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NO. 4-16-0135

FILED
April 13, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WESTBROOK APARTMENTS,	)	Appeal from
Plaintiff and Counterdefendant-Appellee,	)	Circuit Court of Sangamon County
v.	)	No. 06LM2062
ANGELA FERNANDEZ,	)	
Defendant and Counterplaintiff-Appellant,	)	
v.	)	Honorable
REGENCY WINDSOR MANAGEMENT, INC.,	)	John M. Madonia,
Counterdefendant-Appellee.	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in (1) concluding the employer of an independent contractor was not liable for the contractor's collateral negligence, (2) limiting damages for constructive eviction to the rental value for the period the plaintiff was deprived of access to the property, and (3) granting summary judgment on the claim of intentional infliction of emotional distress.

¶ 2 In June 2006, plaintiff, Westbrook Apartments, filed a complaint against defendant, Angela Fernandez, (Sangamon County case No. 06-LM-0869) for forcible entry and detainer, seeking to terminate the parties' rental agreement and recover past-due rent. In November 2007, defendant's counsel moved to consolidate plaintiff's case in No. 06-LM-0869 with plaintiff's case against another defendant he represented in case No. 06-LM-2062. In January 2008, the trial court consolidated the cases into No. 06-LM-2062. In September 2008,

Fernandez filed an amended counterclaim against Westbrook Apartments and counterdefendant Regency Windsor Management, Inc. (collectively "Westbrook"). Fernandez's counterclaim alleged claims for (1) negligence, (2) constructive or unlawful eviction, and (3) intentional infliction of emotional distress. In February 2013, the trial court granted summary judgment in favor of Westbrook as to the count of intentional infliction of emotional distress. In January 2016, following a bench trial, the court entered judgment in favor of Fernandez on her claim of constructive eviction and in favor of Westbrook as to the negligence claim. The court found Fernandez was entitled to damages for the reasonable rental value of the property following the constructive eviction, but it offset those damages based on past-due rent she owed and ultimately awarded Fernandez $0 in damages.

¶ 3 Fernandez appeals, arguing the trial court erred in (1) ruling Westbrook was not liable for an independent contractor's negligence, (2) awarding insufficient damages for constructive or unlawful eviction, and (3) granting summary judgment in Westbrook's favor on Fernandez's intentional-infliction-of-emotional-distress claim. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2006, Westbrook filed a complaint against Fernandez for forcible entry and detainer, seeking to terminate the parties' rental agreement and recover past-due rent. In July 2013, this complaint was dismissed with prejudice and is not subject to this appeal. In September 2008, Fernandez filed an amended counterclaim, alleging claims for (1) negligence, (2) constructive or unlawful eviction, and (3) intentional infliction of emotional distress.

¶ 6 A. Summary Judgment

¶ 7 In November 2011, Westbrook filed a motion for summary judgment on Fernandez's claims, including intentional infliction of emotional distress. Westbrook included

the transcript of Fernandez's discovery deposition in support of its motion. We summarize only the testimony relevant to the intentional-infliction-of-emotional-distress claim.

¶ 8 Fernandez stated she moved into Westbrook Apartments on March 10, 2006. The first day Fernandez lived there, a tornado came through and a tree fell on her car. According to Fernandez, she went to the office and got the impression the staff did not want to hear her complaints, telling her, "that's mother nature." Thereafter, whenever Fernandez had a complaint, the staff would laugh at her.

¶ 9 The March 2006 tornado caused damage to the apartment buildings, and roof repairs began shortly thereafter. On May 24, 2006, the roof of Fernandez's building was being repaired when a storm came through and caused extensive water damage in Fernandez's apartment (discussed further below). When she discovered the damage, six maintenance workers were in her apartment, her clothes had been thrown into the bathtub and out the windows, and there were overflowing buckets of water.

¶ 10 Fernandez stated Westbrook claimed her apartment was habitable and told her to cover her possessions with plastic to protect them and not to turn on the lights. According to Fernandez, she asked Westbrook to put her in another unit but was told there were no units available. However, Fernandez's sister-in-law called the apartment complex, asked about availability, and was told two- and three-bedroom units were available. Fernandez stated a member of the roofing construction crew felt "really bad" and paid for a hotel for Fernandez and her son. Fernandez said they stayed in the hotel for approximately two days when, suddenly and without explanation, she was informed she had to leave because Westbrook refused to pay for a longer stay.

¶ 11 After leaving the hotel, Fernandez went back to Westbrook and received an eviction notice. Fernandez tried to salvage some belongings and discovered half her possessions had been disposed of, her recliner was broken, and her television had water damage. According to Fernandez, her possessions likely got destroyed in the chaos following the leak when the maintenance workers were running in and out of the apartment trying to slow the leak.

