2016 IL App (1st) 143791-U

Nos. 1-14-3791 & 1-15-0562 (Cons.)

Fourth Division
June 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEPPERCORN 1248, LLC and PEPPERCORN CAPITAL, LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs/Appellants,	)	No. 011-L-001367
v.	)	Honorable Margaret Brennan, Judge Presiding.
ARTEMIS DCLP LLP, NORMAN CHERRETT, ALICIA CHERRETT, BRIAN BORKAN, SCOTT CALABRIA, CORPORATELAND, and BKB COMMERCIAL,	)	
Defendants/Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court's orders granting summary judgment in favor of defendants as to all counts of plaintiffs' fourth amended complaint affirmed where no issues of material fact existed as to any claims; trial court did not err in denying defendants' motion for sanctions against plaintiffs.

¶ 2 This case centers on broker commissions relating to a commercial lease for property located at 1248 West Washington Boulevard (Washington property) in Chicago, Illinois, and

owned by plaintiffs Peppercorn 1248 LLC and Peppercorn Capital LLC. Plaintiffs and defendant Artemis DCLP LLP (Artemis) entered into a 10-year lease, but prior to taking possession of the Washington property, Artemis declared the lease to be terminated without default pursuant to a clause within the lease. Plaintiffs had paid commissions to their broker, Mitch Adams of CB Richard Ellis (CBRE). CBRE retained a portion of that payment and paid the remainder to Artemis' brokers, Scott Calabria and Brian Borkan, subsequent to the signing of the lease, but prior to its termination. Plaintiffs sought the return of commission payments from Borkan and Calabria, but their efforts were unsuccessful.

¶ 3 Plaintiffs appeal from orders of the trial court granting summary judgment in favor of defendants Artemis, Norman Cherrett, Alicia Cherrett (collectively the Artemis defendants), Borkan, Calabria, Corporateland, and BKB Commercial (collectively the broker defendants) as to all six counts in their fourth amended complaint, which raised numerous claims of breach of contract, as well as claims of fraudulent misrepresentation, unjust enrichment, and tortious interference with a contract. On appeal, plaintiffs claim that genuine issues of material fact exist which preclude entry of summary judgment in defendants' favor. The broker defendants cross-appeal from an order of the trial court denying their motion for sanctions against plaintiffs.

¶ 4 BACKGROUND

¶ 5 The record reveals that Norman and Alicia Cherrett currently own several day care centers in the Chicago area. In the fall of 2007, they owned only one day care and were seeking to expand their business to a second location. To that end, they began working with Calabria, who had served as Alicia's broker on the first day care location.[1] In conducting their search, the

[1] Norman and Alicia were not married at the time Alicia opened the first location.

Cherretts became interested in the Washington property and Calabria asked Borkan to assist him in relation to this deal. Negotiations ensued.

¶ 6 Letter of Intent

¶ 7 The record further reveals that sometime in December 2007, Philip Denny, who is plaintiffs' principal, Adams, the Cherretts, and Borkan met at a coffee shop and discussed entering into a letter of intent (LOI) relative to the Washington property. The final version of the LOI is on CBRE letterhead and is dated December 19, 2007. Denny and Alicia, the only signatories to the LOI, signed it on December 21, 2007. The LOI states, *inter alia*, the following:

> "Commission: $1.00/SF per year. Brian Borken [*sic*] shall personally guarantee and pay back the unamortized portion of the commission they received, in the event the Tenant defaults under the lease terms."
>
> ***
>
> "This letter/proposal is intended solely as a preliminary expression of general intentions and is to be used for discussion purposes only. The parties intend that neither shall have any contractual obligations to the other with respect to the matters referred herein unless and until a definitive agreement has been fully executed and delivered by the parties. The parties agree that this letter/proposal is not intended to create any agreement or obligation by either party to continue negotiations, including without limitation any obligation to negotiate in good faith or in any way other than at arm's length. Prior to delivery of a definitive executed agreement, and without any liability to the other party, either party may (1) propose different terms from those summarized herein, (2) enter into negotiations with other parties and/or (3) unilaterally terminate all

negotiations with the other party hereto."

¶ 8 The Milwaukee Property

¶ 9 The record reveals that in January 2008, the Cherretts were also considering a property located at 1669 – 1681 North Milwaukee Avenue (Milwaukee property) as the location for their day care. In relation to that property, they were working with a broker named Marybeth Fallico.[2] On January 12, 2008, Fallico drafted a LOI for the Milwaukee property. However, at that time, negotiations did not lead to a signed lease.

¶ 10 Terms of the Washington Property Lease

¶ 11 The record further reveals that on January 31, 2008, plaintiffs and Artemis entered into a 10-year lease for the Washington property. The lease reflects that Artemis shall occupy and use the building for a day care operation and "for no other purpose." The rent commencement date was August 1, 2008. The lease further provides, *inter alia*:

> "The Lease is contingent upon Tenant obtaining all licensing required to lawfully occupy and use the Premises as a licensed day care center. In the event Tenant is unable to procure such license prior to the Rent Commencement Date and the Tenant notifies the Landlord in writing of its failure to procure then Tenant may declare the Lease terminated without default and Tenant will turn possession of the Premises back to Landlord and Landlord shall refund the security deposit to Tenant if Tenant has not otherwise breached the lease and thereby entitled Landlord to retain the security deposit."
>
> ***
>
> "BROKERS. Tenant represents and warrants to Landlord that neither Tenant nor its

[2] Fallico is now married and has changed her last name. For purposes of this order, we will refer to her as Fallico.

> officers or agents nor anyone acting on Tenant's behalf has dealt with any real estate brokers other than CB Richard Ellis, Inc., and BKB Commercial and Land Corporation to whom any commissions due shall be paid by Landlord. Tenant agrees to indemnify, defend and hold harmless Landlord and Agent for Owner from the claim or claims of a broker or brokers (other than CB Richard Ellis, Inc. and BKB Commercial and Land Corporation) claiming to have interested Tenant in the Building or claiming to have caused Tenant to enter into this Lease."

In addition to the lease, the Cherretts signed a "Guaranty," which provided, in pertinent part, as follows:

> "[T]he Guarantor hereby gurantees the payment of the rent and all other sums to be paid by the Tenant and the performance by the Tenant of all the terms, conditions, covenants and agreements of the Lease, and the undersigned promises to pay all the Landlord's expenses, including reasonable attorneys' fees, incurred by the Landlord in enforcing this Guaranty."

¶ 12 Listing Agreement & Commission Payments

¶ 13 The record further reveals that in March 2007, Denny signed an exclusive leasing listing agreement with CBRE in relation to the Washington property. This agreement provided that plaintiffs would pay CBRE a leasing commission which "shall be payable on execution of a lease."

¶ 14 CBRE submitted a commission invoice to Denny on January 30, 2008, the day before the Washington Property lease was executed, and Denny paid that invoice on February 12, 2008. The CBRE invoice reflects a "total amount now due to CBRE" of $102,255, and that this amount

is broken down to $34,085 for CBRE's portion of the commission, and $68,170 for "tenant advisory services." On January 31, 2008, Calabria sent an invoice for $34,085 to CBRE for his portion of the Washington property commission, and Borkan sent CBRE an invoice for that same amount on February 7, 2008. CBRE paid those invoices out of the commission payment it received from Denny.

¶ 15 Parking Requirements

¶ 16 The record further reveals that section 17-10-207E of the Chicago Zoning Ordinance, which covers certain businesses including day care centers, requires all day care centers to have "1 parking space per 3 employees + additional parking and drop-off spaces as determined by the Department of Zoning and Land Use Planning." In March 2008, the Artemis defendants alerted plaintiffs of this requirement and the fact that the Washington property currently did not meet it. In a March 24, 2008, e-mail to Michael Whelton, one of plaintiffs' employees, Norman stated that the Cherretts would need to submit an application for a variance to allow them to use parking that did not meet the requirements, and a board of appeals would decide whether to grant it. Norman stated that "we are taking all steps on our side to rectify the issue, but this project could be in jeopardy," and that no permits will be granted until the issue is resolved.

