

No. 1-13-3044

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES M. BENHART,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 12 CH 20212
)	
JOANNE G. KROLL, Trustee,)	
)	
Defendant-Appellee,)	
)	
(Gary A. Benhart,)	The Honorable
)	Rodolfo Garcia,
Plaintiff).)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* The circuit court erred in entering a judgment on the pleadings pursuant to section 9-201(2) of the Forcible Entry and Detainer Act, finding that the payment of use and occupancy was required for the subject property, where the court failed to hold an evidentiary hearing to

determine whether there was a special agreement for rent between the parties and, if not, the appropriate value for the use and occupancy for the liable party.

¶2 Plaintiff, James Benhart, appeals the circuit court's order in favor of defendant, Joanne Kroll, as trustee, on her petition pursuant to section 9-201(2) of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-201(2) (West 2010)), finding there was no special agreement for plaintiff's rental of the subject property held by the trust and, therefore, he was liable for \$34,135.89 for his use and occupancy of the property over the course of 27 months. Plaintiff contends the circuit court erred in finding section 9-201(2) of the Act applied because defendant did not file an operative pleading where defendant merely filed a petition and no additional pleadings or discovery took place. Plaintiff additionally contends the circuit court erred in finding that no special agreement for rent existed between the parties and that he owed defendant an amount for the use and occupancy of the subject premises without the benefit of an evidentiary hearing. Based on the following, we reverse and remand for further proceedings.

¶3 **FACTS**

¶4 On June 1, 2012, plaintiff and his brother, Gary Benhart, filed a complaint against defendant, their sister, alleging that defendant failed to comply with her duties as trustee under two trust agreements created by the siblings' parents. The trust agreements, the Milo Leroy Benhart Declaration of Trust No. 101 (the Milo Trust) and the Evelyn Lois Benhart Declaration Trust No. 102 (the Evelyn Trust), provided that, upon the death of the surviving parent, defendant, as trustee, was to divide and distribute the trust property in equal shares to Gary, plaintiff, and herself, individually.¹ On January 23, 2011, the surviving parent, Evelyn, died. The trust property included a home located at 717 South Highland Avenue, in Arlington Heights,

¹ According to the parties, the property at issue was part of the Milo Trust. There is no issue before this court regarding the origin of the trust property; therefore, we refer generally to the trust.

Illinois, which is at issue in this case, a home in Mount Prospect, Illinois, and 110 acres of farmland in or near Belvedere, Illinois.

¶5 In their complaint, plaintiff and Gary alleged that defendant failed to comply with her duties and responsibilities as trustee by failing to distribute the trust property in equal shares and failing to render an annual account of the receipts and disbursements of the trust. In particular, the complaint alleged defendant negligently and willfully and wantonly failed to timely offer the trust properties for sale, as well as continuously refused to furnish an account of receipts and disbursements of the trust. The complaint requested the removal of defendant as trustee and appointment of Gary as the next trustee.

¶6 On July 10, 2012, defendant filed an amended answer to the complaint. In relevant part, defendant denied plaintiff's and Gary's allegations that she failed to comply with her duties and responsibilities as trustee. In relevant part, defendant specifically responded that plaintiff lived in the Arlington Heights house and had expressed interest in purchasing the house. Plaintiff, however, had not made a final determination whether to purchase the house and there had been no agreement as to a sale price or the funding of a sale by plaintiff.

¶7 On October 25, 2012, defendant filed an emergency motion for an order authorizing her to sell trust property. More specifically, defendant sought an order authorizing her to sell 70.93 acres of the farmland in the trust because plaintiff and Gary attempted to revoke their previous authorization after she accepted an offer from a purchaser. Attached to the emergency motion was an email from defendant's attorney to defendant describing a detailed proposal submitted by plaintiff's attorney for the distribution of all of the trust property. In that email, dated October 15, 2012, defendant's attorney described "an agreement with your brothers," such that "[t]hey want to accept the offer for the 70.93 acres and will give you the [remaining] 43 acre parcel [of

