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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JENNIFER SHERMAN,)	Appeal from the Circuit Court
,)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 14-LM-822
)	
JOHN ZIMNY,)	Honorable
)	Joseph M. Grady,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant forfeited his first argument regarding attorney fees by not raising it at trial. The trial court's award of unpaid future rent was not contrary to the manifest weight of the evidence. Affirmed.

¶ 2 Plaintiff, Jennifer Sherman, brought this action against defendant, John Zimny, to recover rent due from May 2014 through September 2014, and for attorney fees and costs pursuant to the lease. The trial court found in favor of plaintiff, awarding \$12,250 in damages, \$309 in costs, and \$2,500 in attorney fees. On appeal, defendant contests the trial court's judgment awarding plaintiff attorney fees and unpaid future rent. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 3, 2013, plaintiff leased her house to defendant from September 1, 2013, to October 1, 2014. The lease required a monthly rental of \$2,450 and a security deposit of \$500. In addition, the lease provided for the award of attorney fees in the event of legal action taken against defendant for failure to conform to the terms of the lease in which plaintiff was the prevailing party.

¶ 5 The initial rental relationship between plaintiff and defendant was amicable, but it began to deteriorate in the middle of September 2013, when defendant began a pattern of complaints, including a list of alleged defects.

¶ 6 On May 6, 2014, defendant sent plaintiff a letter informing her that he would be terminating the lease, effective May 23, 2014, “[d]ue to numerous breaches of the lease, including but not limited to, failure to make necessary repairs, *** as well as violations in the leasing codes and requirements for the city of St. Charles.” Defendant further informed plaintiff that she would be contacted by the city of St. Charles (City) for the alleged numerous code violations of which defendant complained. Defendant stated that, “[s]ince there are numerous code violations,” this gave him the right to terminate the lease. Defendant copied the letter to both the building inspector and the code enforcement officer of the City. Defendant paid rent through April 2014 and vacated the premises on May 23, 2014.

¶ 7 Plaintiff filed a contract action against defendant for breach of the residential lease. At the bench trial on June 11, 2014, plaintiff testified that she had been trying to market the property for sale or lease since defendant vacated the property, but the alleged code violations and other defects asserted by defendant impaired her ability to do so. In order to deal honestly with potential tenants or buyers, plaintiff believed she first needed to take care of the claims asserted by defendant.

¶ 8 The trial court found in favor of plaintiff and entered a judgment against defendant for five months unpaid rent, attorney fees, and court costs. In its decision, the court credited plaintiff's testimony that defendant's allegations of defects adversely affected her ability to mitigate damages. The court viewed three months as a reasonable period to allow for re-rental of the property, and that the evidence of defendant initiating code violation complaints would further complicate, delay, and add costs to plaintiff's efforts. The court also found that counsel's request for \$2,500 in attorney fees was reasonable, and it entered judgment for that amount. This timely appeal follows.

¶ 9 II. ANALYSIS

¶ 10 Defendant raises the following two arguments on appeal: (1) whether the trial court abused its discretion in awarding attorney fees because no evidence was presented in support of the amount; and (2) whether the trial court's finding that plaintiff took reasonable steps to mitigate her damages was against the manifest weight of the evidence. Plaintiff responds that defendant has forfeited both issues.

¶ 11 A. Forfeiture

¶ 12 We agree with plaintiff that defendant's first argument regarding attorney fees is forfeited because defendant raises it for the first time on appeal. Arguments not raised in the trial court are forfeited and cannot be raised for the first time on appeal. *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 417 (2006). Moreover, defendant failed to file a reply brief and did not respond to plaintiff's forfeiture argument. See *Central Management Services/Department of State Police v. Illinois Labor Relations Board*, 2012 IL App (4th) 110356, ¶ 26 (argument forfeited when appellant failed to file a reply brief and did not respond to opposing party's forfeiture argument).

¶ 13 B. Mitigation of Damages

¶ 14 Although defendant forfeited the argument as to the amount of attorney fees awarded, he did not forfeit the mitigation of damages issue. At trial, defendant presented evidence concerning his complaints about the code violations. Defendant also testified to the problems he encountered with the house. In addition, at the close of the proceedings, albeit after the trial court had ruled, defendant argued that plaintiff was not able to rent the property due to code violations. Accordingly, we turn to defendant's argument that the trial court's award of unpaid future rent was against the manifest weight of the evidence.

¶ 15 Where an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13; *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 13. "[A] reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact." *In re Application of the County Treasurer*, 131 Ill. 2d 541, 549 (1989). A factual finding 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 the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages. *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972); *Aetna Insurance Co. v. Amelio Brothers Meat Co.*, 182 Ill. App. 3d 863, 865 (1989).

¶ 16 Defendant does not argue that he was not liable for the May and June rent. He only contests the award of unpaid future rent from July through September, arguing that plaintiff did not present sufficient evidence of her efforts to mitigate damages.

¶ 17 A landlord must undertake reasonable efforts to re-let the premises following a defaulting tenant's departure from the premises. 735 ILCS 5/9-213.1 (West 2012). In addition, the landlord shoulders the burden of establishing mitigation of damages because the lessor occupies the best position to prove compliance with his or her duty to mitigate damages. *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 166 (1994).

¶ 18 Plaintiff contends that defendant could have mitigated his losses by accepting her offer to convert the lease to month-to-month. We disagree. Defendant had no obligation to modify the lease to a month-to-month. However, once defendant defaulted and vacated the premises, plaintiff had the burden of establishing mitigation of damages.

¶ 19 Defendant argues that the duty to mitigate is not abrogated if repairs have to be made before the property can be shown. In addition, defendant asserts that plaintiff never demonstrated that she took steps to have someone inspect the property and make repairs.

¶ 20 The trial court was presented with the question of whether plaintiff used reasonable efforts to mitigate damages. It is the trier of fact's burden to determine the weight of the evidence and decide the credibility of the witnesses on controverted questions of fact. *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*, 155 Ill. App. 3d 458, 466 (1987).

¶ 21 It appears that the trial court found defendant's complaints unfounded. The evidence showed that defendant wrote to plaintiff that there were numerous code violations and that she would be contacted by the City. However, no one from the City contacted plaintiff about the alleged complaints. The trial court found plaintiff a more credible witness and relied on her

testimony that her attempts to mitigate damages were adversely affected by defendant's numerous complaints about the condition of the property. The trial court gave plaintiff a three-month window to address any complaints regarding the property. The court viewed three months as a reasonable period of time to allow for re-rental of the property. The trial court's determination was not unreasonable and not against the manifest weight of the evidence. Accordingly, we affirm the trial court's award of unpaid future rent to plaintiff.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 24 Affirmed.