¶ 17 In a March 27, 2008, e-mail to Adams, Norman stated that this parking requirement did not exist at the time he and Alicia opened their first day care location, and described his efforts to resolve the parking issue, which included attempting to rent parking spots at a nearby parking lot. Norman also stated that he met with Alderman Walter Burnett, who gave Artemis a letter of support. The letter is addressed to the zoning board of appeals and states: "The above referenced day care center does not have the required parking requirements pursuant to Section 17-10-207E

of the Chicago Zoning Ordinance. In lieu of this the facility owners will be making arrangements for off-site parking. I am ok with this arrangement."

¶ 18 The record further reveals that after he was alerted to the parking issue, Denny recommended that the Cherretts work with zoning attorney Jim Banks. The Cherretts spoke with Banks, who told them that their chances of succeeding through the appeals process were 50/50. On April 13, 2008, the parties met to discuss various issues, including parking/zoning. In attendance were the Cherretts, a representative from their attorney's office, Adams, Denny, and his attorney. The meeting ended with no resolution relating to the parking issue.

¶ 19 The Termination Letter

¶ 20 The following day, April 14, 2008, the Artemis defendants sent plaintiffs a letter, signed by Alicia, invoking the licensing contingency provision contained in the lease, and declaring the lease "terminated without default." They stated that they had been unable to procure all licensing required to lawfully occupy and use the premises prior to the rent commencement date and that "as you are aware from our recent discussions the appeals process and variance required to address the parking issue and thereby procure permits will take at least four months." The Artemis defendants further stated that they would be willing to continue with the lease if plaintiffs agreed to an addendum that called for, *inter alia*, rent commencing three months following all variance/appeals processes resulting in approval of building permits, and for plaintiffs to bear the cost of the zoning appeals/variance process. The Artemis defendants asked that plaintiffs respond by April 18, 2008, if they were interested in the changes to the lease. In the event the suggested changes were not acceptable to plaintiffs, the Artemis defendants requested the return of their security deposit. Plaintiffs did not respond within that timeframe.

¶ 21 The Milwaukee Property

¶ 22 The record reveals that sometime in April 2008, the Cherretts turned their attention back to the Milwaukee property. However, rather than work with Fallico, they asked Borkan to serve as their broker. A broker at Baum Realty Group, who served as the broker for the Milwaukee property's owner, sent a draft LOI to the Cherretts on April 25, 2008, and Alicia signed it on April 29, 2008. A disagreement regarding broker commissions subsequently ensued, however, it was agreed that Borkan and Fallico would share commissions relating to the Milwaukee property. The Cherretts signed a lease for the Milwaukee property in July 2008. However, shortly thereafter, they discovered that this property was the subject of foreclosure proceedings, and, as a result, the lease was terminated. A judgment of foreclosure relating to the Milwaukee property was entered in September 2008, and a bank purchased the property pursuant to a judicial sale. Sometime in 2009, the Cherretts once again entered into a lease for the Milwaukee property.

¶ 23 Post-Washington Property Lease Termination Communications

¶ 24 The record reveals that after the Artemis defendants sent plaintiffs the termination letter, the parties remained in communication and disagreed about the status of the lease. In a May 1, 2008, e-mail to Adams and Denny, Norman stated that "the deal is dead," and inquired when the security deposit would be returned. Later that same day, Denny responded via e-mail and stated that the Cherretts were still obligated under the lease and that he had agreed to provide them with parking spaces in a parking lot that is already "spoken for" by other tenants who have already signed a lease for the entire parking lot. Denny further stated, "[i]f you have found a better location for your business, please do me the courtesy of being honest and forthright" and asked that, if that was the case, they reimburse him $138,000 for various costs, including broker commissions paid to Borkan and Calabria.

¶ 25 On May 7, 2008, plaintiffs' attorney, Michael O'Conner, sent a letter to the Artemis defendants, stating that the landlord "does not accept the tenant's termination of the lease and demands that the tenant [] fully perform [its] obligations under the lease." He further stated that plaintiffs believed that the tenant had simply decided to locate its business elsewhere. On May 12, 2008, Joel Goldblatt, the Artemis defendants' attorney, responded to O'Conner's letter and stated that the Artemis defendants consider the lease terminated without default, and requested the immediate refund of the security deposit.

¶ 26 Borkan's suit against the Cherretts

¶ 27 The record further reveals that in 2009, Borkan filed suit against the Cherretts, alleging that as their broker, he was entitled to commissions for the Milwaukee property. He raised claims of breach of duty to pay commission, *quantum meruit*, conversion, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. This litigation resulted in a settlement agreement whereby the Cherretts paid Borkan $25,000.

¶ 28 The Current Litigation

¶ 29 In 2011, plaintiffs filed an action solely against the broker defendants. They subsequently added the Artemis defendants, and, in their fourth amended complaint, raised the following counts against the various defendants: Count I – Breach of Contract against Artemis; Count II – Breach of Contract against the Cherretts; Count III – Breach of Contract against Borkan and Calabria; Count IV – Unjust Enrichment against all defendants (pled in the alternative to Counts I through III); Count V – Fraudulent Concealment against all defendants except Calabria; and Count VI – Tortious Interference with a Contract against Borkan.

¶ 30 In their fourth amended complaint, plaintiffs alleged, *inter alia*, that at the coffee shop meeting in December 2007 (1) Borkan verbally agreed that he would return the commission

monies paid to himself and Calabria in the event that Artemis did not execute the lease, take possession of the property, and/or if the Artemis defendants defaulted under the lease; and (2) the Artemis defendants verbally agreed that they would ensure and oversee Borkan and Calabria's return of their advanced commission monies in the event that Artemis did not execute the lease, take possession of the property and/or if the Artemis defendants defaulted under the lease. Plaintiffs further alleged that in separate conversations with Calabria, he also promised to return commission monies under the same circumstances as Borkan.

¶ 31 Plaintiffs further alleged that it is the customary practice of landlords to pay commission monies to its own broker and for the landlord's broker to share those commissions with a broker who introduces a tenant to a given leased space. Plaintiffs alleged that it is their custom and practice to not allow a tenant broker to be paid any commission monies in advance of possession or a waiver of a right to terminate provision, but that they were induced to prematurely tender commission monies to Borkan and Calabria based on the previously mentioned verbal agreement and subsequently drafted LOI.

¶ 32 Plaintiffs further alleged that although the LOI was only signed by Artemis and plaintiff, Borkan and Calabria also agreed to be bound by it and that in submitting invoices for commission payments, Borkan and Calabria were agreeing to the terms of their alleged verbal agreement to return the commission monies under certain circumstances. Plaintiffs further alleged that Borkan and the Artemis defendants "secretly devised a plan" to use the parking issue to create and declare a pretextual breach of the Washington property lease.

¶ 33 The broker defendants subsequently filed a motion for summary judgment as to the counts against them, and the Artemis defendants filed a separate motion for summary judgment as to the counts against them. All defendants relied, at least in part, on the statute of frauds as a

defense to some of the claims against them. In support of their motion, the broker defendants submitted the discovery depositions of Denny, Borkan, Calabria, Norman, Alicia, Goldblatt, and Fallico. In support of their motion, the Artemis defendants also relied upon Norman's affidavit.

¶ 34 In his affidavit, Norman averred that neither he nor Alicia ever verbally, or in writing, agreed to pay commissions to Borkan or Calabria in connection with the Washington property or agreed to reimburse plaintiffs for any commissions paid to any of the brokers. Norman further averred that pursuant to the lease, the Washington property would be "built-out" to suit Artemis' needs, and, after the lease was signed, Artemis' architect began drafting plans for the build-out. Norman averred that in March 2008, the architect brought those plans to the City of Chicago to obtain building permits. Based on the architect's meeting with the city, Norman learned for the first time that the Washington property did not comply with the parking requirements of Section 17-10-207E of the Chicago Zoning Ordinance, and it was his understanding that Artemis was unable to obtain building permits as a result thereof.