farmland] at \$10,000 per acre. [Plaintiff] would get the Arlington Heights house and be responsible for all outstanding or future real estate taxes. The 2 farm parcels, the Arlington Heights house[,] and \$200,000 from the security accounts will be distributed simultaneously with the closing of the sale of the 70 acres." The email further added that the Arlington Heights house would go to plaintiff by "quit claim, no tax prorations, no claim for back rent (\$225,000 in value)." On November 9, 2012, defendant filed a motion to withdraw her emergency motion for an order authorizing her to sell the farm property because the purchaser had withdrawn the purchase offer, thereby rendering the motion moot. The motion to withdraw was granted.

¶18 On February 6, 2013, the circuit court entered a status order indicating that the parties had until March 1, 2013, "to appear in court and file objections, if any ***, to the sale [of the Arlington Heights house] by the trustee to [plaintiff] on the terms set out herein." The order described the terms as "a cash sale for \$225,000 with no pro rations. [Plaintiff] shall be responsible for title insurance, real estate taxes, and property insurance for the property during the time [plaintiff] resided in the [Arlington Heights house.] Closing shall occur no later than April 1, 2013." The order additionally stated that "the purchase price shall be paid to the Trust from [plaintiff's] share of the sales proceeds of the DeKalb County farm property."

¶19 On March 1, 2013, the circuit court entered another status order, setting the case for status on March 22, 2013 and instructing that Gary "shall have 14 days to file objections to issues regarding the sale and rental of the Arlington Heights real estate." On March 15, 2013, Gary filed "Objections to the Sale of Real Estate and Trustee's Failure to Collect Rent," disputing the circuit court's February 6, 2013, order calling for the sale of the subject property to plaintiff for the sale price of \$225,000. Gary alleged a more fair and reasonable sale price was \$250,000 since the house was appraised for that amount in 2011. In his objections, Gary stated that

plaintiff had lived in the subject property since Evelyn's death on January 23, 2011, while paying only the real estate taxes for a total of \$13,114.11 over a two-year period (\$2,928.04 for first installment 2012 taxes, \$5,323.70 for 2011, and \$4,826.37 for 2010). Gary proposed that a more "fair and reasonable" rental amount would have been \$1,800 per month based on a realtor's opinion regarding similar rental homes in the area, for a total of \$21,600 per year. Gary attached the realtor's email opining that the monthly rental value of the Arlington Heights house was between \$1,750 and \$1,900 based on nearby comparable rentals, as indicated by attached real estate rental listings. In the objections, Gary noted that the difference between the proposed rental figure and the amount plaintiff had paid in real estate taxes to the trust was \$33,685.89. Gary requested that the sale price of the property be \$250,000, that plaintiff pay the trust monthly rent of \$1,800 beginning April 1, 2013, and that plaintiff pay back rent to the trust in the amount of \$33,685.89 for the period from February 1, 2011, through March 31, 2013.

¶10 On March 19, 2013, defendant filed a response to Gary's objections to the sale of the Arlington Heights house and her failure to collect rent. In defendant's response, she stated that she was offering "background information for the court's consideration" without wishing to take sides in the "ongoing dispute" between plaintiff and Gary. According to defendant's response, the sale price of the Arlington Heights house may be moot because plaintiff advised her that he intended to purchase an unrelated home. However, in defendant's response, she indicated that the parties, including Gary, agreed that the property should be sold for \$225,000 based on two different appraisals, one stating the value as \$250,000 and one stating the value as \$212,000. Defendant added that, at the time of the "parties' 2011 agreement," plaintiff's interest in the trust "substantially exceeded" the \$225,000 purchase price of the Arlington Heights house, but the trust was not liquid at the time. In her response, defendant said that Gary objected to her offer to

transfer the Arlington Heights house to plaintiff because there would not be a simultaneous corresponding distribution to Gary. According to defendant's response, Gary, however, had suggested more recently that plaintiff pay interest on the \$225,000 equivalent to the interest he would have had to pay if he had taken a mortgage on the property. To the response, defendant attached two emails presumably written by Gary.²

