

Nos. 1-12-3171 and 1-13-1888 (consolidated)

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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No. 1-12-3171	)	Appeal from the
	)	Circuit Court of
AFFINITY COMMERCIAL REAL ESTATE, INC.,	)	Cook County.
	)	
Plaintiff-Appellant/Cross-Appellee,	)	
	)	
v.	)	
	)	
GREEN OAKS PARTNERS, LLC,	)	
	)	
Defendant-Appellee/ Cross-Appellant.	)	
	)	No. 08 L 8219
	)	
No. 1-13-1888	)	
	)	
GREEN OAKS PARTNERS, LLC,	)	
	)	
Third-Party Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
EQUITIES ASSOCIATES CORPORATION, III,	)	Honorable
	)	Clare Elizabeth
	)	Williams,
Third-Party Defendant-Appellee.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

¶ 1 *Held:* Circuit court's judgment in favor of real estate brokerage in this lawsuit seeking to recover for an unpaid commission is affirmed, where circuit court correctly determined: (1) broker was entitled to commission on sale of commercial real estate; and (2) nevertheless, broker was only entitled to a reduced commission in

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line with the parties' prior practice. Furthermore, circuit court properly dismissed seller's third-party complaint against buyer with prejudice, where seller failed to prosecute its claim at trial.

¶ 2 These two appeals arise out of a suit initially filed by plaintiff-appellant and cross-appellee, Affinity Commercial Real Estate, Inc. (Affinity), against defendant-appellee, cross-appellant, and third-party plaintiff-appellant, Green Oaks Partners, LLC (Green Oaks). Affinity sought to recover a 6% broker's commission it was purportedly owed pursuant to a listing agreement it had with Green Oaks. This commission was alleged to be owed in connection with the sale of a piece of commercial real estate by Green Oaks. During the pendency of the underlying litigation, Green Oaks filed a third-party complaint for indemnity against the ultimate purchaser of the property, third-party defendant-appellee, Equities Associates Corporation, III (Equities).

¶ 3 Following a bench trial, the circuit court entered a judgment in favor of Affinity, albeit for a commission amount representing 2% of the final sale price of the property. Affinity immediately appealed from that order, challenging only the amount of the circuit court's award (appeal number 1-12-3171). Green Oaks filed a motion to reconsider the circuit court's order, which was denied. Noting that the circuit court's judgment did not contain a ruling on its third-party complaint and that Equities had never filed an answer to the third-party complaint, Green Oaks thereafter filed a motion for default against Equities. The circuit court denied this motion and dismissed the third-party complaint with prejudice, after finding that Green Oaks had failed to properly prosecute its third-party complaint at trial.

¶ 4 Green Oaks then filed its own notice of appeal (appeal number 1-13-1888), challenging: (1) the judgment in favor of Affinity; (2) the denial of Green Oaks' motion to reconsider that order; and (3) the order denying Green Oaks' motion for default judgment against Equities and

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dismissing the third-party complaint with prejudice. The two appeals were subsequently consolidated. For the reasons that follow, we affirm the circuit court's judgment in favor of Affinity and its dismissal of Green Oaks' third-party complaint with prejudice.

¶ 5

## I. BACKGROUND

¶ 6 This matter was litigated over the course of five years in the circuit court, with the parties developing a significant record on appeal. We summarize here only those facts necessary to an understanding of our disposition of these consolidated appeals.

¶ 7 Affinity initiated the instant litigation with the filing of its complaint against Green Oaks on July 28, 2008. Therein, Affinity generally alleged that it was a licensed Illinois business entity and real estate broker. Anthony R. Scardino and Ronald P. Bild were licensed real estate brokers, and worked for Affinity. Green Oaks was alleged to be an Illinois limited liability company comprised of three members: Sidney Oko, Mark Loeb, and Peter Swan. Green Oaks owned a 35-acre parcel of commercial real estate located in Green Oaks, Illinois (property).