¶ 35 Norman further averred that he alerted plaintiffs of the parking issue via e-mail on March 24, 2008, and in a March 27, 2008, e-mail, also informed them that the Department of Zoning notified him that a variance would be needed, which could take an additional four months. Norman averred that it was his understanding that Artemis would need to obtain sufficient parking near the Washington property before it could seek a zoning variance from the zoning commission. Banks advised him that this process could take several months and had a 50/50 chance of success. Norman averred that he tried to locate parking that would satisfy the City's ordinance, and was able to secure parking from a company called Heat Valet, LLC. He obtained a letter from the local alderman in support of a zoning variance based on the Heat Valet contract. However, when this contract was "run by the City," Norman was informed that it was

insufficient because it was not for the full term of the Washington property lease. Heat Valet informed him that it could not agree to a longer term since it was itself a lessor. Norman then approached the owner of the Heat Valet lot, but he refused to enter into a lease that could encumber his ability to develop the property.

¶ 36 Norman further averred that despite his efforts to resolve the parking issue, by April 14, 2008, it was clear that a solution would not be reached by May 1, 2008.[3] Accordingly, assuming they could even find off-site parking, the Artemis defendants were in a position where they would have to wait several months to see if a variance would be granted, and risk being bound to a long-term lease for space they could not use if in fact the variance was not granted. The Artemis defendants thus terminated the lease on April 14, 2008.

¶ 37 Norman further averred that the Artemis defendants were not looking for alternative properties to rent until the Washington property lease was terminated. Even at that point, they tried to work out another lease with plaintiffs because they did not want to lose the Washington property or all the money and time they had put into it. However, those discussions went nowhere because plaintiffs demanded that they abandon the licensing contingency, which was something the Artemis defendants could not do.

¶ 38 At his discovery deposition, Denny acknowledged that he paid the entire Washington property commission to CBRE with the understanding that it would then pay roughly 60 to 70 percent of the total commission to Borkan and Calabria, the procuring brokers. He described this practice as "standard protocol." Denny acknowledged that commission agreements can be verbal, and testified that he is unaware of any obligation by the Artemis defendants to pay commission to Borkan and Calabria in relation to the Washington property.

¶ 39 Denny further testified that at the December 2007 coffee shop meeting, Borkan made a verbal agreement "to repay the commissions if there was any reason why this ever became turbulent and the Cherretts never occupied the space and paid their rent." This verbal agreement was the only reason Denny "agreed to go forward," so he instructed Adams to include it in the LOI. Although Calabria never stated that he would repay his commission, Denny assumed that Borkan could legally speak for Calabria because they were partners on the deal. Denny testified that although he does not consider the LOI to be binding, he would "carve out," the commission component, which he does consider to be binding in spite of the disclaimer language in the LOI. Denny testified that he authorized CBRE to pay commissions to Borkan and Calabria based on the verbal agreement from the coffee shop meeting.

¶ 40 Denny further testified that at the December 2007 coffee shop meeting the Cherretts verbally agreed to repay commissions if anything came to pass that would jeopardize the rent stream associated with their occupancy. Denny's understanding was that the Cherretts would personally guarantee the return of the commissions if the lease did not go through, but he testified that he could not recall specific details of the Cherretts' verbal agreement or whether the Cherretts verbally agreed or merely nodded their heads in assent. Denny testified that he felt comfortable with everyone's acknowledgment and understanding of the agreement.

¶ 41 Denny acknowledged that the lease contained a licensing contingency and that as of April 14, 2008, the Artemis defendants did not have the proper zoning for use of the Washington property as a licensed daycare facility. Denny testified that he would not expect the Artemis defendants to be bound by a lease without being able to secure a business license. Denny acknowledged that he does not know whether Banks, the zoning attorney he recommended to the

[3] We note that although Norman refers to May 1, 2008, the Washington property lease reflects that the rent commencement date was August 1, 2008.

Cherretts, could have gotten a variance for them and in what timeframe, and that Banks told the Cherretts that they had a 50/50 chance of obtaining one. Denny testified that he would have told the Cherretts to ignore Banks' statements and trust that the zoning would get done in time.

¶ 42 Denny further testified that he did not see a tremendous amount of activity or initiative on the part of the Cherretts or their brokers toward resolving the parking issue in good faith, and saw no effort to do so on the part of Goldblatt. In his opinion, obtaining a zoning variance is an uncomplicated procedure, but acknowledged that he did not have an understanding that the alderman could guarantee that the zoning appeals process would go in the Cherretts' favor. Denny further testified that after the Artemis defendants submitted the termination letter, he offered to provide parking spaces, but they refused his offer. Denny could not recall if the parking spaces he offered were leased to another party at that time, but testified that he was optimistic that he could make those spaces available even if they were encumbered. Denny testified that he believes that the Cherretts were working on the Milwaukee property LOI at the same time they were working on the Washington property termination letter.

¶ 43 Denny further testified that he would expect tenants to view multiple properties in searching for a location. Denny testified that he does not know when Borkan became aware of the Milwaukee property and acknowledged that he did not have any evidence with regard to when Borkan first became aware that the Cherretts were looking at that property, but testified that he has "a great belief and opinion" that Borkan is unethical. Denny testified that he has not sued CBRE, which paid back its portion of the Washington property commission indirectly, such as by making concessions in subsequent deals. Pursuant to plaintiffs' contract with it, CBRE was not required to pay back commissions if the Washington property lease was terminated.

¶ 44 Borkan testified at his discovery deposition that nothing pertaining to commissions was agreed to at the December 2007 coffee shop meeting. He assumed that his commission fee would be calculated pursuant to the contents of an unsigned proposal dated September 26, 2007, which reflected a commission amount of $1.00 per square foot. Borkan noted that the listing agreement between plaintiffs and CBRE states that commission will be payable if a lease is signed, and testified that he believes he earned his commission because he helped deliver a signed lease. He also showed the Washington property, sent proposals, and coordinated what needed to be done between the parties. Borkan further testified that he did not play a role relative to the parking issue, as it was not one of his areas of expertise, and that he never told Goldblatt that he would return the commission money to plaintiffs.

¶ 45 Borkan further testified that he first became involved in the solicitation of the Milwaukee property on or about April 14, 2008. In relation to that property, Borkan had a written commission agreement with the landlord's broker which detailed the conditions under which he would receive his commission. Borkan was not asked to sign such a document relative to the Washington property. Borkan further testified that although he did not have a contractual commission agreement with the Cherretts in relation to the Milwaukee property, he sued them because he felt they treated him unfairly.

¶ 46 Norman Cherett testified at his discovery deposition that he and Alicia did not investigate parking or zoning before signing the Washington property lease because parking had not been an issue at their first location. They had the City Department of Building's daycare task force visit the Washington property to assess whether it would be an appropriate location for a day care, then gave the task force's findings to Pam Hutter, their architect, to implement into the plans. When Hutter submitted the plans to city hall for approval, the city requested a parking

determination and it was at that point that the specific parking requirements were determined. Norman first learned of the parking issue sometime in March 2008, when Hutter informed him that the city would not approve their plans.

¶ 47 Norman reiterated what he had averred in his affidavit regarding his efforts to find viable parking options, his agreement with Heat Valet, the reasons the city rejected that agreement, and the reason the owner of those parking spots refused to enter into a contract with Artemis. Norman further testified that he looked for other viable options, but found nothing that would meet the city's requirements. There was a parking lot behind a building adjacent to the Washington property, however, Denny told them that those spots were not available because he was already leasing them to someone else.

¶ 48 It was Norman's understanding that Goldblatt was going to look into what the Cherretts needed to do relating to appealing the City's decision. However, Goldblatt did not actively pursue anything because the timeline to appeal the decision would have taken six months. Norman reiterated what he averred in his affidavit regarding the timeline to appeal the decision, the choice the Cherretts had to make, what Banks told them about their chances of succeeding in an appeal, and what prompted their decision to terminate the lease.

¶ 49 Norman further testified that he had a conversation with Borkan and at that time Borkan told him that it was his intent to make sure that Denny got his commission money back. The Cherretts believe all of the brokers, including CBRE, should have returned the Washington property commission money. The Cherretts settled with Borkan in his lawsuit relating to the Milwaukee property purely for financial reasons. Norman further testified that it was his understanding that Borkan would honor the LOI commission provision.