¶ 12 Fernandez attended counseling with her daughter prior to these events. However, after this transpired, Fernandez began going with more frequency to deal with the added stress in her life. Specifically, Fernandez stated she struggled financially to raise her son as a single mother and she lost many belongings to water damage. Her son's Xbox gaming system and television were ruined, and Fernandez could not afford to replace these items to keep her son occupied. Fernandez also said the loss of family photographs, particularly those of her late stepfather, caused her emotional pain.

¶ 13 According to Fernandez, Westbrook's staff disliked her because she would go to the management office to make complaints. When Fernandez made complaints, she would hear the staff whispering and giggling when she turned to leave. Fernandez stated she complained about loud wind chimes and the tornado damage to her car and both complaints were met with laughter.

¶ 14 Fernandez acknowledged she had troubles keeping current with her rent and on April 24, 2006, signed a payment agreement. Fernandez claimed she never received a "5-day notice" in April but went to the office on her own to work out a payment plan. Fernandez denied receiving a "5-day notice" in May, as well. When Fernandez went to the office on May 24, 2006, to complain about the water damage and chaos in her apartment, the office staff's initial response was to inform Fernandez her rent was due.

¶ 15 In February 2013, the trial court granted Westbrook partial summary judgment on Fernandez's intentional-infliction-of-emotional-distress claim. In pertinent part, the docket entry reads as follows:

> "[Westbrook] next allege[s] that [Fernandez's] claim of intentional infliction of emotional distress is unsound based upon the absence of conduct which as a matter of law constitutes the intentional infliction of emotional distress and that no evidence exists supporting the claim that [Fernandez] suffered extreme emotional distress. In response, [Fernandez] alleges that this [c]ourt cannot make a determination upon 'a cold record' and that '[a] fair question has been raised . . . as to whether the facts warrant Fernandez to recover on this ground.' In contrast to [Fernandez's] assertion, this Court can appropriately review the factual record in this matter and a thorough review of the record reveals that summary judgment as to [Fernandez's] assertion of intentional infliction of emotional distress is appropriate. Summary judgment as to that count is granted."

¶ 16 In May 2013, Fernandez filed a motion to reconsider the entry of summary judgment on the intentional-infliction-of-emotional-distress claim. In July 2013, the trial court denied the motion to reconsider.

¶ 17 B. Bench Trial

¶ 18 During a bench trial on nonconsecutive days in November 2013 and May 2014, counsel for Fernandez stated in opening argument his belief the trial court could reconsider the

ruling granting summary judgment on the intentional-infliction-of-emotional-distress claim. The court noted it had already ruled on the motion to reconsider and indicated it would not receive evidence related to the claim of intentional infliction of emotional distress. The court told counsel to limit the evidence to the remaining claims. Counsel agreed but again expressed his belief the testimony might change the court's ruling. The court thereafter heard the following evidence.

¶ 19 1. *Don Doehrman*

¶ 20 Don Doehrman, the manager of Westbrook in 2006, testified Fernandez signed a lease in early March 2006. The lease contained a fire and casualty clause exempting Westbrook from liability for the loss of personal effects in the event of "fire, wind, explosion, or other cause," and a provision stating, "Residents shall be responsible to obtain their own insurance to protect against all losses."

¶ 21 Doehrman, who lived in the complex, further testified his unit shared a wall with the unit Fernandez rented. According to Doehrman, in March 2006, a tornado went through the complex and damaged many apartments. Doehrman testified the roof of Fernandez's building was flat and had debris embedded in it as a result of the tornado. During the tornado, a tree fell on Fernandez's vehicle. Following this event, Fernandez had difficulties paying her rent.

¶ 22 According to Doehrman, Fernandez's first rent payment was due April 1, 2006, but records showed that payment was late. Doehrman testified Westbrook would send a "5-day notice" if a tenant was late with a rent payment. After that, Westbrook would make contact with the resident to set up a payment agreement and, if the tenant did not pay according to the agreement, Westbrook would move forward with an eviction. Doehrman recalled Fernandez signed an agreement but could not recall the terms. According to Doehrman, Fernandez never

paid rent for the month of May 2006. On May 30, 2006, Westbrook sent a request to their attorney to process an eviction as soon as possible against Fernandez. Doehrman testified Fernandez moved out on June 13, 2006, following the eviction process. On July 1, 2006, the unit was leased to another party.