¶ 8 On May 19, 2006, Mr. Oko, on behalf of Green Oaks and Mr. Scardino, on behalf of Affinity, entered into an "EXCLUSIVE AUTHORIZATION OF SALE AND LEASE" (listing agreement). A copy of that listing agreement was attached to the complaint. By its own terms, the listing agreement granted Affinity the "exclusive right to sell" the property for a period of nine months. However, the listing agreement also contained a provision specifying that, if during that period the property was "removed from the market" due to the acceptance of an offer and "the transaction is not consummated for any reason," the listing agreement would be extended for a period of time equal to the number of days the property was off the market. In addition, the listing agreement provided that "in the event this Property goes under contract, is sold/leased or otherwise disposed of within one hundred eighty (180) days from the termination

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date of the Agreement to a prospect to whom it was submitted by [Affinity] during the term of the Agreement, and whose name has been submitted in writing to [Green Oaks] within fifteen (15) business days of the termination hereof, \*\*\* or to anyone with whom [Green Oaks] had dealt during the term of this Agreement, then in such event [Green Oaks] agrees to pay [Affinity] a broker's commission as stipulated in this agreement."

¶ 9 The listing agreement indicated that the property was to be "priced for sale at \$11,000,000." The commission on a sale of the property was to be "six percent (6%) of the selling price." Finally, the listing agreement stated that "[n]o amendment or alterations in the terms hereof with respect to the amount of commission or to the time of payment of commission shall be valid or binding unless made in writing and signed by [Affinity]."

¶ 10 Affinity's complaint contained two counts, one each for breach of contract and unjust enrichment. The breach of contract count generally alleged that, during the term of the listing agreement, Affinity had submitted the property to both Inland Real Estate (Inland) and Bradford Real Estate Services Corporation (Bradford) and had informed Green Oaks of this fact within 15 days of the listing agreement's termination. Green Oaks then sold the property for \$8.45 million within 180 days of the agreement's termination to "Equities-Bradford Green Oaks, LLC," which Affinity alleged was "an entity in which principals of both Inland and Bradford own an interest." Nevertheless, Green Oaks breached the terms of the listing agreement by refusing to pay Affinity a commission on this sale. Affinity therefore asked the court to enter a judgment in its favor and against Green Oaks in the amount of \$507,000, representing—pursuant to the listing agreement—6% of the final purchase paid for the property.

¶ 11 The unjust enrichment count alleged that, in the alternative and independent of any written contract, Green Oaks had asked Affinity to provide real estate brokerage services with

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respect to the property. This count then restated the actions taken by Affinity on behalf of Green Oaks, alleged that these actions led to the sale of the property, and asked the court to award Affinity 6% of the final purchase price, an amount representing a "reasonable and customary fee for real estate brokerage service."

¶ 12 Thereafter, the parties engaged in over three years of discovery and motion practice. During that process, Affinity filed the operative fourth amended verified complaint. That complaint again included two counts, one each for breach of contract and unjust enrichment, but it provided different and more detailed allegations supporting these two claims. Specifically, the breach of contract claim alleged that the listing agreement had been extended to July 30, 2007, because "during the original term the Property was under contract to be sold but that sale contract was not consummated." Affinity again alleged that it submitted the property to Inland and Bradford, via Bradford's president and agent, Steve Pagnotta, during the term of the listing agreement and notified Green Oaks of this fact within 15 days of the agreement's termination. Affinity also alleged that Green Oaks had also provided information regarding the property to Inland and Bradford during the term of the listing agreement.