¶ 50 Norman further testified that he and Alicia initially worked with Fallico under the misimpression that she was the person to whom they had been referred by their banker. She showed them numerous properties, and they reached the LOI stage on several of those properties, including the Milwaukee property, but it never went further than that. The Cherretts realized that Fallico was not suited for their needs. Norman further testified that he and Alicia did not pursue the Milwaukee property again until after they terminated the Washington property lease. Borkan became involved with the Milwaukee property after the Washington property lease was terminated. A second meeting with Denny had been proposed, and at the time such a meeting was being discussed, they had already signed the Milwaukee property LOI.

¶ 51 Alicia Cherrett testified in her discovery deposition that she never entered into a verbal agreement with Denny relative to commission, or, as far as she can recall, into a written agreement. She testified that she does not know how the commission section in the LOI came to be and acknowledged that she read the entire LOI before she signed it. At the time the LOI was signed, it was not the city's requirement to perform a parking determination before plans are submitted. Alicia further testified that Norman and Hutter were the ones who primarily dealt with the Washington property licensing issue. Alicia could not recall when the parking issue first arose, but testified that it was sometime after the Washington property lease was signed. Her recollection of the efforts they made to resolve the parking issue included speaking with the alderman, looking at various potential off-site parking locations, and speaking with plaintiff.

¶ 52 Alicia testified that at the April 13, 2008, meeting with Denny, the Cherretts asked Denny for parking spots and he refused to provide them because the spots were already committed to someone else. The Cherretts terminated the lease after that meeting because they did not want to risk being stuck with a property that they would not be able to use as a day care. Due to their

experience with the Washington property, the Artemis defendants now include a parking provision in their LOIs. One was included in the Milwaukee property LOI. She believes the brokers should return the commission payments. Alicia further testified that Borkan did not become involved with the Milwaukee property until immediately after termination of the Washington property lease. Prior to that point, Borkan had no knowledge of the Milwaukee property deal.

¶ 53 Joel Goldblatt testified at his discovery deposition that he negotiated the Washington property lease on behalf of the Artemis defendants. The parking issue was discovered as part of the early process of seeking the license to occupy the Washington property, and it was his recollection that the Cherretts handled the discussions with the city. He was not personally involved in substantive efforts to resolve the zoning/parking issue because he was not hired for that purpose, however he thinks Borkan was actively involved in those efforts.

¶ 54 Goldblatt further testified that in late March 2008, the Cherretts began thinking about terminating the Washington property lease if they could not legally use the space. Denny would not give the Cherretts time to get a variance, and, without that additional time, the Cherretts would be at risk as they would be "on the hook" for a property without knowing if they ultimately be able to obtain a license.

¶ 55 Goldblatt further testified that at the time there was discussion with Denny regarding the possibility of setting a second meeting pertaining to the Washington property, the Milwaukee property was only in the LOI stage, and was not final. Goldblatt does not recall having knowledge that Borkan said he was working with Denny to return the commission. Goldblatt further testified that the Artemis defendants' reason for terminating the lease was not pretextual

and the parking issue was not something that could have been resolved by the alderman. He believes the Artemis defendants engaged in good faith negotiations with plaintiffs.

¶ 56 Scott Calabria testified at his discovery deposition that he asked Borkan to become involved with the Washington property deal because he valued Borkan's expert opinion and needed his help with the financial components of the deal. Calabria testified that he and Mitch Adams spoke briefly about the Washington property commissions over the phone sometime after initial discussions began. During that conversation, he asked Adams if commissions would be the "industry standard" and Adams said "yes."

¶ 57 Calabria further testified that he does not know who drafted the commission section in the Washington property LOI, and he did not see a signed version of it until after litigation began. He has not returned the commission money because he earned it by providing an executed lease between the tenant and the landlord. Calabria further testified that at no time did the Cherretts owe him or Borkan a commission. His involvement with the Washington property essentially ended after the lease was signed and he was not involved in trying to resolve parking and zoning issues. Calabria testified that he had no involvement with the Milwaukee property.

¶ 58 Fallico testified at her discovery deposition that in 2007, she worked for Prudential Preferred Properties, and, toward the end of December 2007, she began working with the Cherretts on a potential lease for the Milwaukee property. At that time, the Cherretts did not tell her they were also looking at the Washington property. On January 14, 2008, she drafted a LOI on the Milwaukee property, but the Cherretts made a very "lowball" offer, and she was unable to put a deal together at that time. Although the Milwaukee property deal "kind of died," in her opinion it was "kind of just always open." For example, if the property were still available a year

later, "you could still do it." In March 2008, she was under the impression that she was still pursuing the Milwaukee property and was "in the loop" in the Cherretts' search for properties.

¶ 59 Fallico further testified that the Cherretts did not involve her in the April 2008 LOI for the Milwaukee property. Although when asked when Borkan's name first "came up" in relation to the Milwaukee property, Fallico initially testified "maybe in like March," she further testified that she could not recall a specific date off the top of her head. She further testified that if she had to guess "maybe it was April" when she first heard that Borkan was involved in the Milwaukee property deal, but that it was so long ago "who knows." Fallico further testified that through an e-mail exchange with the Cherretts that took place on June 3, 2008, she first learned that they wanted to involve another broker in the Milwaukee property deal. On that date, Fallico told the Cherretts via e-mail that she believed she deserved a commission on the Milwaukee property. She received an e-mail in response from Norman in which he stated he did not want to be associated with her. Fallico testified that she believes that Norman's e-mail was his attempt to back her out of the deal and scare her off so they would not have to pay her. She thinks Norman is a "real jerk" and thinks that making such a low offer on the Milwaukee property was part of a plan to back her out of the deal. Fallico further testified that she did not have a written commission agreement with the Cherretts because brokers do not sign them with the buyers or tenants, rather, it is the landlord who pays commissions.

¶ 60 Fallico further testified that her managing broker, Dennis Dooley, spoke with Borkan and they agreed to a commission split on the Milwaukee property. Fallico started a new job in December 2008, and it was her understanding that no one would receive a commission on the Milwaukee property because it was going into foreclosure. Fallico was shown a July 12, 2009, e-mail in which Borkan asked Dooley whether Prudential Preferred was going to join in his

litigation pertaining to the Milwaukee property, as well as Dooley's response indicating that it would not. Fallico testified that this information was never communicated to her.

¶ 61 On October 29, 2014, following a hearing on the broker defendants' and the Artemis defendants' motions for summary judgment, the circuit court granted summary judgment in favor of the broker defendants as to all counts against them, as well as granted summary judgment in favor of the Artemis defendants as to counts IV and V, and partial summary judgment in their favor as to Counts I and II. In doing so, the court found that a question of fact existed pertaining to whether or not there was a default on the lease.

¶ 62 The Artemis defendants filed a motion for reconsideration of the court's denial of their motion for summary judgment with respect to the breach of lease portion of Counts I and II. Therein, they argued that the court had misapplied the law due, in part, to plaintiffs' counsel's erroneous argument at the summary judgment hearing that unspecified documents or testimony created an issue of material fact. Plaintiffs filed a motion to strike the motion for reconsideration as improper, arguing that the Artemis defendants were using the motion to reconsider as an opportunity to "amend and correct its previously filed motion for summary judgment with pre-existing law and facts that they failed to originally argue/assert."

¶ 63 On December 11, 2014, the trial court denied plaintiffs' motion to strike. Following a hearing on the motion for reconsideration, the court granted that motion and entered summary judgment in the Artemis defendants' favor on the remaining portions of Counts I and II. In doing so, the court stated that it had re-examined its prior ruling "under the basis of the misapplication in the law." Plaintiffs filed a notice of appeal on December 17, 2014.

¶ 64 Thereafter, on January 12, 2015, the broker defendants filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013) against plaintiffs, arguing that

they filed suit without a good faith legal or factual basis, and that their counsel made false representations to the court. The trial court denied that motion on February 19, 2015, finding that although it disagreed with plaintiffs' position in this case, they presented an objectively reasonable argument in support thereof. The broker defendants filed a notice of appeal from that ruling, and this court consolidated the two appeals. We first address plaintiffs' appeal from the entry of summary judgment in favor of the broker defendants and the Artemis defendants on all counts of their Fourth Amended Complaint.

