.E.2d at 582. Thus, because the defendants had failed to demonstrate good cause to overcome the statutory presumption in favor of granting the plaintiff's motion for possession, the appellate court affirmed the trial court's decision to put a receiver in control of the office building. *Travelers Insurance*, 200 Ill. App. 3d at 146, 558 N.E.2d at 583. Accord *Centerpoint Properties Trust*, 398 Ill. App. 3d at 393, 923 N.E.2d at 883-84 (indicating mortgagee has a presumed right to possession and citing *Travelers Insurance* for the proposition that adequate protection is not good cause for denying the plaintiff's request).

¶ 20 The defendant next argues that the plaintiff objected to and would not comply with the defendant's discovery request and that the defendant needed compliance in order to refute the motion to appoint a receiver, but the trial judge "ignored" this state of affairs. The defendant

concludes this demonstrates good cause for denying the receivership. We disagree. There is no indication the defendant raised this issue in the trial court. The defendant did not seek a hearing on the plaintiff's objection to discovery or file a motion to compel compliance with its discovery request. See Ill. Sup. Ct. Rs. 213(d) ("[a]ny objection to an answer or to the refusal to answer an interrogatory shall be heard by the court upon prompt notice and motion of the party propounding the interrogatory"), 219(a) (authorizing proponent of discovery to motion the court to compel compliance). Thus, there was no ruling for us to review.

¶ 21 Based on the authority set out above, we reject the defendant's argument that it demonstrated good cause warranting denial of the plaintiff's motion and we find that the trial court did not err by appointing a receiver of the Rolling Meadows commercial property.

¶ 22 The final issue is presented by the defendant's affiliated company, Younan Investment Properties, Inc., regarding the denial of its motion for SOJ. This entity, which we shall now refer to Younan Investment, relies on *Applegate Apartments* and the rule regarding SOJ motions for the proposition that it was entitled to an SOJ as a matter of right. *Applegate Apartments Limited Partnership v. Commercial Coin Laundry Systems*, 276 Ill. App. 3d 433, 657 N.E.2d 1172 (1995) (indicating that in a consent foreclosure action which is an action that terminates all subordinate interests in the property if notice of the proceeding is given, tenants in possession have sufficient interests to warrant notice); 735 ILCS 5/2-1001(a)(2) (West 2012) ("[e]ach party shall be entitled to one [SOJ] without cause as a matter of right") . Younan Investment argues that, in combination, these authorities indicate the SOJ motion should have been granted as a routine matter.

¶ 23 The plaintiff counters that the record is inadequate for our review, but if we do address the

issue, we will conclude the SOJ motion was properly denied for any one of numerous reasons, such as that this judicial foreclosure action does not affect any tenancy and an uninterested entity is not entitled to interfere in a suit and obtain an SOJ.

¶ 24 It is true that the record presented for our review lacks the lease amendment that purportedly put Younan Investment into possession of the property and is this entity's factual basis for claiming an interest in these judicial foreclosure proceedings. The defendant did not attach the lease amendment to the third SOJ motion or otherwise file the document in the circuit court, and, therefore, the document was not available when the record was bound and transferred to this court. See 155 Ill. 2d. R. 321 (indicating the trial court clerk is to compile into the official record on appeal every document that was filed and any documentary exhibits). This is problematic for Younan Investment because if it cannot show it is a tenant, then we have no reason to analyze the contention that its tenancy made it a "party" to this lawsuit and brought it within the terms of the SOJ statute. It is well established that the omission of an essential document from the compiled record is grounds for summary affirmance. See *Foutch v. O'Brien*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1982) (when an appellant fails to present this court with a sufficient record to support the claim of error, we are to presume the trial court followed the law and had a sufficient factual basis for its ruling); *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 408, 419, 513 N.E.2d 506, 514 (1987) ("When portions of the record are lacking, it will be presumed that the trial court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"); *In re Estate of Jacobs*, 189 Ill. App. 3d 625, 629, 545 N.E.2d 502, 504 (1989).