¶ 13 In addition, Affinity now further alleged that the property had been sold to or through various entities that were "subsidiaries of Inland, controlled by Inland, or affiliated with Inland." Specifically, the amended complaint identified: (1) Midwest Real Estate Equities, Inc. (Midwest), a corporation affiliated with Inland whose shareholders were made up predominantly of past and present employees of Inland; (2) Equities, "an affiliate or wholly owned subsidiary of Inland" whose sole shareholder was Midwest; and (3) Equities Bradford Green Oaks, LLC (Equities Bradford), a limited liability company whose sole member was Equities and which was formed solely to hold title to the property in anticipation of a joint venture between Midwest and

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Bradford. The complaint alleged that the property ultimately went under contract to be sold for \$8.45 million to Equities on August 20, 2007. On October 11, 2007, the property was sold to Equities Bradford, as the assignee of Equities.<sup>1</sup>

¶ 14 In essence, the breach of contract claim contained in the fourth-amended complaint alleged: (1) Affinity provided information to Inland and Bradford during the extended term of the listing agreement; (2) Green Oaks provided information to and negotiated with Midwest during the extended term of the listing agreement; (3) Green Oaks breached the listing agreement by failing to notify Affinity of Midwest's interest in the property during the extended term of the listing agreement; (4) Midwest was the alter ego of Inland; and (5) for all these reasons, Affinity was entitled to a commission on the sale of the property under the terms of the listing agreement.

¶ 15 The unjust enrichment count avoided pleading the existence of an actual, written contract with Green Oaks. Rather, Affinity generally alleged that Green Oaks had requested Affinity to "perform real estate brokerage services for the procurement of a purchaser for the Property" and that as a result of Affinity's services the property was sold. Thus, Affinity alleged that a commission was owed for that sale to prevent Green Oaks from being "unjustly enriched by this benefit which was requested and voluntarily accepted."

¶ 16 In addition, Green Oaks filed a third-party complaint for indemnity against Equities. Therein, Green Oaks alleged that Equities had either failed to inform or had misinformed Green Oaks regarding its relationship with Inland. As such, Green Oaks's third-party complaint alleged that, should Midwest—the sole shareholder of Equities—be found to be the alter ego of Inland and Affinity awarded a commission, Green Oaks was entitled to be indemnified by Equities for

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<sup>1</sup> Because of the close relationship among these entities with respect to the sale of the property, for convenience we will hereafter primarily refer to Midwest, Equities, and Equities Bradford collectively as "Midwest." Where necessary, we will refer to them individually.

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any damages awarded to Affinity. The record reflects that Equities filed an appearance in this matter, but never filed an answer to Green Oaks' third-party complaint.

¶ 17 The matter thereafter proceeded to a bench trial in July and August of 2012. At the beginning of the trial, counsel for Equities appeared and the parties discussed the matter of the third-party complaint with the circuit court. In that exchange, which was conducted without the benefit of the court file being immediately available, Green Oaks and Equities disputed whether the third-party complaint was still pending. Equities contended that two years prior to trial, Green Oaks had indicated it would be filing an amended third-party complaint but it had never done so and had never otherwise prosecuted that complaint. Equities further contended that it had been excused from attending any future court dates by a previous judge, had not done so until trial, and thus was unfairly put in a position where it was unprepared to defend the third-party complaint at the pending bench trial. Green Oaks acknowledged that no amended third-party complaint had ever been filed, but contended that the original third-party complaint was still viable, had not been answered, and was set to be tried along with the underlying complaint.

¶ 18 Recognizing the debate between the parties and the confusion caused by the fact that the court file was not immediately available, the circuit court stated that if there was a pending third-party complaint it should be tried along with the underlying complaint and Green Oaks would not be able to return to court at a later date to get a ruling on such a claim. Ultimately, the circuit court and counsel for Green Oaks had the following exchange:

"THE COURT: Okay. Well, as far as I'm concerned right now, [Affinity] versus [Green Oaks] is on trial. I'm not aware of any other complaint that's before me right now, so we're going to proceed –

MR. SWAN: That's fine, your Honor.

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THE COURT: (Continuing) – we're going to proceed knowing that, and if something comes up later, you feel that you've got an active third-party complaint, you'll bring that to my attention.

MR. SWAN: Thank you, Judge."