¶11 In a January 26, 2013, email to defendant's attorney and copying plaintiff, the author wrote that "the trustee failed to address the rent issue timely and has already put the trust in a really bad position. By doing that, the trustee decided to financially favor one beneficiary vs. another." The email added that "the rent issue at the Highland Street house was addressed many times during the first [half] of 2011. In an email dated 05/04/2011, Jim wrote: 'I paid again \$3200? For 6 months of the real estate tax for rent. I would not mind paying more rent once all the assets are dispersed [*sic*] and I know where I am going to live.' " In the January 26, 2013, email, the author continued, "I always disagreed the trust could simply give Jim the house, however, while I was asked to wait for my \$225k distribution. That issue came up during our court session on 09/21/2012. The trust would need to loan Jim the money to buy the house and charge him interest until the loan was repaid. To my knowledge, loan terms between the trust and Jim have never been negotiated."

¶12 In a March 10, 2013, email to plaintiff,³ the author stated that:

"When I called one of your neighbors last year and inquired about the house rent he was charging, he told me it was \$1,975 per month. Under that figure to calculate your rent, the results are going to be very similar [to the

² The author's email address, namely, jaxgab@comcast.net, does not expressly identify the author; however, the context of the email seemingly indicates the author was Gary.

³The email was also sent as a carbon copy to "snowball467@comcast.net". The record does not reveal the identity of the recipient.

amount owed to the trust for interest assuming the trust considered that plaintiff purchased the Arlington Heights house as of January 23, 2011 for \$225,000 with undistributed assets from the trust]. You would owe the trust between \$30-35,000 for unpaid rent. That is because the amount you paid for property taxes is less than 25% the fair amount you should have been paying for rent."

¶13 On March 22, 2013, the circuit court entered an order instructing defendant to "list" the Arlington Heights house for sale "within a reasonable time," advising the parties that they had until April 10, 2013, to file written objections to defendant's accountings, and instructing defendant to file a petition for rent due from plaintiff pursuant to Gary's objections. On April 17, 2013, defendant was ordered to file a petition for rent from plaintiff by April 29, 2013. Plaintiff and Gary were given until May 27, 2013, to file a response to the petition for rent and defendant was given until June 10, 2013, to reply to any responses.

¶14 On April 29, 2013, defendant filed a petition, as trustee, against plaintiff and Gary, requesting that the circuit court "make a determination as to a fair and reasonable satisfaction for the use and occupation" of the Arlington Heights house by plaintiff "as provided for in [s]ection 735 ILCS 5/9-201," for the entry of judgment in favor of the trust and against plaintiff in the amount determined to be fair and reasonable for use and occupancy less the \$13,114.11 already paid by plaintiff, and for the authority to charge interest to plaintiff for any outstanding amounts due. In her petition, defendant noted that plaintiff lived in the subject property prior to Evelyn's death and did not pay rent, but only paid the real estate taxes for the property. Since Evelyn's death on January 23, 2011, plaintiff continued to live in the subject property while "paying only real estate taxes on the property." According to the petition, plaintiff, Gary, and defendant, as beneficiaries, agreed to sell the subject property to plaintiff for \$225,000. Because plaintiff did

not have the funds to pay for the subject property, defendant "on multiple occasions" proposed to sell the property to plaintiff for the agreed amount and treat the purchase price as a partial distribution from both trusts. Gary, however, objected to the proposals. Then, in December 2012, the Evelyn Trust sold farm property and the proceeds of the sale provided a sufficient distribution to plaintiff from which he could purchase the Arlington Heights house. Just prior to February 6, 2013, defendant suggested that a portion of plaintiff's share of the proceeds from the farm property be used to purchase the Arlington Heights house. Defendant's proposal was reported to the circuit court on February 6, 2013. According to the petition, the circuit court then entered its order instructing the parties to file objections to the sale by March 1, 2013. Gary filed his objections and suggested plaintiff owed rent to the trust. The petition provided that plaintiff subsequently purchased another home and abandoned his agreement to purchase the Arlington Heights home. On April 17, 2013, the circuit court ordered defendant to file this petition for rent.