¶ 25 Defense counsel, however, attached to the opening appellate brief what is purportedly the

missing lease amendment and a transcript of the SOJ hearing on April 16, 2013, and relies on these attachments to support the arguments for reversal. This approach is contrary to the rule that litigants must cite the specific pages of the record that support their arguments. See Ill. Sup Ct. R. 341(h)(7)). Furthermore, it is well settled that the record on appeal cannot be supplemented by attaching documents to a brief or including them in a separate appendix. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826, 748 N.E.2d 291, 294 (2001); *Denny v. Haas*, 197 Ill. App. 3d 427, 430, 554 N.E.2d 727, 729 (1990) ("attachments to briefs which are not otherwise of record are not properly before a reviewing court and cannot be used to supplement the record"); *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 697, n. 1, 275 Ill. 648, 793 N.E.2d 128, 130, n. 1 (2003) (in which the appellate court refused to consider a memo that appeared only the appendix to the plaintiff's brief); *Clay v. County of Cook*, 325 Ill. App. 3d 893, 896, n. 2, 759 N.E.2d 6, 9, n. 2 (2001) (in which the appellate court refused to consider affidavits that were included only in the appendix to the party's brief); *Smith v. First National Bank of Danville*, 254 Ill. App. 3d 251, 258, 624 N.E.2d 899, 905 (1993) (in which this court granted the appellee's motion to strike portions of the appellant's reply brief that included and discussed a settlement agreement that was not part of the record); *Berdelle v. Carpentier*, 11 Ill. 2d 295, 298, 143 N.E.2d 53, 55 (1957) (in which the supreme court refused to consider a transcript attached to a party's petition for rehearing because it was not part of the record).

¶ 26 In a motion taken with the case, defense counsel asks us to supplement the record with the documents attached to its brief. See 134 Ill. 2d R. 329 (indicating material omissions in the record may be corrected by a stipulation of the parties or by order of this reviewing court). The plaintiff objects to the timing of this request nearly a year after the appeal began and to our acceptance of

any documents that are not file stamped. The plaintiff's only specific objection is to the supposed three-page lease amendment which does not bear a file stamp and was not authenticated at the SOJ hearing by affidavit or witness testimony.

¶ 27 In our opinion, the transcript of the hearing on April 16, 2013, neither aids nor undermines the appellate arguments and is accepted into the record. It includes the following discussion:

> "THE COURT: Let's see. *** I think before anything else is addressed, I need to look at the motion for substitution of judge as of right[.]
>
> Have the Plaintiffs received notice of that motion?
>
> [Plaintiff's attorney]: We received it about 5:00 p.m. yesterday.
>
> THE COURT: The motion indicates on its face that [movant] Younan Investment Properties, LP, is an unknown owner and a party because of its tentative possession pursuant to a lease. No copy of any lease is attached however. Do you have a copy of the lease with you?
>
> [Defendant's attorney]: Yes, I do.
>
> [Proposed receiver's attorney]: We haven't seen anything either.
>
> THE COURT: Do you have a copy of the lease you can tender to counsel?
>
> [Defendant's attorney]: I'm sorry. We just brought that one copy. I apologize.
>
> THE COURT: This is a document captioned 'First Amendment to Lease,' dated the 2nd day of December 2011 [']by and between YPI 1600 Corporate Center, LLC, a Delaware Limited Liability Company, landlord, and Younan Investment Properties, LP, a Delaware Limited Partnership, as successor to

Younan Properties, Incorporated, tenant.[']

Younan Investment Properties, LP is a successor to Younan Properties, Incorporated?

[Defendant's attorney]: Successor – What that's referring to is meaning that they are the tenant that's under a lease now.

THE COURT: What do you mean "now"?

[Defendant's attorney]: Now, as of December of '11.

THE COURT: So what standing did Younan Properties, Incorporated have to bring its motion for substitution of judge as of right when the case is before [the second trial judge]?

[Defendant's attorney]: The standing that it had was the lease that Younan Properties had. Well, let me just put it this way: Younan Properties – Well, what's before the Court now is the first amendment – is the motion for substitution of judge brought by Younan Investment Properties, LP under the first amendment that I just handed to your Honor.

THE COURT: Okay, but this is not the first motion for substitution of judge as of right in this case. In fact, this is the third.

[Defendant's attorney]: That's correct.

THE COURT: The first was brought by the named Defendant, YPI 1600 Corporate Center, LLC; and the second was brought by Younan Properties, Incorporated.