The record reflects no amended third-party complaint was ever filed, and that the original third-party complaint remained operative and unanswered at the time of trial. However, the record also reflects that that no further discussions regarding the third-party complaint were conducted at the bench trial.

¶ 19 At that trial, the circuit court was presented with the testimony of Mr. Scardino, Mr. Swan, and Midwest's vice-president, Mr. DeAngelis. The evidence deposition of Mr. Bild and the affidavits of Midwest employee Paul J. Wheeler and former Bradford employee Eric Dams were also presented. In total, over 40 exhibits were entered into evidence at trial. We need not detail all of the evidence presented below to resolve this appeal. While additional detail will be provided in the context of our analysis of the issues raised on appeal, it is sufficient to outline a number of undisputed facts established below and a few points of factual contention raised by the parties.

¶ 20 In general, the evidence presented at trial established that Affinity and Green Oaks had entered into the listing agreement, covering a nine month period from May 19, 2006, to February 19, 2007. During that initial term, the property went under contract to be sold on two occasions. First, Green Oaks agreed to sell the property to Inland, but that transaction did not close. Then, Green Oaks agreed to sell the property to Glenstar Properties, LLC (Glenstar) for \$7.3 million. It was undisputed that, with respect to the Glenstar deal, Green Oaks and Affinity negotiated for

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a reduced commission of \$148,000 to be paid to Affinity. However, the Glenstar deal also failed to close.

¶ 21 What the parties and the witnesses did strenuously dispute at trial was whether these two potential deals caused the property to be "off the market" such that the listing agreement would be extended. Mr. Swan testified that they did not, while Mr. Bild and Mr. Scardino testified that they did extend the agreement. That dispute was also memorialized in a series of email exchanges between Mr. Swan and Mr. Bild in February of 2007. As part of these exchanges, Mr. Swan indicated that he thought the listing agreement had terminated, but in light of the 180-day protective language contained therein, Mr. Swan wanted to know if Affinity would accept a reduced commission on another possible sale to Inland for \$8.25 million. The evidence at trial reflects that Green Oaks and Affinity ultimately agreed to a \$150,000 commission on any such sale, but it too failed to materialize.

¶ 22 Despite the disagreement between Mr. Swan and Mr. Bild regarding any possible extension of the listing agreement, Affinity presented evidence at trial that it continued to market the property on behalf of Green Oaks after February of 2007. Of particular importance was evidence that it was Affinity that provided new, additional information to Bradford regarding the property in May of 2007 and that it was this information that led directly to Midwest's ultimate purchase of the property as part of an anticipated joint venture with Bradford. This evidence was contrasted with Green Oaks' evidence that it was the first party to contact Midwest about the property in an email to Mr. DeAngelis on July 24, 2007, and that Affinity played no role in the sale to Midwest. Green Oaks also presented evidence that it had negotiated with Bradford regarding the property before it ever hired Affinity, but those negotiations did not lead to a final sale.

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¶ 23 Finally, the evidence established that the property did go under contract on August 30, 2007, to be sold for \$8.45 million to Equities. On October 11, 2007, the property was sold to Equities Bradford, as the assignee of Equities. It was undisputed that Green Oaks never informed Affinity about Midwest's interest in the property until after the sale. Prior to filing suit, Affinity made a demand for a 6% commission on the sale of the property, but that demand was rejected by Green Oaks.

¶ 24 On September 27, 2012, the circuit court issued a written order. Therein, the circuit court concluded: (1) Affinity and Green Oaks had actually agreed to an extension of the listing agreement to July 30, 2007, pursuant to the unambiguous language of the listing agreement; (2) Midwest was the alter ego of Inland; (3) Affinity provided information to Bradford during the extended term of the listing agreement that led to the sale of the property; (4) Green Oaks breached the listing agreement by failing to refer Midwest's interest in the property to Affinity during the extended term of the listing agreement; and (5) for all these reasons, Affinity was entitled to a commission on the sale of the property under the listing agreement. However, the circuit court also determined that Affinity was only entitled to a 2% commission (\$169,000), in line with the parties' "usual and customary practice of negotiating commission fees" as evidenced by the prior unsuccessful deals with Inland and Glenstar.