¶15 Both plaintiff and Gary filed responses. In his response⁴, plaintiff noted that defendant's petition was not verified and, therefore, "any 'facts' purported as 'facts' that are contained therein are not properly before this Court. On the other hand, any admissions contained in the Petition are properly before this Court." Plaintiff then addressed each paragraph of defendant's petition. In relevant part, plaintiff argued that defendant collected rent from him in the form of real estate taxes on the subject property. Plaintiff argued, however, that, in the event defendant failed to collect rent, Gary's remedy was against defendant for failing to execute her fiduciary duties as a trustee and not against plaintiff as a beneficiary. According to plaintiff's response, Gary first proposed the monthly rental value as between \$1,750 and \$1,900 on March 15, 2013, in his objections and plaintiff, thereafter, decided not to purchase the Arlington Heights house. In his

⁴ The date stamp of the response is unreadable.

response, plaintiff argued that he was a month-to-month tenant of the subject property and he paid his rent on a "regular basis in roughly six-month intervals." According to plaintiff's response, some of his checks were marked with a time period and labeled "rent" and were received, accepted, and deposited by defendant. Plaintiff characterized the dispute as a landlord-tenant matter, denying the application of section 9-201 of the Act because he had a special agreement for the payment of rent. To his response, plaintiff attached five checks: (1) dated March 14, 2011, for \$3,449.16 made to defendant with "6mo rent" in the memo line⁵; (2) dated October 7, 2011, for \$1,413.21 made to defendant; (3) dated February 17, 2012, for \$2,630.00 made to defendant; (4) dated July 17, 2012, for \$2,649.40 made to defendant; and (5) dated March 1, 2013, for \$2,928.04 made to defendant with "6mo rent" in the memo line.

¶16 In his response⁶, Gary "answered" each allegation of defendant's petition. In relevant part, Gary denied that he, plaintiff, and defendant agreed to sell the Arlington Heights house to plaintiff for \$225,000. Gary "admit[ted]" all other allegations in defendant's petition and requested the same relief from the circuit court as defendant, namely, to make a determination as to a fair and reasonable satisfaction for the use and occupation of the subject property as provided by section 9-201 of the Code, for the entry of a judgment in favor of the trust and against plaintiff in the fair and reasonable amount as determined by the court less the \$13,114.11 paid to date by plaintiff, and for the entry of an order authorizing defendant to charge interest to plaintiff for the outstanding amount due the trust.

⁵Plaintiff has since admitted that "6 mo rent" was added to the memo line after the instant litigation began and did not originally appear on the check.

⁶The date stamp of the response is unreadable.

¶17 Defendant filed a reply to plaintiff's and Gary's responses.⁷ In her reply, defendant stated that pursuant to section 2-610 of the Code of Civil Procedure (Code) (735 ILCS 5/2-610 (West 2010)) "many of the allegations pled in the Petition are admitted or, in the case of James Benhart, not denied." In the reply, defendant averred that the only outstanding issue was whether plaintiff's payment of the real estate taxes satisfied "full and complete payment for James' use and occupancy" of the subject property. In addition, defendant denied having any discussions with plaintiff regarding his payments other "than that they were for real estate taxes due on the [subject property]." According to defendant's reply, the issue of rent was not raised because there was an agreement between herself, plaintiff, and Gary that the subject property would be sold to plaintiff for \$225,000 from his share of the trust. Defendant said that the real estate taxes were paid by plaintiff during the pendency of the agreement. Finally, in her reply, defendant denied admitting that Evelyn lived in the Arlington Heights house at the time of her death. Instead, Evelyn lived in the Mount Prospect house and plaintiff lived in the Arlington Heights house.