¶ 23 Beginning in mid-March 2006, Tabor Construction (Tabor) repaired the roof damage and was working on Fernandez's building on May 24, 2006. On that date, Doehrman and Tabor became aware of an approaching storm. Doehrman testified he checked with Tabor to ensure they were taking measures to prepare for the approaching storm, including covering the roofs to prevent rain from going into the apartment building. According to Doehrman, Tabor overlapped the new and old roof and covered the seam with old roofing material or a tarpaulin held down by blocks. Doehrman testified, "I was actually up there and checked and they had done that. We were quite concerned about the storm. *** [I]t had worked in the past what they had done, so I wanted to make sure that it was done." Tabor had successfully used this method to protect roofs at Westbrook during rainstorms between the March 2006 tornado and the May 24, 2006, storm.

¶ 24 Not long after the storm began, Doehrman received a call from a tenant reporting water was coming into their apartment. Doehrman went to investigate which apartments had water damage and described seeing water coming from the ceiling in Fernandez's unit. Doehrman recalled another employee moving items in Fernandez's apartment so they would not get wet, and Doehrman helped place buckets around the apartment to capture rainwater. According to Doehrman, Fernandez's unit needed the walls and ceilings repaired and the unit needed to be dried out.

¶ 25 Doehrman testified Tabor put Fernandez up in a hotel from May 26 to May 31, 2006, and invoiced Westbrook's insurance for the expense. According to Doehrman, Westbrook moved very few residents to accommodate repair work following the May 24, 2006, storm. Doehrman testified some tenants were moved permanently or temporarily to other units. Additionally, Doehrman testified regarding invoices showing expenses for relocating tenants or storing their possessions while repairs were made. Fernandez was the only tenant who was moved to a hotel. According to Doehrman, Westbrook gave some rent concessions to tenants inconvenienced by having to move out of their apartments and additionally subtracted some late fees due to the roof repairs. These concessions and fee waivers applied only to rents paid subsequent to the tornado and storm damage.

¶ 26 2. *Marilyn McCarthy*

¶ 27 Marilyn McCarthy, Fernandez's mother, testified Fernandez called her on May 24, 2006, and told her about the water damage to her apartment. The following day, McCarthy visited the apartment, which was flooded and smelled of mildew, prompting McCarthy to tell Fernandez she could not stay in the apartment. According to McCarthy, she asked the apartment manager if there was another apartment for Fernandez. McCarthy testified the manager was very angry and refused to offer any assistance. According to McCarthy, the manager seemed determined not to help and just wanted Fernandez to get out of the apartment.

¶ 28 McCarthy testified Fernandez was distraught following the May 24, 2006, storm, particularly because she lost all of her family photographs, including those of her deceased stepfather. Additionally, Fernandez's son lost all his belongings. According to McCarthy, Fernandez became depressed because of these events and "got in a little shell."

¶ 29 3. *Cassandra Sokolis*

¶ 30 Cassandra Sokolis testified she was Fernandez's daughter and, in spring 2006, she was in college and working. After the March 2006 tornado destroyed Fernandez's car, Sokolis provided Fernandez with transportation. On May 24, 2006, Sokolis drove Fernandez to her apartment so she could get ready for her second job. When the two arrived at Fernandez's apartment, the door was unlocked and there were ladders and buckets everywhere. Sokolis testified everything in the apartment was wet and smelled of sewage, and the ceilings were dripping water. According to Sokolis, Fernandez stayed with her that night and Fernandez's son went to his father's house.

¶ 31 Within 24 hours of discovering the condition of Fernandez's apartment, Sokolis and Fernandez confronted the apartment complex's manager. According to Sokolis, the manager was hostile and did not care about what happened to Fernandez's apartment. Shortly thereafter, Fernandez moved to a hotel and took some baskets of clothes, but she left the rest of her possessions in the apartment. At some point, Fernandez was told to leave the hotel, and Sokolis and Fernandez went by the apartment. According to Sokolis, at that time, the ceilings were torn down and there were still buckets and ladders in the apartment. All of Fernandez's possessions were piled in corners and the apartment smelled of standing water and mildew.

¶ 32 Sokolis testified Fernandez had to throw out her mattress and box springs, and her couch had water marks on it. According to Sokolis, the apartment was uninhabitable and Sokolis did not want Fernandez to bring any possessions to her house because everything smelled of mold and mildew. Sokolis testified Fernandez was depressed following these events.

¶ 33 4. *Angela Fernandez*

¶ 34 Fernandez testified she moved into Westbrook in March 2006, and the tornado hit and destroyed her car the next day. The office staff laughed at her when she sought their help.