¶ 25 Affinity filed a timely notice of appeal (appeal number 1-12-3171) from the circuit court's judgment on October 24, 2012. In its notice of appeal, Affinity indicated that it was challenging only the amount of the circuit court's \$169,000 award, contending that it was actually entitled to a judgment against Green Oaks in the amount of \$507,000. In turn, Green Oaks filed a motion to reconsider the circuit court's judgment on October 26, 2012. Therein, Green Oaks contended that the circuit court had erred in concluding that the listing agreement

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had been extended and that Midwest was the alter ego of Inland. That motion was denied by the circuit court on January 15, 2013.

¶ 26 On January 22, 2013, Green Oaks filed a motion for default judgment against Equities. Therein, Green Oaks contended that it was entitled to a default judgment because, although Equities had appeared in this case it had never answered the third-party complaint. The motion made no mention of any of the evidence introduced at trial, nor did it contend in any way that the allegations contained in the third-party complaint had been proven at trial. In a written order entered on April 26, 2013, the circuit court stated: "this matter, including the third party action, was assigned for trial which commenced and proceeded in July, 2012; [Green Oaks'] post-trial motion for default is untimely; and at the time of trial, [Green Oaks] failed to prosecute its third party complaint against the third party defendant, [Equities,] and as such *waived* the third party claim." (Emphasis in original.) The circuit court's written order concluded by ordering that Green Oaks' "Motion for Default be and is hereby denied and its Third Party complaint is dismissed with prejudice[.]"

¶ 27 Green Oaks then filed a notice of appeal on May 20, 2013, which indicated that Green Oaks challenged: (1) the initial judgment in favor of Affinity; (2) the denial of its motion to reconsider that order; and (3) the order denying its motion for default judgment against Equities and dismissing its third-party complaint with prejudice. The appeals filed by Affinity and Green Oaks were subsequently consolidated by order of this court.

¶ 28

## II. ANALYSIS

¶ 29 On appeal, we first consider this court's jurisdiction over these consolidated appeals before proceeding to address the substantive issues raised by the parties.

¶ 30

### A. Jurisdiction

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¶ 31 As an initial matter, the parties on appeal debate whether this court has jurisdiction over these appeals. After reviewing the record, we conclude that we do have jurisdiction to review all the matters presented in each appeal.

¶ 32 Except as specifically provided by the Illinois Supreme Court Rules, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 *et seq.* (eff. Feb. 1, 1994); *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). "A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment." *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005).

¶ 33 However, even a final judgment or order is not necessarily immediately appealable. Illinois Supreme Court Rule 304(a) provides:

"If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. \*\*\* In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 34 In addition, Illinois Supreme Court Rule 303(a)(2) (Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008)), provides in relevant part:

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"When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered."

Under Rule 303(a)(2), unless it is accompanied by Rule 304(a) language, a final judgment resolving *either* an underlying claim or a third-party claim is not appealable until *both* such claims are finally resolved. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461, ¶ 13-16.

¶ 35 We first consider—and reject—Green Oaks' contention that we lack jurisdiction over Affinity's initial appeal because it was prematurely filed before all of the claims involved in this matter were finally resolved. On September 27, 2012, following the bench trial, the circuit court entered a judgment in favor of Affinity on its claim against Green Oaks. Affinity filed its notice of appeal from this order, challenging the amount of the commission awarded to it, on October 24, 2012. However, Green Oaks subsequently filed a motion to reconsider, which was denied on January 15, 2013. Moreover, at the time Affinity filed its notice of appeal, Green Oaks' third-party complaint against Equities had not yet been finally resolved. That third-party complaint was not finally resolved until April 26, 2013, when the circuit court denied Green Oaks' motion for a default judgment and dismissed Green Oaks' third-party complaint with prejudice. None of these orders contained language allowing an immediate appeal pursuant to Rule 304(a).