¶18 Gary filed a reply to plaintiff's response.⁸ In his reply, Gary agreed with plaintiff that defendant had a fiduciary obligation to collect rent from tenants of the trust property. Gary maintained that the parties repeatedly discussed the issue of plaintiff's failure to make fair market payments prior to March 15, 2013. In his reply, Gary maintained that there was no special agreement for rent of the subject property and that plaintiff's payment of real estate taxes did not constitute a fair and reasonable amount of rent. Gary denied that plaintiff was a month-to-month tenant of the subject property.

⁷ The date stamp of the reply is unreadable; however, a stipulation for the supplemental appellate record indicates the reply was filed on June 7, 2013.

⁸ The date stamp of the reply is unreadable; however, a stipulation for the supplemental appellate record indicates the reply was filed on June 11, 2013.

¶19 According to a certified bystander's report filed by the circuit court, a hearing was held on June 17, 2013. The bystander report stated that "all that remained outstanding as to James Benhart and Gary Benhart's lawsuit was the issue of James Benhart's responsibility for the payment of use and occupancy of the [Arlington Heights] property. [Defendant's attorney] informed the court that the use and occupancy issues had been fully briefed." According to the bystander's report, the circuit court was considering establishing a fair market rental value based on the previously offered sale price of \$225,000. The circuit court denied plaintiff's argument that the rent was previously agreed to and set as the amount equal to the property taxes, noting that any such agreement should have been in writing. The circuit court stated that such an agreement would only benefit plaintiff and not the other beneficiaries. Defendant's attorney noted that "a separate and reasonable rental amount was alleged in one of the party's filings" and asked the circuit court whether an evidentiary hearing was necessary. The circuit court rejected the necessity of an evidentiary hearing in light of "the briefs." None of the parties objected to having the circuit court decide the pending issue based on written submissions and oral arguments. There were no requests for an evidentiary hearing.

¶20 On August 8, 2013, plaintiff's newly-hired attorney was granted leave to file a surreply, after having received "new evidence" in the form of the trust's income tax returns and email exchanges between plaintiff and defendant's attorney. In his surreply, plaintiff stated that the trust had reported rental income for every year on the tax returns from 2008 through 2012. In addition, in response to defendant's reply stating that she never had discussions with plaintiff regarding the nature of his payments, plaintiff attached an email exchange between plaintiff and defendant's attorney from November 7, 2012, in which plaintiff requested clarification regarding "back rent." In relevant part, plaintiff's email requested additional information regarding a

"recent proposal" that said he owed back rent of \$225,000 that would be relieved upon the disbursement of the trust assets. Defendant's attorney sent a response email on November 7, 2012, stating "I said no such thing. Any reference I made to \$225,000 was as to the amount your share of the Trust would be charged if the property is to be transferred to you." In the reply, plaintiff argued that the email exchange demonstrated that he was paying the agreed rent.

¶21 On August 22, 2013, a hearing was held during which the circuit court stated that the parties were "here on the petition by the trustee to assess rents for the duration of time that *** James Berhart was in possession of the property." The circuit court added that "I think the position is fairly straightforward and everybody has responded to it and the petition is clear on the record." Plaintiff's attorney noted that defendant's petition was not a pleading and, therefore, any allegations that were not answered in the response were not deemed admitted. Plaintiff again argued section 2-901(2) of the Act did not apply where he complied with the special rental agreement under which he paid the real estate taxes. Plaintiff maintained that his position was supported by the trust's tax returns, which reported his payments as income. In response, defendant argued that the petition was a pleading, as was plaintiff's response, and plaintiff failed to file an affidavit in support of the alleged rental agreement. The circuit court replied that plaintiff "appeared in court many times and represented himself and gave certain information and there's little dispute that there's been a lot of communication between the parties. To the extent that that's set out and not challenged, that information at the very least, is part of the consideration that I can take into account." Specifically, the circuit court referenced an "e-mail that went from [plaintiff] that he acknowledged that he would have to pay more than what he was currently paying."