The loss of her car caused financial difficulties, and Fernandez got behind in her rent payments. Fernandez testified she complained repeatedly about wind chimes, loud music, a man across the courtyard staring at her, and men working on the buildings yelling at her. According to Fernandez, the staff did nothing but laugh at her complaints. Fernandez testified she asked to move to a different unit and was told there would be a transfer fee. According to Fernandez, she signed two different payment agreements to catch up on rent she owed for the month of May and to pay the transfer fee by May 26, 2006.

¶ 35 On May 24, 2006, Fernandez returned to her apartment from work to discover men running in and out of her apartment, buckets of dirty water everywhere, and her clothing thrown out of windows. Fernandez testified she went to the office and Doehrman told her she could stay in the apartment, to cover her belongings with plastic, and not to turn on the lights. Fernandez further testified, when she initially went to the office about the water damage, the first thing the staff did was remind her that her rent was due on May 26 per the payment agreement. According to Fernandez, she did not go to her second job that night because she was dealing with the water damage and, as a result, she lost that job. Fernandez stayed at her daughter's house that night and only took a few items of clothing because everything was wet and smelled of mildew.

¶ 36 The next day, Fernandez returned to the apartment, and the door was standing open and buckets of water were overflowing. According to Fernandez, she asked about moving to a different unit and was told none were available. However, when Fernandez called anonymously and inquired about availability, the staff said there were units available.

¶ 37 On May 26, 2006, Fernandez went back to the apartment and found a note from Andy, who worked for Tabor. According to Fernandez, Andy said they were going to put her up in a hotel. Fernandez testified, on May 29, 2006, the ceiling in her apartment had not been

touched and there were still buckets of water in the apartment. On May 30, 2006, Fernandez was forced to throw away her mattress and a loveseat due to water damage, and mold was growing on the apartment ceiling.

¶ 38 Fernandez testified she had been at the hotel for five days when the hotel manager informed her she had to leave because the room was no longer being paid for. That same day, Fernandez went to Westbrook and found an eviction notice in her mailbox. Fernandez acknowledged she never made the rent payment on May 26, 2006. Fernandez testified June 8, 2006, was the last time she went into the apartment and some work on the ceiling had begun. Fernandez discovered her recliner had been broken in half, but the rest of her furniture had been put in a storage unit. On June 9, 2006, Fernandez went to the apartment and tried her key in the door, but the key no longer worked.

¶ 39 According to Fernandez, very few of her possessions were salvageable and she lost personal photographs, her televisions, an Xbox, her couch, clothing, pots and pans, and dishes. Fernandez further testified about expenses incurred for medical visits for her daughter and expenses associated with loss of work. According to Fernandez, she began seeing her psychiatrist more often after these events. Fernandez testified she had been seeing the psychiatrist every three to six months but, following the water damage, she saw him every three to four weeks.

¶ 40 5. *Closing Arguments*

¶ 41 The parties submitted their closing arguments in written form. In her brief, Fernandez again requested reconsideration of the entry of summary judgment on the intentional-infliction-of-emotional-distress claim. Fernandez suggested the evidence introduced at trial

showed Westbrook engaged in sufficiently extreme and outrageous conduct and she suffered extreme emotional distress.

¶ 42 C. Judgment

¶ 43 In January 2016, the trial court entered its judgment. The court did not address Fernandez's request to reconsider the entry of summary judgment on the intentional-infliction-of-emotional-distress claim.

¶ 44 1. *Negligence*

¶ 45 The trial court assumed, *arguendo*, section 427 of the Restatement (Second) of Torts (1965) applied to this case and proceeded to make the following factual findings. First, the court found that Doehrman and Tabor both recognized the danger of the approaching storm on May 24, 2006, discussed the impending storm, and prepared for it. Although the parties stipulated Tabor was negligent, the court found Doehrman's actions that day relevant to whether Westbrook should be held liable for Tabor's negligence. The court credited Doehrman's testimony as to the measures Tabor took in covering the roof and using a tarpaulin, a method which Tabor had used successfully in the past. The court highlighted the fact that the building in question was Doehrman's own building, and he therefore had a particular personal interest in ensuring the roof was protected. The court found this added credibility to Doehrman's testimony that he personally observed Tabor taking these precautions to prevent damage from the coming storm. Accordingly, the court concluded Tabor's negligence was collateral and Westbrook took sufficient precautions against the anticipated threat of danger the storm presented so as to preclude liability for Tabor's negligence.

¶ 46 Finally, the trial court noted Fernandez's amended complaint alleged the use of a tarpaulin was a common method to protect underlying structures in the event of precipitation

before new roofing material could be installed. Fernandez's amended complaint alleged a complete "failure to provide the protective covering after having removed the roofing material." The court found those allegations had not been proved because the court found Doehrman personally observed the steps taken to provide a protective covering. The court determined it would be unreasonable to expect the apartment manager to personally ensure the steps the roofing company took were done properly.