¶ 36 Thus, pursuant to Rule 303(a)(2), Affinity's notice of appeal became effective on April 26, 2013, the first point in time at which Affinity's underlying claim, Green Oak's motion to reconsider, and Green Oak's third-party complaint had all been finally resolved. Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008); *McMackin*, 2011 IL App (2d) 100461, ¶ 13-16. The fact that

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Affinity's notice of appeal was actually filed before the final resolution of Green Oaks' motion to reconsider and the third-party complaint against Equities is no impediment to our jurisdiction to consider the September 27, 2012, judgment as challenged in Affinity's notice of appeal.

¶ 37 We next consider our jurisdiction to consider the matters raised in Green Oaks' notice of appeal. That notice of appeal was filed on May 20, 2013, and sought to challenge: (1) the judgment in favor of Affinity, entered on September 27, 2012; (2) the denial of Green Oaks' motion to reconsider that order, entered on January 15, 2013; and (3) the order denying Green Oaks' motion for default judgment against Equities and dismissing Green Oaks' third-party complaint with prejudice, entered on April 26, 2013. Green Oaks styled its notice of appeal as a "NOTICE OF CROSS APPEAL & ORIGINAL APPEAL."

¶ 38 We find that we have jurisdiction to review all these matters, whether we view Green Oaks' notice of appeal to have initiated a separate appeal or a cross-appeal. Rule 303(a)(1) provides that "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from \*\*\*." Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). In addition, we note that "a party can appeal an otherwise nonappealable order at the time of the entry of a final order, as all prior rulings would be final and appealable at that point as well." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 66. Here, Green Oaks' notice of appeal was filed on May 20, 2013, well within 30 days of April 26, 2013, when the circuit court denied Green Oaks' motion for a default judgment and dismissed Green Oaks' third-party complaint with prejudice. As noted above, this was the first time that the circuit court entered a final and appealable order in this matter. Once that order was entered, Green Oaks was entitled to appeal from it and any prior orders that were not otherwise previously appealable. Pursuant to Rule

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303(a)(1) and *Mashal*, Green Oaks therefore filed a timely and proper separate appeal from all three of the orders listed in its notice of appeal.

¶ 39 Moreover, Rule 303(a)(3) provides:

"If a timely notice of appeal is filed and served by a party, any other party, within 10 days after service upon him or her, or within 30 days from the entry of the judgment or order being appealed, or within 30 days of the entry of the order disposing of the last pending postjudgment motion, whichever is later, may join in the appeal, appeal separately, or cross-appeal by filing a notice of appeal, indicating which type of appeal is being taken." Ill. S. Ct. R. 303(a)(3) (eff. June 4, 2008).

Because Green Oaks' notice of appeal was filed within 30 days of the final and appealable April 26, 2013, order, it also initiated a timely and proper cross-appeal under Rule 303(a)(3). And again, pursuant to *Mashal*, Green Oaks was also entitled to seek review of the two prior orders listed in its notice of appeal.

¶ 40 Finally, we briefly note that the parties on appeal have also debated the nature of the circuit court's dismissal of the third-party complaint; *i.e.*, whether it was merely a dismissal for want of prosecution (DWP) or a true dismissal with prejudice. This issue has important jurisdictional consequences because a DWP is not a final and appealable order due to the fact that a plaintiff has an absolute right to refile its suit within one year of the DWP. 735 ILCS 5/13-217 (West 2012); *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶¶ 7-8. As we discuss below, we conclude the trial court did in fact correctly dismiss the third-party complaint *with prejudice*. Thus, the above analysis is not affected, and we have jurisdiction over these two appeals.

¶ 41

B. Affinity's Right to a Commission

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¶ 42 We next address whether the trial court correctly concluded that Affinity was entitled to a commission on the sale of the property. We conclude that it did, under either a theory of breach of contract or unjust enrichment.