¶22 Plaintiff argued that, upon his decision to no longer purchase the subject property, defendant was not entitled to charge back rent, but, rather, the remedy was to "see what damage is to the trust." Alleging there was a contract for the purchase of the Arlington Heights house for \$242,000, plaintiff argued there was no damage to the trust. Moreover, plaintiff argued that it was a breach of defendant's fiduciary duty to charge plaintiff for two years of rent after having permitted him to live in the property while saying "you only need to pay real estate taxes for now." The court interjected and said "as I recall, *** [plaintiff] was certainly informed that the prospect of use and occupancy was going to be raised at some point." Defendant responded that use and occupancy was raised "from the beginning" and the "reason we didn't set a rent was he was going to buy the property. We figured he was going to own it and you wouldn't have to pay it because it was taken out of his share of the estate." The circuit court then stated:

"The only thing that's clear is that the agreement was within a certain— was binding as to the conditions that were agreed upon by the parties and that is that *** [plaintiff] was going to buy the property. When he didn't, that opened the possibility of other things occurring. And to the extent that, you know, the trust—trust is acting on behalf of all beneficiaries and that includes James Benhart and, you know, James Benhart is going to be sort of paying himself and recouping – recouping at the same time.

So I'm going to make express rulings and that is that the Section 9-201 does, in fact, apply because there is no agreement that takes into account the ultimate circumstances of what occurred in this case and, therefore, James Benhart is obligated to pay use and occupancy for the time that he remained on the premises. ***

Then the question becomes, you know, what the rental amount should be and I basically am working with two figures. Gary advocates 1800 and the lower amount of the range provided by the trust is 1750. I see no reason not to go with 1750."

¶23 When plaintiff's counsel asked for the court's factual basis for the rental amount, the circuit court responded "[w]hat is already spread of record which is the 1750. There's comparisons. There's the market analysis on rental property and that's set out in the record. Based on that I'm going to impose a rental amount of 1750." The circuit court added that plaintiff would receive credit for the payments he had already made, making the actual monthly rental payment equal to "like \$1150."

¶24 In response to the question of whether the petition was a pleading, the circuit court stated:

"I think it has to be treated as a pleading and, you know, a motion or pleading, it makes little difference because they both have to be challenged and, as I indicated, I think the matters as presently before me allow a determination to be made by this Court as a matter of law."

¶25 The circuit court memorialized its findings in a written order. In addition to its oral findings, the August 22, 2013, written order provided that "the court has not taken into account any purported admissions based on James Benhart's failure to respond to any allegations in the petition." The written order expressly stated that plaintiff was liable to the trust for the use and occupancy of the Arlington Heights house in the amount of \$34,135.89, which was \$1,750 per month for 27 months less the \$13,114.11 previously paid in real estate taxes. This appeal followed.

¶26

ANALYSIS

¶27

I. Procedural Error

¶28 Plaintiff contends the circuit court erred in issuing any ruling related to the matter of use and occupancy where there was no operative complaint filed that requested such relief.

According to plaintiff, defendant's petition was not a proper pleading and the responses filed in relation thereto were not pleadings upon which the circuit court could issue its ruling. In addition, because there was no proper pleading before the circuit court, plaintiff contends he was not afforded the opportunity to "submit a verified answer, depose the Trustee, submit interrogatories, take other discovery, or otherwise develop the facts before the circuit court."

Defendant responds that her petition was a sufficient pleading where it met all the requirements for filing a complaint or counterclaim pursuant to section 2-603 of the Code (735 ILCS 5/2-603 (West 2010)) and the substance clearly informed the parties of the nature of her claim.

Defendant additionally argues that plaintiff waived his challenges where he never raised an objection to the pleading or the lack of discovery. We review these questions of law *de novo*.

Andrews v. Kowa Printing Corp. 217 Ill. 2d 101, 106 (2005).

¶29 Section 2-603 of the Code provides:

"Form of pleadings. (a) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.

(b) Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

(c) Pleadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603 (West 2010).

Moreover, section 2-612 of the Act provides that "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." 735 ILCS 5/2-612(b) (West 2010).