[Defendant's attorney]: Yes.

THE COURT: What was the basis of Younan Properties, Incorporated's motion for substitution of judge as of right?

[Defendant's attorney]: When that motion was filed, I was informed that Younan Properties [Incorporated] was a tenant under a lease. We had a—have a lease—we had a lease supporting that. In speaking to my client, I understand that Younan Investment Properties is the tenant of this premises under the First Amendment to Lease dated December of '11.

THE COURT: And so it was—Younan Investment Properties, LP was the tenant at the time that Younan Properties, Incorporated brought its motion for substitution of judge as of right claiming that it was the tenant and seeking to have substitution of judge as of right on that basis, am I correct?

[Defendant's attorney]: I am not certain. I know that as of December of '11, the First Amendment to Lease was executed making Younan Investment Properties the tenant in possession of the premises.

Now, whether Younan Properties was properly sought to intervene, that is a different story. I really don't know that. That's not really what's before the court at this time.

THE COURT: It is a related question and I am looking at Younan Properties, Incorporated's appearance by [you, the company's attorney].

[Defendant's attorney]: Yes, sir.

THE COURT: So you know as well as anybody here does, correct, given that both of these were motions that you filed on behalf of your respective clients?

[Defendant's attorney]: Yes.

THE COURT: And so?

[Defendant's attorney]: All I could say is that at the time we filed the appearance on behalf of Younan Properties, I was informed that Younan Properties was a tenant in possession of the premises. I don't know that—and that's the situation. That's what I was informed by my client at that time.

THE COURT: Which client?

[Defendant's attorney]: By the individual representative that I'm dealing with.

THE COURT: Representative of whom? I'm specifically attempting to understand whether you are referring to the named defendant, YPI 1600 Corporate Center, LLC, or Younan Properties, Incorporated, who is also your client, or Younan Investment Properties, who is also your client.

[Defendant's attorney]: Well, I was speaking to an individual and asked him for the status of the—there's a—the status of the tenancy at the premises.

THE COURT: And that individual you represented was a representative of your client, which one or all of them or do you wish to name him or her?

[Defendant's attorney]: I wouldn't wish to name them, but it doesn't matter. He is the individual that I'm in contact with from whom I obtained this information.

THE COURT: On behalf of whom?

[Defendant's attorney]: Well—

THE COURT: Who in other words, told you first that Younan Properties, Incorporated was the tenant and then that Younan Investment Properties was the tenant?

[Defendant's attorney]: That was my client.

THE COURT: Which client?

[Defendant's attorney]: It was an individual that I spoke with.

THE COURT: You understand we are talking in circles here. You are representing three different corporate entities. Which of those corporate entities made the representation to you? On behalf of whom was this unnamed individual making that representation?

[Defendant's attorney]: I don't know that I could really answer that.

THE COURT: All right. *** Counsel for the Plaintiff, do you wish me to pass the case briefly for you to have an opportunity to review the amendment to the lease, which has been tendered in open court and is not attached to the motion?

[Plaintiff's attorney]: First of all, I don't see where the original lease is. We are only talking about the amended lease. I believe your Honor has cued in to the point and that is whoever the party was in the first instance that may have had the authority to bring the motion alleging some purported interest in the property, I think they are both stemming from the same purported interest in the property. So—

[Proposed receiver's attorney]: Excuse me. Your Honor, I mean, our problem is that this happened last time before [the second trial judge], too. [This

same defense attorney] comes in with this motion that says unknown owner based on a lease. There is no lease attached to the motion. There is no basis of the motion for that purported claim, which is the same thing here.

You know, we would ask that the motion be denied on that basis. If they want to have leave to refile with the purported lease attached, then that's fine. We are not going to object to that but, you know, this is on the eve—you know, for the third time on the eve of the receiver hearing, which *** has now been pending for almost a year. We are entitled to a prompt hearing under the statute. I don't see any basis to delay based on this filing.

[Plaintiff's attorney]: And also, your Honor, it appears that they are trying to get a second bite at the apple. Counsel cannot articulate to your Honor what interest either of his clients, whoever they might be, has in the particular property; and he did not answer any of the questions that your Honor has asked regarding that.

There is no purported basis on the face of this motion where the Court should even grant this motion.