¶ 65 ANALYSIS

¶ 66 Summary judgment is proper where the pleadings, admissions, affidavits and depositions on file reveal that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Bruns v. City of Centralia*, 2014 IL 116998; ¶ 12. In determining whether an issue of material fact exists, the court must construe the pleadings and evidentiary materials in favor of the non-moving party. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). We review the circuit court's entry of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 67 Breach of Contract (Artemis) – The Washington Property Lease

¶ 68 In Count I, plaintiffs allege that Artemis is in breach of the letter of intent and a verbal agreement which contractually required it to either oversee the return of Borkan and Calabria's commission payments or to return the money itself. Plaintiffs further allege that Artemis is in breach of the lease for failing to accept the tenancy and pay rent. We first address whether the evidence supports a conclusion that Artemis is in breach of the lease.

¶ 69 The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the

defendant; and (4) resulting injury to the plaintiff. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27. This applies whether the contract at issue is oral or written. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68. Although a plaintiff is not required to prove each element of their claim at the summary judgment stage, in order to survive such a motion, the nonmoving party must present a factual basis that would arguably entitle him or her to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002).

¶ 70 The question here is whether Artemis breached its lease with plaintiffs. It is uncontested that the lease specifies that it is contingent upon Artemis obtaining all requisite licensing to conduct a day care business on the premises. In his deposition, Denny acknowledged that as of April 14, 2008, the date Artemis sent the termination letter, it did not possess that requisite licensing. Accordingly, pursuant to the terms of the lease, Artemis was able to declare the lease terminated without default. Plaintiffs, however, maintain that because Artemis terminated the lease due to its inability to secure sufficient parking, it could not invoke the licensing contingency to terminate the lease without default. In so arguing, plaintiffs contend that the licensing contingency is very "basic" and it would be improper to construe it as a parking contingency.

¶ 71 In construing the provisions of a contract, our primary objective is to give effect to the intent of the parties at the time the contract was made. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). In doing so, we ascertain the parties' intentions from the language contained in the contract. *Id.* If the contractual language is clear and unambiguous, we must determine the parties' intentions " 'solely from the plain language of the contract' and may not consider extrinsic evidence outside the 'four corners' of the document itself." *Id.* (quoting *Omnitrus Merging Corporation v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 34 (1993)).

Additionally, clear and unambiguous contractual language should be given its plain and ordinary meaning. *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 72 Here, the licensing contingency expressly and clearly states that the lease is contingent upon Artemis obtaining "all licensing required to lawfully occupy and use the premises as a licensed daycare center" and that in the event Artemis was unable to procure such license prior to the rent commencement date, it may declare the lease terminated without default so long as it notified plaintiffs in writing. We note that this provision appears in the first paragraph of the lease and rather than being entitled "licensing contingency" or "parking contingency," it bears no title whatsoever. Further, the language contained in this provision is very broad in that it refers to "all licensing required to occupy and use the premises as a licensed day care center." Many different factors could have impacted Artemis' ability to procure a license, and rather than specify each of those potential situations, or expressly limit its application to only certain scenarios or situations, this provision clearly states that it applies to "all" licensing that is required to "lawfully occupy and use" the premises as a licensed day care center. We find nothing ambiguous about this language. Here, it is uncontested that (1) section 17-10-207E of the zoning ordinance governs parking for day care centers; (2) the Washington property did not meet this sections' requirements; and (3) as a result thereof, as of April 14, 2008, the date the Artemis defendants terminated the lease in writing, they did not possess the requisite license to run a day care business on the premises. We thus find that Artemis could properly invoke the licensing contingency in this case.

¶ 73 That said, we agree with plaintiffs that the Artemis defendants were required to exercise the licensing contingency in a reasonable manner. Were that not the case, then the Artemis

defendants could conceivably engage in no efforts whatsoever to procure the necessary licensing, then declare the lease terminated without default due to their own failure to act. To prevent such scenarios, "Illinois courts have recognized that a party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract." *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004). This implied covenant requires that where the terms of a contract grants one of the parties with broad discretion in performing a term of the contract, the party exercise that discretion " 'reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.' " *Id.* (quoting *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993)).

¶ 74 Here, the lease contained a contingency which gave the Artemis defendants the discretion to terminate the lease if they were unable to obtain licensing to run a day care at the Washington property. As previously mentioned, this discretion was quite broad, as the contingency did not contain language limiting its application to only certain scenarios. Accordingly, we find that pursuant to the implied covenant of good faith and fair dealing, the Artemis defendants were required to exercise their discretion in a reasonable manner and not arbitrarily.

¶ 75 We further find that plaintiffs have failed to present evidence showing that the Artemis defendants exercised their contractual discretion unreasonably and arbitrarily. The record shows that the Artemis defendants first found out about the parking requirements sometime in March 2008, after their architect met with the city to obtain approval for the "build out" of the premises and those plans were rejected due to the Washington property's failure to meet the zoning ordinance's parking requirements for day care centers. Norman and Alicia testified that they did not look into parking requirements prior to this point in time because parking had not been an

issue with their first day care location, and these parking requirements were not in effect at that time. Thus, at the time they signed the Washington property LOI and lease, they did not know that parking could be an issue.

¶ 76 The record further shows that upon finding out about the parking requirements and the Washington property's failure to meet them, Norman notified plaintiffs and also told them that no permits would be issued until the issue was resolved. Norman also informed plaintiffs that in order to use parking that did not meet the requirements, the Artemis defendants would need to seek a variance, and that this process could take months. In his affidavit, as well as his deposition testimony, Norman detailed his efforts to resolve the parking issue. Those efforts included speaking with the alderman and obtaining a letter of support from him, entering into a contract for off-site parking spots with Heat Valet, attempting to negotiate with the owner of those spots after that contract was rejected by the city, and searching for other potential off-site parking spots. Notably, plaintiffs do not contest that Norman engaged in these efforts on behalf of Artemis, but rather, point out that Denny testified that he did not believe that the Artemis defendants were "diligent" in their efforts to resolve the parking issue. In doing so, they have cited no authority, nor have we found any, to support a contention that such a personal belief, on its own, constitutes evidence sufficient to show that a defendant has exercised his contractual discretion arbitrarily and unreasonably.

¶ 77 Norman and Alicia both testified that when their efforts to resolve the issue proved to be unsuccessful, they were left in the position of either seeking a variance and running the risk that it would not be approved, or exercising their right to terminate the lease without default due to their inability to secure a business license prior to the rent commencement date. Further, Denny acknowledged that Banks, the zoning attorney to whom Denny referred the Cherretts, told them

that their chances of being successful in seeking a parking variance were 50/50. Denny testified that he would have advised the Artemis defendants to disregard what Banks told them, and move forward with the lease. Although this scenario would certainly have been more beneficial for plaintiffs, the implied covenant of good faith and fair dealing "does not require a party with discretion to forbear from exercising its rights to terminate a contract for the benefit of the other party to the agreement. Parties are entitled to enforce the terms of their negotiated contracts to the letter without being mulcted for lack of good faith." *Id.* at 166. In sum, we find that the evidence does not support plaintiffs' contention that the Artemis defendants breached the implied covenant of good faith and fair dealing.

¶ 78 In reaching this determination, we have considered Denny's testimony that he offered parking spots to the Artemis defendants, but they refused his offer. We note that in his May 1, 2008, e-mail to Norman, Denny stated that the parking spots he was offering were already "spoken for" by other tenants who had already signed a lease for the entire parking lot. Although at his deposition Denny testified that he did not know whether those spots were already leased to another party, and that he was "optimistic" that he could "make those spots available" if they were encumbered, the fact remains that he informed the Artemis defendants in writing that the spots he was offering were in fact already leased to another party. Norman and Alicia both testified that when they inquired about these particular spots, Denny told them they were not available because they were already leased to another party. Accordingly, we find that the fact that the Artemis defendants did not rely upon parking spots that they were told were already "spoken for" in making their determination is not unreasonable.