¶30 In this case, we conclude that the petition was a sufficient counterclaim upon which the circuit court could issue a ruling. Although titled "petition," the substance of defendant's petition for use and occupancy was a counterclaim which requested a finding that plaintiff was required to pay the trust for his use and occupancy of the Arlington Heights house pursuant to section 2-901(2) of the Act because the parties did not have a special agreement for rent. There is nothing to indicate that plaintiff was not reasonably informed. On the contrary, plaintiff filed his response to the petition in the same form of a typical answer by numbering the responses in concert with the numbered allegations in the petition. In addition, plaintiff argued that he was a month-to-month tenant, attaching copies of the checks he remitted to defendant for his alleged rental payments.

¶31 More importantly, though, plaintiff did not contest the substantive sufficiency of the petition as a pleading before the circuit court and, therefore, plaintiff has waived any such challenge on appeal. Pursuant to section 2-612(c), "[a]ll defects in pleadings, either in form or substance, not objected to in the trial court are waived." 735 ILCS 5/2-612(c) (West 2010). We recognize that plaintiff challenged the petition in terms of admitting any allegations that were not answered in his response; however, plaintiff never argued that the petition substantively was defective and that the issue of use and occupancy pursuant to section 2-901(2) was not properly before the circuit court. Instead, plaintiff was given leave to file a surreply to defendant's reply,

in which he presented further arguments and documents demonstrating that he did in fact pay rent in the form of real estate taxes. No where within the surreply did plaintiff argue that the petition was a defective pleading. Accordingly, plaintiff has waived such a challenge on appeal.

¶32

II. Use and Occupancy Charges

¶33 Plaintiff next contends that the circuit court erred in finding the parties did not have a special rental agreement for the Arlington Heights house and imposing a judgment requiring him to pay use and occupancy.

¶34 Section 9-201 of the Act provides when "lands are held and occupied by any person without any special agreement for rent," the landlord is entitled to "sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof." 735 ILCS 5/9-201(2) (West 2010). The parties agree that the applicable standard of review is whether the circuit court's judgment is against the manifest weight of the evidence. A judgment is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *In re Marriage of Lasota & Luterek*, 2014 IL App (1st) 132009, ¶ 21.

¶35 We conclude that the circuit court's finding that section 2-901(2) of the Act required plaintiff to pay use and occupancy was erroneous where it was not substantiated by the evidence. There is no dispute that the Arlington Heights house was owned by the trust and that plaintiff lived in the house. The question before the circuit court was whether plaintiff had a special agreement for the rental of the Arlington Heights house. The circuit court determined there was no special agreement. A special rental agreement required the elements of a contract, namely, an offer, a strictly conforming acceptance to the offer, and supporting consideration. See *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 154

(1998). However, the only "evidence" presented here was the pleadings and attachments, which included unauthenticated emails and tax returns. There were no affidavits and there was no evidentiary hearing. Moreover, there was no dispositive motion filed on the question of whether there was an agreement. Without any evidence, there was nothing to substantiate the circuit court's finding. We, therefore, conclude that, in order to determine whether the parties had an agreement for special use of the subject property as a matter of law, this cause must be remanded for an evidentiary hearing.

¶36 Similarly, in the event the circuit court still determines no special agreement existed following the evidentiary hearing, an evidentiary hearing is necessary to determine the fair and reasonable amount of use and occupancy, the period for which use and occupancy is owed, and who bears liability. All of these questions were raised before the circuit court and were not properly litigated.

¶37

CONCLUSION

¶38 We conclude that the petition filed by defendant was a sufficient counterclaim requesting use and occupancy pursuant to section 2-901(2) of the Act. We further conclude that the circuit court's finding that plaintiff did not have a special rental agreement with the trust was made without an evidentiary hearing. We, therefore, find the circuit court erred in failing to conduct an evidentiary hearing to determine the question of use and occupancy and remand this cause for further proceedings.

¶39 Reversed; remanded.