THE COURT: Thank you. Anything further ***?

[Defendant's attorney]: Yes. We have—The motion is based upon the written lease dated December 2nd, 2011 between 1600 Corporate Center and Younan Investment Properties, LP as to the premises[.]

I was supplied with a lease by my client dated 2007 in which Younan Properties, Inc. has an office lease, and I have it in my hand here. It's about a

> 50-page lease, and it's on that basis that I proceeded to file the appearance that the Court referred to previously in this case.
>
> Upon further inquiry to my client, I have determined and my client informed me that there was an amendment to that lease dated December 2nd, 2011extending the term of the lease, changing the rent of the lease and providing that Younan Investment Properties, a different entity, would occupy the premises. [I] filed an appearance on behalf of that entity, and is now a motion for substitution of judge as of right; and I think that under Illinois law, we are entitled to that substitution at this time."

¶ 28 Returning to the motion taken with the case, we find it would be inappropriate to accept the three-page lease amendment into the record for any one of several reasons. First, we cannot be certain this document is the same one that was briefly in the hands of the trial court judge at the hearing, but never given to the plaintiff and never filed with the clerk's office. Exhibits normally are attached to the motion they support and filed in the clerk's office prior to their timely presentation to opposing counsel and the trial judge. The trial judge made an exception in this case by even considering an unfiled exhibit. After the trial judge was done examining the exhibit, it would have been a simple matter for defense counsel to have filed that photocopy with the clerk and then deliver a photocopy to the plaintiff's attorney, or vice versa. There is no way to objectively confirm that what we are looking at is what was discussed in open court. It would be unfair to the plaintiff and the trial judge for this appellate court to reverse a ruling on the basis of such a document. Second, defense counsel has offered no excuse for his failure to timely file the exhibit in the circuit court. In fact, his perfunctory motion consists of just two sentences: "1.

The appendix that is attached to Appellants' brief contains documents that are not part of the record. 2. Appellants request leave to supplement the record with the documents that are included in the appendix that is attached to its brief." We expected an explanation for why he kept the document to himself for a year before making the extraordinary request of adding it to the official record. Third, even if we were willing to accept the unauthenticated document into the record, an amendment to a lease is meaningless without the underlying lease, which is another document that defense counsel has never filed or even attached to his appellate brief. In fact, as the third trial judge pointed out, even a cursory examination of the new document shows that it does not establish that Younan Investment is a tenant of the subject property. More specifically, it is entitled "First Amendment to Lease," and states Younan Investment took a five-year lease in 2006 and that as of December 2, 2011, the landlord and tenant "desire to amend the Lease to provide for an extension of the Term of the Lease," for three more years, "through and including December 31, 2014," and to make other minor revisions to their contractual obligations. Thus, this document indicates movant Younan Investment was the tenant in January 2013, but this was when the other affiliated entity, Younan Properties, Inc., was claiming to be the tenant and was granted an SOJ (the second SOJ) on this basis. In other words, the statements in the current document are inconsistent with the record created in January 2013. Perhaps there is a legitimate explanation for this inconsistency, such as that Younan Properties, Inc. and Younan Investment were tenants of different suites in the subject office building in January 2013. Ordinarily we would delve deeper into the record to clarify crucial facts like these. But again, this record lacks the underlying 50-page lease that allegedly put Younan Properties, Inc. into possession in 2006 and was its basis in early 2013 for requesting the second SOJ. Without that underlying lease, it is

impossible to resolve the factual inconsistency between the allegation that Younan Properties, Inc. was the tenant in 2013 and the allegation that Younan Investment had taken over that tenancy in 2011. In short, the new document raises more questions than it answers.

¶ 29 For these reasons, we grant the motion to supplement the record with the exception of the purported lease amendment and we find that the record is inadequate for our review of the third SOJ ruling. In the absence of an adequate record, the appropriate conclusion is to affirm the trial court's ruling.

¶ 30 Accordingly, we do not reach the merits of the argument that *Applegate Apartments* and the SOJ rule dictated that the third SOJ motion be routinely granted. We affirm the challenged ruling. This concludes the interlocutory appeal.

¶ 31 Motion taken with the case granted in part and denied in part, circuit court rulings affirmed.