¶ 79 Further, although plaintiffs contend that the Artemis defendants intentionally schemed to use the parking issue as a pretext upon which to terminate the lease, plaintiffs have offered no

evidence of this aside from Denny's testimony pertaining to his opinions and beliefs. Once again, unsupported opinions and conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion. *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 495 (1998). Thus, Denny's opinions and beliefs of the motives behind the Artemis defendants' actions, without actual evidence supporting those beliefs, are insufficient. Accordingly, we find that contrary to plaintiffs' assertions, no question of material fact exists precluding entry of summary judgment on whether the Artemis defendants breached the lease.

¶ 80 Breach of Contract (Artemis defendants) – The LOI

¶ 81 In counts I and II, plaintiffs also contend that the Artemis defendants breached the LOI, which required that they oversee the return of the commission payments or personally return those funds. However, the LOI specifically states that it is non-binding. Plaintiffs contend that parol evidence should be considered to determine the true intent of the parties as to whether the disclaimer language in the LOI applies to the LOI as a whole, or whether it applies only to the "business terms," which, they maintain, would not include the commission provision. In so arguing, plaintiffs point out that Denny testified that although the LOI contained a disclaimer, he did not think it applied to the commission provision.

¶ 82 As previously stated, extrinsic evidence is not considered unless terms of a contract are ambiguous. *Owens*, 316 Ill. App. 3d at 344. Here, the language used in the disclaimer states that "this letter/proposal is intended solely as a preliminary expression of general intentions and is to be used for discussion purposes only" and that "neither party shall have any contractual obligations to the other with respect to the matters referred herein." Thus, the disclaimer unambiguously refers to the "letter/proposal" as a whole, and does not limit its application to

only certain portions of the LOI. Furthermore, nowhere in the LOI does it state that Artemis, or either of the Cherretts, is agreeing to personally return commission payments or to oversee the return of those payments. Accordingly we find that plaintiffs have failed to provide evidence that the LOI was a binding contract or that the Artemis defendants breached its terms, both of which are requisite elements of a breach of contract claim. Accordingly, no question of material facts exists precluding entry of summary judgment in the Artemis defendants' favor on plaintiffs' claim that they breached the LOI.

¶ 83 Breach of Contract (all defendants) – Verbal Agreement

¶ 84 In counts I and II, plaintiffs contend that the Artemis defendants are in breach of a verbal agreement to ensure the return of commission monies paid by plaintiffs to the broker defendants or to personally return the commission monies. In Count III, plaintiffs contend that the broker defendants breached a verbal agreement to return commission monies that were paid to them.

¶ 85 To establish a valid verbal agreement, a plaintiff must show that there was an offer, an acceptance, and a meeting of the minds as to the terms of the agreement. *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B, ¶ 67. Additionally, to be enforceable, the material terms of a contract must be definite and certain. *Id.*; see also *Vandevier v. Mulay Plastics, Inc.* 135 Ill. App. 3d 787, 791 (1985).

¶ 86 In their fourth amended complaint, plaintiffs alleged that at the December 2007 coffee shop meeting, the Artemis defendants verbally agreed that they would "ensure and oversee Borkan and Calabria's return of their advanced commission monies in the event that Artemis did not execute the lease, take possession of the property and/or if [the Artemis defendants] defaulted under the lease." Plaintiffs further alleged that at that coffee shop meeting, Borkan also verbally agreed to return the commission monies paid to himself and Calabria under those same

circumstances. Plaintiffs additionally alleged that in separate conversations with Calabria, he likewise promised to return the commission monies under the same circumstances as Borkan.

¶ 87 First, as to Calabria, Denny acknowledged that Calabria was not present at the coffee shop meeting where he contended the Artemis defendants and Borkan made their verbal agreements and further testified that Calabria never stated that he would repay his commission. Plaintiffs have submitted no additional evidence in support of their allegation that Calabria made any such verbal agreement, and thus we find that no question of material fact exists precluding entry of summary judgment on this portion of Count III on the basis that no enforceable verbal contract pertaining to the return of commission monies existed between plaintiff and Calabria.

¶ 88 Turning to the Artemis defendants and Borkan, plaintiffs' sole evidence of their alleged verbal agreements is Denny's testimony. At his deposition, Denny testified that the Cherretts verbally agreed to repay commissions "if anything came to pass that would jeopardize the rent stream associated with their occupancy." However, he further testified that he could not recall what Alicia or Norman stated relating to the verbal agreement or whether they voiced their assent or merely nodded their heads. As to Borkan, Denny testified that he verbally agreed "to repay the commission if there was any reason why this ever became turbulent and the Cherretts never occupied the space and paid their rent." Denny also referred to Borkan's purported verbal agreement as an agreement to be "on the hook for anything that went wrong." We find this testimony insufficient to show that the Artemis defendants entered into a verbal agreement to oversee the return of commission payments or to personally repay those funds or that Borkan entered into a verbal agreement to repay commission monies that had been paid to him and Calabria. This language is quite broad and we find that this testimony does not identify with certainty the material terms of the Artemis defendants' or Borkan's purported verbal agreements.

¶ 89 Further, to the extent the repayment in the purported verbal agreements was to be triggered by Artemis' default under the lease, as previously discussed, no breach or default under the lease occurred. Rather, Artemis exercised its contractual right under the licensing provision in the lease to terminate it without default due to its inability to procure the requisite business license after engaging in reasonable efforts to do so.

¶ 90 Plaintiffs assert that we should consider parol evidence in determining whether an oral contract existed, such as the LOI, which they contend "reflected the general understanding that the parties agreed to repay the commission monies pursuant to the coffee shop meeting/agreement." We note that nowhere in the LOI does it state that any of the Artemis defendants agree to repay broker commissions or oversee the return of those funds. Although the commission section of the LOI does refer to Borkan, as previously stated, the LOI in its entirety is a non-binding document.

¶ 91 Plaintiffs further contend that the invoices Borkan and Calabria submitted to CBRE for their portion of the commission payment, as well as their receipt of payment in the form of checks, are parol evidence that a verbal commission agreement existed between plaintiffs and the broker defendants. Notably, the broker defendants do not contest that their commission agreement with plaintiffs was a verbal one. Calabria testified that he spoke with Adams of CBRE and asked if commissions would be "industry standard and Adams replied "yes." Denny testified that commission agreements can be verbal. Thus, there appears to be no question that the broker defendants' commission payments were based upon a verbal agreement between them and CBRE. Plaintiffs, however, appear to be confusing a verbal commission agreement with a verbal agreement to repay earned commissions. These are two very different types of agreements. The existence of the former does not prove the existence of the latter.

¶ 92 We reiterate, Denny signed an exclusive listing agreement with CBRE. The parties do not assert that the broker defendants were a party to that agreement. Consistent with the listing agreement, upon execution of the lease, CBRE submitted an invoice to Denny and was paid the total amount of the broker's commission. Subsequently, each of the broker defendants invoiced CBRE, not plaintiffs, for their respective percentage of the commission and CBRE, not plaintiffs, paid them out of the total commission amount it had received. Although plaintiffs were aware of the brokers' verbal commission payment agreement, there is nothing in the record to indicate that plaintiffs were a party to that agreement. Notably, the listing agreement did not require CBRE to return the commission to plaintiff in the event the Washington property lease was terminated and we find no basis to conclude the existence of an oral agreement which would require the broker defendants to do so.

¶ 93 Statute of Frauds

¶ 94 As previously stated, in counts I through III, plaintiffs raised claims that the Artemis defendants, as well as the broker defendants, have breached verbal agreements to repay commissions. All of the defendants successfully raised the statute of frauds as a defense to those claims on summary judgment in the trial court below.

¶ 95 The Statute of Frauds, provides, in pertinent part, as follows:

> "No action shall be brought *** whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person *** unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (West 2014).

A suretyship "exists when one person undertakes an obligation of another person who is also under an obligation or duty to the creditor/obligee." See *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 576 (2007) (citing Restatement (Second) of Contracts § 112, at 292 (1981)). A surety contract falls under the Statue of Frauds where (1) the promisee is an obligee of an individual's duty, (2) the promisor is a surety for that individual, and (3) the promisee knows or should know of the suretyship. *Id.*

¶ 96 We first consider the claim in regards to the Artemis defendants, who plaintiffs alleged verbally agreed to ensure the return of, or personally return, commission monies plaintiffs paid to the broker defendants. Because those funds were not paid to the Artemis defendants, and plaintiffs are seeking the return of those funds, we find that this constitutes the debt of another. In other words, pursuant to their own allegations, plaintiffs are seeking to charge the Artemis defendants with a promise to answer for the debt of another. As such, the statute of fraud applies.