¶ 47 2. *Constructive Eviction*

¶ 48 The trial court found the apartment was uninhabitable following the water damage and determined Westbrook was required to accommodate Fernandez. The court found Westbrook accommodated Fernandez by putting her up in a hotel for five days. However, after Fernandez was forced to leave the hotel, Westbrook did not provide other accommodations for her, and her apartment remained uninhabitable. The court found Westbrook clearly accommodated others by temporarily moving them into other units. Therefore, the court found Westbrook's failure to provide accommodations after May 31, 2006, constituted constructive eviction.

¶ 49 The trial court found the property Fernandez sought damages for was not Westbrook's responsibility because Fernandez failed to salvage her possessions during the time between the storm and the time of the constructive eviction on May 31, 2006. The court further found Fernandez was entitled only to the rental value for the period between the constructive eviction (May 31, 2006) and the filing of the forcible entry and detainer case (June 13, 2006). The court concluded Fernandez was entitled to a total of $743 in damages for the rent and a security deposit that was not returned. However, the court noted there was evidence of past-due

rent and offset Fernandez's damages with the rent owed. Accordingly, the court awarded Fernandez $0 in damages.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 A. Negligence

¶ 53 Fernandez first claims Westbrook should be held liable for Tabor's negligence because roofing work involves a special danger which Westbrook knew to be inherent in the work and failed to take reasonable precautions against the danger. We turn first to our standard of review.

¶ 54 1. *Standard of Review*

¶ 55 Fernandez asserts this is a question of law for this court to review *de novo*. *Arthur v. Catour*, 216 Ill. 2d 72, 78, 833 N.E.2d 847, 851 (2005). Westbrook, on the other hand, emphasizes the trial court's factual findings and urges this court to determine whether the trial court's judgment is against the manifest weight of the evidence. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 14, 980 N.E.2d 1207. "[O]ur standard of review will not be *de novo* across the board." *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 19, 983 N.E.2d 1124. Our review of the legal questions presented will be *de novo*; however, we will scrutinize factual findings deferentially and uphold those findings unless they are against the manifest weight of the evidence. *Id.* We turn now to the merits.

¶ 56 2. *Westbrook's Liability*

¶ 57 As a general rule, an employer is not liable for the negligent acts of an independent contractor. *Woodward v. Mettille*, 81 Ill. App. 3d 168, 175, 400 N.E.2d 934, 941

(1980). However, Fernandez contends Westbrook is liable for Tabor's negligence under section 427 of the Restatement (Second) of Torts, which provides as follows:

> "One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Restatement (Second) of Torts § 427 (1965).

¶ 58 The parties disagree as to whether roofing is an inherently dangerous activity. Fernandez asserts "the recognizable and inherent danger" of potential leaks in the event of rain during roofing work renders Westbrook liable. In support, Fernandez relies on *Benesh v. New Era, Inc.*, 207 Ill. App. 3d 1049, 1051-52, 566 N.E.2d 779, 781 (1991). We need not decide whether roofing work is inherently dangerous because we conclude that, even under the analysis in *Benesh*, the trial court correctly concluded Westbrook indeed took reasonable precautions to prevent the danger of leaks.

¶ 59 In *Benesh*, an independent contractor was hired to paint the defendant's building and sprayed or splattered paint on the plaintiff's fence and garage. *Id.* at 1050, 566 N.E.2d at 780. The plaintiff sought to hold the employer liable under section 427 of the Restatement (Second) of Torts for the independent contractor's failure to take precautions to avoid the paint overspray. *Id.* The defendant argued spray painting was not inherently dangerous and the exception did not apply. *Id.* at 1050, 566 N.E.2d at 781. The appellate court determined the damage the plaintiff suffered was "such that it might have been anticipated by [the] defendant as

a probable consequence of the independent contractor's work." *Id.* at 1052, 566 N.E.2d at 782. The court held the defendant should have anticipated the danger of the paint overspray and should have taken precautions against it. *Id.* at 1053, 566 N.E.2d at 782.

¶ 60 We first note Fernandez's complaint alleged Tabor was negligent in failing to provide *any* protective covering over the open roof. The trial court specifically noted Fernandez failed to prove this allegation, pointing to Doehrman's testimony, which the court found sufficient and credible, that he had discussed the impending storm with the roofers and he personally observed the roofers taking precautions to prevent storm damage. Given Doehrman's testimony, we do not find the court's ruling in this regard to be against the manifest weight of the evidence.