¶ 97 With that in mind, we note that plaintiffs have pointed to no writing signed by any of the Artemis defendants in which they agree to repay the commission funds that were paid to the broker defendants, or to oversee the repayment of those funds. Although Alicia signed the LOI, as discussed above, not only is that a non-binding document due to the disclaimer language, but the contents of the LOI do not include a promise by any of the Artemis defendants to repay or oversee the repayment of commissions. Thus, even if we were to assume that the Artemis defendants entered into a verbal agreement to repay the commissions, due to the lack of a signed writing by any of the Artemis defendants memorializing such an agreement, the verbal contract would be barred by the statute of frauds. [4]

[4] We note that plaintiffs point out that none of the defendants knew anything about the statute of frauds defense and deferred to their attorneys in their deposition testimony. Plaintiffs appear to imply that this in some way indicates that a question of material fact exists pertaining to the applicability of the statute of frauds. We disagree, as it is not entirely unusual for a party to be unfamiliar with legal theories and to defer to their legal counsel on those matters.

¶ 98 Plaintiffs nevertheless maintain that pursuant to the main purpose rule, the statute of frauds is inapplicable to the Cherretts' verbal agreement. Pursuant to the main purpose rule, when the " 'main purpose' " or " 'leading object' " of the promisor is to subserve or advance his own pecuniary or business interests, the statute of frauds does not apply. *Rosewood Care Center, Inc.*, 226 Ill. 2d at 572 (quoting P. Alces, Law of Suretyship and Guaranty § 4:19 (1996)). Factors to consider include, *inter alia*, the equivalence between the value of the benefit and the amount promised and the existence of a larger transaction to which the suretyship is incidental. *Id.* At 575. Here, Borkan and Calabira's commission payments, collectively, amounted to $68,170. Those commissions were paid in relation to a 10-year long commercial lease worth almost $1.4 million. Thus, we find that the broker defendants' commission payments were incidental to a much larger transaction. Further, as previously stated, the Artemis defendants bore no duty to pay commissions to the broker defendants. Thus, it was not in their pecuniary interest to agree to pay commissions that they would not otherwise owe under circumstances where they derived no benefit from making such an agreement. We thus find that this exception does not apply.

¶ 99 Plaintiffs also maintain that the full performance exception to the statute of frauds applies to the Artemis defendants' purported agreement. In *Brown & Shinitzky Chartered v. Dentinger*, 118 Ill. App. 3d 517, 519-20 (1983), this court found the full performance exception inapplicable in situations involving surety agreements, reasoning that "[a]n application of an executed contract exception to the surety provisions of the statute of frauds would render these provisions totally meaningless. A performing party in normal circumstances does not attempt to enforce a surety contract until after performance under the contract is complete and the primary debtor has failed to satisfy his obligation. We will not apply an exception to the statute of frauds provision requiring that a promise to answer for the debt of another be written which would destroy the

effect of that provision." *Id.* at 519-20. In accordance with *Brown*, we find that the full performance exception is inapplicable in this case.

¶ 100 Turning to the broker defendants, plaintiffs alleged that they "verbally agreed with [plaintiffs] to return all commission monies in the event that *Artemis* rejected the lease, did not take possession of the lease and/or otherwise defaulted under the lease." The Artemis defendants had no obligation to pay or refund the commissions in question, thus the alleged agreement did not charge the broker defendants with any debt that Artemis was obliged to pay. However, we need not further consider whether the verbal agreement was barred by the statute of frauds because, as already discussed, plaintiffs failed to sufficiently show that such an agreement ever occurred.

¶ 101 Unjust Enrichment – All Defendants

¶ 102 In Count IV, plaintiffs raised claims of unjust enrichment against the Artemis defendants and Borkan. "To prevail on a claim for unjust enrichment, a plaintiff must prove that the defendant 'retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates fundamental principles of justice, equity, and good conscience.' " *National Union Fire Insurance Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 67 (quoting *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989)).

¶ 103 As to the Artemis defendants, plaintiffs alleged that they were unjustly enriched in that plaintiffs paid commission to Borkan and Calabria, thereby relieving the Artemis defendants of their own contractual obligation to pay Borkan and Calabria a commission in relation to the Washington property. However, the only evidence plaintiffs rely upon in support of their contention that the Artemis defendants owed such a contractual commission obligation to Borkan and Calabria is the fact that the Cherretts paid a $25,000 settlement to Calabria in relation to the

suit he filed pertaining to the Milwaukee property. According to plaintiffs, this settlement served as an "acknowledgement" by the Artemis defendants that "it is their obligation to pay brokers." We disagree, as the record shows that no such contractual obligation on their part existed.

¶ 104 The fact that the Cherretts settled with Borkan in his Milwaukee property lawsuit does not mean that they did so because they owed a contractual commission duty to him. To the contrary, Norman testified that he and Alicia settled the lawsuit purely for financial reasons, and Borkan testified that he did not have a contractual commission agreement with the Cherretts in relation to the Milwaukee property. Further, even if the Cherretts had a contractual commission agreement with Borkan pertaining to the Milwaukee property, that would not mean that they had a comparable agreement with Borkan and Calabria pertaining to the Washington property. Denny testified that it is standard protocol for the landlord's broker to pay commissions to the tenant's brokers out of the commission payment they receive from the landlord, and that he is unaware of any obligation by the Artemis defendants to pay commission to the broker defendants in relation to the Washington property. Calabria testified that the Artemis defendants owed him no such obligation. Based on the foregoing, we find that plaintiffs have presented no evidence of a contractual obligation on the part of the Artemis defendants to pay commission fees to Borkan and Calabria relating to the Washington property. Thus, plaintiffs failed to show that the Artemis defendants retained a benefit of any kind in relation to the commission, and thus no question of material fact exists that would preclude entry of summary judgment in defendants' favor on this claim.

¶ 105 As to the broker defendants, plaintiffs alleged that they were unjustifiably enriched by retaining a payment that was "not earned" and which was secured in bad faith. At their depositions, Calabria and Borkan described what they did in their capacity the Artemis

defendants' brokers on the Washington property deal. These activities included showing the property, negotiating with plaintiffs' brokers, sending proposals, compiling financial information, coordinating logistics, and engaging in phone conversations. Notably, plaintiffs do not contest that the broker defendants engaged in these activities, but rather, rely solely upon Denny's testimony that he felt that the broker defendants had not "earned" their commission payments. As previously stated, unsupported opinions and conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion. *Davis*, 297 Ill. App. 3d at 495. Because plaintiffs presented no evidence supporting their allegations that the broker defendants were unjustly enriched, we find that no question of material fact exists that would preclude entry of summary judgment in the broker defendants' favor.

¶ 106 Fraudulent Concealment – The Artemis Defendants and Borkan

¶ 107 In Count V, plaintiffs allege that Borkan and the Artemis defendants knew that the Cherretts were soliciting alternative tenancy at the Milwaukee property in early 2008 through May 2008, which constitutes a material fact. Plaintiffs further allege that the Artemis defendants and Borkan intentionally concealed this material fact from plaintiffs during this time period, in spite of having a duty to advise them of it due to the landlord-tenant relationship and "the commission agreement with Borkan, Calabria, the Cherretts and Artemis."

¶ 108 To state a claim for fraudulent concealment, a plaintiff must allege, *inter alia*, that the defendant concealed a material fact when it was under a duty to disclose such a fact to the plaintiff. *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶ 106. A duty to disclose may arise where plaintiff and defendant are in a fiduciary or confidential relationship or if plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff. *Id.* at ¶ 107. However, the mere fact that the parties have engaged in

business transactions or have a contractual relationship is, on its own, insufficient to establish a fiduciary relationship. *Benson v. Stafford*, 407 Ill. App. 3d 902, 913 (2010).

¶ 109 Plaintiffs maintain that the Artemis defendants had a duty to disclose to them due to their landlord-tenant relationship. In so arguing, plaintiffs cite to *City of Chicago v. American National Bank & Trust Co.*, 233 Ill. App. 3d 1031, 1037 (1992), in which this court found that the failure to reveal to a prospective tenant impending condemnation proceedings can constitute fraud. Those are not the circumstances involved in this case. Plaintiffs appear to rely upon the landlord-tenant relationship as the basis for Borkan's duty to disclose as well. Borkan was not plaintiffs' tenant, nor was he their agent. Further, plaintiffs presented no evidence showing that Borkan stood in a position of influence or superiority over them. We thus find that plaintiffs failed to present evidence showing that the Artemis defendants or Borkan owed them a duty to disclose.

¶ 110 Further, even assuming a duty to disclose existed, plaintiffs failed to present evidence showing that the Artemis defendants and Borkan failed to disclose a material fact. Plaintiffs focus on two time periods: (1) the time following the signing of the LOI but prior to the signing of the lease, and (2) the time following the signing of the lease and prior to its termination. In relation to the time period following the signing of the LOI and prior to the signing of the lease, the LOI specifically stated that prior to an executed agreement/lease either party may enter into negotiations with other parties. Thus, the LOI contemplated, and expressly allowed, the parties to explore dealings with parties other than the signatories to the LOI. Additionally, Denny testified that he would expect the Artemis defendants to view multiple properties in searching for a location. As such, the fact that the Artemis defendants were considering properties other than the

Washington property after signing the Washington property LOI, but prior to executing the Washington property lease, was not a material fact.

¶ 111 Plaintiffs also maintain that the Artemis defendants were looking at alternative locations after the lease was signed and prior to its termination. Not only did Norman expressly deny this allegation in his affidavit, but plaintiffs have provided no evidentiary support for this allegation. Denny testified that it was his belief that this was the case. Again, as previously stated, such unsupported opinions and conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion. *Davis*, 297 Ill. App. 3d at 495. Plaintiffs also point to Fallico's testimony, which they maintain shows that (1) the Artemis defendants are not credible people; (2) the Artemis defendants and Borkan engaged in "unethical and deceptive" conduct relative to the Milwaukee property; (3) and the Artemis defendants and the broker defendants concealed their solicitation of the Milwaukee property while simultaneously raising their pretextual parking excuses to plaintiffs in an effort to break the lease. However, Fallico's opinion as to the character of the Artemis defendants and Borkan does not constitute evidence of failure to disclose a material fact. Notably, as to Borkan, although plaintiffs contend that she testified that Borkan was involved in the Milwaukee property deal in March 2008, the record shows that she was not aware of his involvement until June 3, 2008, and did not know at what point he first became involved. Fallico testified that "maybe it was April," but that it was so long ago, "who knows." It is clear that Fallico did not testify that Borkan was involved in the Milwaukee property deal at any time prior to the Washington property lease's termination, and that her testimony does not establish that the Artemis defendants were actively pursuing the Milwaukee property prior to the Washington property lease's termination.[5] Further,

[5] We note that in their reply brief, plaintiffs maintain that the Artemis defendants acknowledged in their response brief that "of course" they were looking at alternative properties after the signing of the Washington property lease.

Denny testified that he had no evidence with regard to when Borkan first became aware of the Milwaukee property. In sum, we find that no question of material fact exists that would preclude entry of summary judgment in the defendants' favor on this count.

¶ 112 Tortious Interference with a Contract

¶ 113 Plaintiffs argue that the trial court erred in granting summary judgment in favor of Borkan on their tortious interference with a contract claim. To prevail on a claim of tortious interference with a contract, a plaintiff must plead and prove the following: (1) the existence of a valid and enforceable contract between plaintiff and a third party; (2) that defendant was aware of the contract; (3) that defendant intentionally and unjustifiably induced a breach of the contract; (4) that the wrongful conduct of defendant caused a subsequent breach of the contract by the third party; and (5) that plaintiff was damaged as a result. *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 43. Moreover, establishing inducement, in the context of a claim for tortious interference with a contract, requires some active persuasion, encouragement, or inciting that goes beyond merely providing information in a passive way. *In re Estate of Albergo*, 275 Ill. App. 3d 439, 446 (1995).

¶ 114 First, as previously stated, the Artemis defendants properly exercised their contractual right to terminate the lease without default pursuant to the licensing contingency. As such, there was no breach of the lease. Additionally, even assuming that the lease termination was construed as a breach rather than a termination without default, plaintiffs provided no evidence that Borkan induced the Artemis defendants to terminate the lease. Neither Norman nor Alicia testified that they made their decision based upon Borkan's inducement. Rather, they both testified that they decided to exercise the licensing contingency because they would otherwise risk being in a long-

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That is not the case, the Artemis defendants made that acknowledgment solely as to the time period following the

term lease for a property that they would be unable to use. Although plaintiffs argue that Borkan did not do enough to help rectify the parking issue, a failure to act does not equate to the active persuasion that is required to sustain this claim. We thus find that plaintiffs failed to establish that Borkan induced the Artemis defendants to breach the lease. See *Id.* at 448. Accordingly, we find that no question of material fact exists that would preclude entry of summary judgment in Borkan's favor on this count.

¶ 115 Motion for Reconsideration

¶ 116 Plaintiffs argue that the trial court erred in denying their motion to strike the Artemis defendants' motion for reconsideration. In so arguing, plaintiffs maintain that the Artemis defendants failed to file the motion based on one of the three proper bases, which are to bring the court's attention to: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 280 (2009). Plaintiffs contend that because the Artemis defendants' argument relative to the breach of lease and guaranty in their motion for summary judgment was "approximately one page in argument," and the argument contained in their motion for reconsideration was much lengthier, their motion for reconsideration was actually more akin to an amended motion for summary judgment, and thus the court had no discretion to entertain the motion. They argue that a trial court does not have discretion to hear new factual/legal arguments unless the movant first provides a reasonable explanation as to why it was not available at the time of the original hearing.

¶ 117 In their motion for reconsideration, the Artemis defendants clearly state that it is their contention that the court's prior conclusion "was in error under Illinois law." The Artemis

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signing of the LOI and prior to the signing of the lease.

defendants argued that it was their belief that this error was due to plaintiffs' counsel's erroneous argument at the summary judgment hearing that unspecified documents or testimony created an issue of material fact. They also argued at length as to why the record showed that there was no disputed material fact that would prevent entry of summary judgment in their favor. Further, in granting the motion for reconsideration, the trial court specified that it had re-examined its prior ruling "under the basis of the misapplication in the law." We thus find that, the trial court did not err in denying plaintiffs' motion to strike the motion for reconsideration.

¶ 118 Supreme Court Rule 137 Sanctions

¶ 119 We now address the broker defendants' appeal from the court's denial of their motion for sanctions against plaintiffs. More specifically, the broker defendants argue that all of plaintiffs' claims are frivolous and merit sanctions. The broker defendants maintain that plaintiffs originally premised their suit on the existence of a signed document by the broker defendants in which they purportedly agreed to return commission payments in the event of a default by the Artemis defendants, but when it was established that no such writing existed, plaintiffs simply "changed the facts to continue its campaign of harassment" and "cooked up a seemingly endless parade of nonsensical legal and factual theories designed to keep its suit alive."

¶ 120 "Rule 137 authorizes sanctions against an attorney for pursuing false or frivolous lawsuits." *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 578 (2000). Because Rule 137 is penal in nature, it is strictly construed. *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1020 (2004).

¶ 121 The decision whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit court, and that decision will not be overturned absent an abuse of discretion. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998) "A court has abused its

discretion when no reasonable person would agree with its decision." *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 16.

¶ 122 In the case at bar, the circuit court concluded in a written order that sanctions were not appropriate because plaintiffs presented an objectively reasonable argument in support of their argument. After carefully reviewing the record, we cannot say that the circuit court abused its discretion in denying defendant's request for sanctions.

¶ 123 CONCLUSION

¶ 124 For the foregoing reasons, we affirm the orders of the circuit court of Cook County granting summary judgment in favor to defendants as to all counts of plaintiffs' fourth amended complaint and denying the broker defendant's motion for sanctions.

¶ 125 Affirmed.