¶ 61 Because we accept the trial court's factual finding regarding the actions Doehrman took to ensure Tabor was putting roof coverings in place in anticipation of the storm, we find *Benesh* distinguishable. Here, even if we assume section 427 of the Restatement (Second) of Torts applies and, therefore, assume Westbrook should have anticipated the danger of a leak, Westbrook took reasonable precautions to guard against the danger, unlike the defendant in *Benesh*. Doehrman discussed the impending storm with the roofers, asked whether they were putting protective coverings in place, and even personally went up to the roof to observe the coverings being placed.

¶ 62 We agree with the trial court's conclusion that Doehrman did not have a further duty to ensure those coverings were properly placed. Tabor's negligence in placing those coverings is more akin to the collateral negligence discussed in *Woodward*, which the court relied on in its ruling. In *Woodward*, the question was whether an independent contractor was engaged in an inherently dangerous activity when using a cutting torch. *Id.* at 176, 400 N.E.2d at

942. The independent contractor's negligent use of the cutting torch caused a fire, which the plaintiff sought to hold the employer liable for under an inherently-dangerous-activity theory. *Id.* The court determined the danger and likelihood of the damage did not arise from the nature of the activity, but rather arose from the manner of its use. *Id.* The court concluded the risk to the plaintiff's property arose not from the mere use of a cutting torch, but from the careless manner in which the contractor operated it. *Id.*

¶ 63 In the instant case, the risk of damage from a leak arose not from Tabor's failure to cover the roof, but rather from the negligent manner in which Tabor covered the roof. To impute liability to Westbrook, especially given Doehrman's efforts to ensure precautions were being taken, would be to impute liability for Tabor's collateral negligence. Section 427 of the Restatement (Second) of Torts provides for vicarious liability for an independent contractor's *failure* to take reasonable precautions. It does not provide for vicarious liability for an independent contractor's collateral negligence. Accordingly, we conclude the trial court did not err in finding Westbrook was not liable for Tabor's collateral negligence.

¶ 64 B. Damages

¶ 65 Fernandez argues the water leak and Westbrook's acts rendered her apartment uninhabitable, forcing Fernandez to vacate the premises. Fernandez further asserts Westbrook's failure to provide her with alternate accommodations constituted an eviction. Fernandez seeks to recover damages based on the constructive-eviction claim for (1) damage to her personal property, (2) costs of storage for items removed from her apartment, (3) costs of moving to new housing, (4) lost wages, and (5) physical stress and injury.

¶ 66 "Constructive eviction has been defined as something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the

premises. *** Where premises leased are rendered useless to the tenant or the tenant is deprived, in whole or in part, of the possession and enjoyment thereof as the result of the wrongful act of the landlord, there is a constructive eviction." (Internal quotation marks omitted.) *John Munic Meat Co. v. Gartenberg & Co.*, 51 Ill. App. 3d 413, 416, 366 N.E.2d 617, 620 (1977). The question of whether a constructive eviction occurred is a question of fact. *Fitzwilliam v. 1220 Iroquois Venture*, 233 Ill. App. 3d 221, 231, 598 N.E.2d 1003, 1009 (1992). We will disturb the finding of a constructive eviction only if it is manifestly against the weight of the evidence. *John Munic Meat Co.*, 51 Ill. App. 3d at 417, 366 N.E.2d at 620.

¶ 67 As an initial matter, we note the unusual nature of this claim. Generally, constructive eviction is raised as an affirmative defense because it "relieves the tenant from the responsibility to pay rent [citation], but only after the tenant quits the premises [citation]." *Shaker and Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 134, 733 N.E.2d 865, 872 (2000). However, Fernandez does not seek to avoid claims of unpaid rent following the date of the constructive eviction.

¶ 68 Constructive eviction can also be raised as a counterclaim. In *Home Rentals Corp. v. Curtis*, 236 Ill. App. 3d 994, 995, 602 N.E.2d 859, 860 (1992), the plaintiff filed a claim for money damages for breach of a residential lease. The tenants filed a counterclaim alleging constructive eviction and requesting damages. *Id.* Prior to the tenants moving into the apartment, they paid the plaintiff a total of $1,980 to cover the damage deposit and the last two months' rent of the lease term. *Id.* at 995, 602 N.E.2d at 861. When the tenants moved in, the apartment was uninhabitable due to bug infestations and filth. *Id.* Having alerted the plaintiff to the conditions, the tenants waited four days before moving out of the uninhabitable apartment. *Id.* at 999, 602 N.E.2d at 863. The court awarded damages for the $1,980 paid in advance rent

and as a damage deposit, finding the constructive eviction absolved the tenants' liability to pay future rent (the last two months' rent paid) and the plaintiff was not entitled to keep the damage deposit in the absence of any damage done by tenants. *Id.* at 1000, 602 N.E.2d at 864.

¶ 69 Fernandez also does not seek damages for advance rent paid. Rather, Fernandez seeks to use her claim of constructive eviction to request compensation for damage to her property, storage and moving expenses, lost wages, and physical stress and injury. Our research revealed no cases in which constructive eviction has been applied in such a manner. Indeed, we strain to understand how Fernandez's constructive-eviction claim remained viable at all following the dismissal of Westbrook's forcible entry and detainer action, as Fernandez was thereafter under no liability to pay Westbrook rent (and indeed did not pay Westbrook any rent after the date of the constructive eviction).

¶ 70 It appears this claim is an attempt to hold Westbrook liable for the damage to Fernandez's property in the absence of its own negligence and in derogation of the lease, which absolves Westbrook of such liability. To that end, Fernandez argues the constructive eviction occurred on May 24, 2006, and Westbrook had a duty to protect her property following the unlawful eviction, which it failed to do. However, the trial court found Westbrook provided alternate accommodations by paying for a hotel stay. The court therefore determined the constructive eviction occurred the date Westbrook refused to pay for the hotel—May 31, 2006. During her hotel stay, Fernandez failed to salvage her possessions from the apartment to avoid the consequences of the water damage. Westbrook had no duty to protect her possessions from the consequences of the water damage, and the lease provided Westbrook had no liability for the consequences of the water damage. The court noted it would have awarded Fernandez damages

for the costs of storage or moving her possessions, but Fernandez provided no evidence of what those costs were.

¶ 71 We have found no cases to support the theory that a constructive-eviction claim would support the award of property damages, and we struggle to understand why Fernandez would raise this claim. Constructive eviction does not create liability for property damages. Constructive eviction claims absolve tenants from the duty to pay future rent or, in some instances, a tenant may be able to receive the difference in rent paid for the premises they were forced to abandon and the rent paid for the replacement premises. See *Glasoe v. Trinkle*, 107 Ill. 2d 1, 9, 479 N.E.2d 915, 917-18 (1985). In *Glasoe*, the trial court awarded the tenant the difference in the rent paid for the property from which they were constructively evicted and the increased rent paid for the replacement property. *Id.* The Illinois Supreme Court's review considered the tenants' claim of breach of the warranty of habitability, and the court concluded: "The tenant is liable only for the fair rental value of the defective premises during the period of the breach of the implied warranty and is entitled to an abatement of rent in excess of that amount. If the full rent has been paid for a period for which the tenant is entitled to an abatement, damages may be awarded in his favor in that amount." *Id.* at 17, 479 N.E.2d at 922. The claim is similar to constructive eviction and, like constructive eviction, the available remedy is tied to the rental price of the property. The property damages, lost wages, and physical stress and injury claims Fernandez raises are not appropriate remedies for a constructive-eviction claim. Given the facts and circumstances of this case, we cannot say the court's finding of a constructive eviction was against the manifest weight of the evidence. Consequently, we affirm the court's judgment.

¶ 72 The trial court awarded Fernandez damages in the amount of the fair rental value for the time period from the constructive eviction (May 31, 2006) to the filing of Westbrook's forcible entry and detainer action (June 13, 2006). The court offset this amount with the amount Westbrook alleged Fernandez owed in unpaid rent in the forcible entry and detainer action. At oral argument, counsel for Westbrook asserted this damages award was technically wrong given the forcible entry and detainer action had been dismissed with prejudice. However, counsel asserted the award was practically correct because Fernandez's damages should be reimbursement for any rent she paid for the time following the constructive eviction. As Fernandez did not pay any rent, the damage award of $0 was, as a practical matter, correct. We agree and affirm the award of $0 in damages.

¶ 73 C. Summary Judgment

¶ 74 The purpose of a motion to reconsider a summary judgment ruling "is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand." *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 492, 919 N.E.2d 426, 436 (2009). As such, a trial court acts within its discretion in denying a motion to reconsider and ignoring its contents "when it contains material that was available prior to the hearing at issue but never presented." *Id.* at 493, 919 N.E.2d at 436. We review the denial of a motion to reconsider which raises new matters, such as additional facts or new arguments that were not previously presented during summary judgment proceedings, for an abuse of discretion. *Id.* at 492, 919 N.E.2d at 436.

¶ 75 Here, Fernandez asked the trial court to reconsider the summary judgment ruling based on the evidence adduced at trial, including testimony from Fernandez's mother and

daughter. However, Fernandez has not alleged the trial evidence was previously unavailable at the summary judgment proceeding. We note that Fernandez initially requested this court to reverse the trial court's ruling and enter summary judgment in her favor on this claim. In her reply brief, Fernandez argues the court actually never denied the request for reconsideration made following the trial and, therefore, this court should remand for a ruling on the motion for reconsideration. We decline to do so. The record shows counsel for Fernandez asked the trial court to reconsider its summary judgment ruling during opening argument, and the court noted it had already ruled on the motion to reconsider and would not receive evidence related to the claim of intentional infliction of emotional distress or further entertain this claim. Merely raising the suggestion in written closing arguments that the court might have changed its mind following the trial was insufficient to bring this issue before the court. Moreover, Fernandez makes no argument of new evidence previously unavailable, changes in the law, or misapplication of the law. *Id.* Accordingly, we decline to remand for further proceedings. To the extent that Fernandez requests review of the court's denial of the motion to reconsider prior to the trial, we conclude the court did not abuse its discretion.

¶ 76 Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48. Summary judgment is a drastic measure, to be granted only if the movant's right to judgment is clear. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). To determine whether a genuine issue of material fact exists, courts construe the pleadings, depositions, admissions, exhibits, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Id.* We review summary judgment rulings *de novo*. *Id.*

¶ 77 To prevail upon a claim of intentional infliction of emotional distress, a party must prove the following elements: "First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that his conduct inflict severe emotional distress or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress." *Schweihs*, 2016 IL 120041, ¶ 50. The outrageous conduct is not " 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *Id.* ¶ 51 (quoting Restatement (Second) of Torts § 46 cmt. d, at 73 (1965)). The conduct must be so extreme as to be beyond the bounds of decency and so atrocious it is intolerable in civilized society. *Id.* The distress inflicted must be so severe that no reasonable person would be expected to endure it. *Id.*

¶ 78 Fernandez contends the following conduct was sufficient to show a genuine issue of material fact existed as to Westbrook's extreme and outrageous conduct. First, Fernandez alleges Westbrook lied to her in telling her no alternate units were available for her use following the water damage. Second, Westbrook put her up in a hotel, only to turn around and discontinue payments for the hotel five days later, forcing her "to almost immediately move again, thereby doubling the trauma and stress resulting from the ruined apartment." Third, Westbrook intentionally treated her personal belongings with contempt and disrespect while dealing with the water damage. Fourth, Westbrook falsely accused Fernandez of being in breach of her rental obligation and instituted eviction proceedings in retaliation for her complaints. Fifth, Westbrook staff made verbal remarks that Fernandez was a "bad person" and was being evicted for lease violations.

¶ 79 We note Westbrook relied on Fernandez's discovery deposition in support of its motion for summary judgment. In her deposition, Fernandez stated she asked Westbrook to put

her in another unit and was told there were no units to put her in. However, Fernandez's sister-in-law called the apartment complex, asked about availability, and was told two- and three-bedroom units were available. Fernandez stated Westbrook put her up in a hotel, and although she could not remember exactly how long she stayed, she estimated it was for only two days when, suddenly and without explanation, she was informed she had to leave because Westbrook was done paying for the stay. Fernandez also stated her possessions likely got destroyed in the chaos following the leak, when the maintenance workers were running in and out of the apartment trying to slow the leak. Fernandez acknowledged having difficulties paying her rent and stated Westbrook began eviction proceedings. Finally, Fernandez stated the Westbrook staff laughed at her when she raised complaints.

¶ 80 We cannot say this conduct is sufficiently extreme or outrageous to rise to the level required for a successful claim of intentional infliction of emotional distress. This conduct is not so atrocious that it is unacceptable in civilized society. Perhaps Westbrook could have handled the situation differently by placing Fernandez in another unit instead of paying for a hotel, but we cannot say that the conduct is beyond the bounds of decency. Moreover, the laughter and whispers in response to Fernandez's complaints are certainly no more than "mere trivialities." *Id.* Additionally, there is no indication whatsoever that Westbrook acted with the intent to inflict emotional distress. " 'It has not been enough that the defendant has acted with an intent which is tortious or even criminal, *** or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.' " *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d, at 73 (1965)). Even construing Fernandez's deposition in the light most favorable to her, we conclude Westbrook's conduct, as a matter of law, does not rise to the level required for a successful intentional-

infliction-of-emotional-distress claim. Because there is no question of fact as to whether this conduct "could be deemed extreme and outrageous, summary judgment against plaintiff on her intentional infliction of emotional distress claim was proper." *Id.* ¶ 61.

¶ 81 III. CONCLUSION

¶ 82 For the reasons stated, we affirm the trial court's judgment.

¶ 83 Affirmed.