¶ 43 1. Breach of Contract

¶ 44 On appeal, Green Oaks contends that the circuit court's ultimate conclusion regarding Affinity's right to a commission was incorrect, because: (1) the evidence did not support the conclusion that the listing agreement had been extended or that Midwest was the alter ego of Inland; and (2) Affinity was not the "procuring cause" of the sale of the property.

¶ 45 This matter involves an issue of contract interpretation. It is well recognized that "[t]he primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). If there is no ambiguity in the language of a contract, a determination of the intent of the parties is governed solely by the language of that agreement. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. Where the language of a contract is clear and unambiguous, the construction of that contract is a matter of law subject to *de novo* review. *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 684 (2009).

¶ 46 From the evidence produced at trial, it is clear that Affinity would be entitled to a commission on the sale of the property pursuant to the listing agreement, assuming *arguendo* the circuit court correctly determined that the listing agreement had been extended to July 30, 2007. Indeed, Affinity's right to a commission would be clear regardless of whether Affinity took any steps to procure Midwest as a buyer or whether Midwest was the alter ego of Inland.

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¶ 47 Specifically, it is well recognized that "the rights and obligations of a real estate broker are determined by the terms of the listing or other brokerage agreement." *RE/MAX R.E. Professionals, Inc. v. Armstrong*, 288 Ill. App. 3d 552, 556 (1997). Here, the listing agreement clearly provided that it was an "EXCLUSIVE AUTHORIZATION OF SALE AND LEASE" granting Affinity the "exclusive right to sell and lease or sublease" the property. "In an exclusive sales agreement (as opposed to an exclusive agency agreement), the broker may become entitled to a commission if the property is sold by anyone during the life of the agreement. \*\*\* One of the obvious purposes of an exclusive right-to-sell agreement is to prevent the seller from showing or offering the property to others without informing the broker so as to avoid paying a commission. *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 523 (1997). Thus, had the property in this case been actually sold during the extended term of the exclusive listing agreement, there is no question that Affinity would be entitled to a commission regardless of who it was sold to or who actually sold the property.

¶ 48 Moreover, the exclusive listing agreement at issue here also provided Affinity with additional protection even after the agreement terminated. The agreement specifically provided that "in the event this Property goes under contract, is sold/leased or otherwise disposed of within one hundred eighty (180) days from the termination date of the Agreement to \*\*\* anyone with whom [Green Oaks] had dealt during the term of this Agreement, then in such event [Green Oaks] agrees to pay [Affinity] a broker's commission as stipulated in this agreement." This language is unambiguous, and "[w]here the terms of a contract are clear and unambiguous, the contract must be enforced as written \*\*\*." *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014, ¶ 32.

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¶ 49 Here, the record is clear that Green Oaks itself was involved in marketing the property to Midwest in July of 2007. Furthermore, it is undisputed that Green Oaks and Midwest entered into a contract for the sale of the property on August 10, 2007, and the closing of that sale occurred on October 11, 2007. Thus, assuming that the circuit court was correct that the original listing agreement was extended to July 30, 2007, the property both went under contract and was sold to Midwest within 180 days of the termination of that agreement. Moreover, Midwest was an entity with which Green Oaks "had dealt during the term" of the extension of listing agreement. Thus, Affinity was entitled to a commission pursuant to the unambiguous terms of the listing agreement itself.

¶ 50 2. Unjust Enrichment

¶ 51 Furthermore, we also conclude that Affinity was entitled to a commission even if it is assumed that the circuit court was incorrect and the listing agreement itself was not extended for any period of time after February 19, 2007. Specifically, we conclude that pursuant to the unjust enrichment count contained in the fourth-amended complaint, Affinity was entitled to a commission for its activities following that date, activities for which Green Oaks would be unjustly enriched if it did not pay Affinity a commission on the sale of the property. In reaching this conclusion, we note that a reviewing court may affirm the circuit court's judgment on any basis which appears in the record, regardless of the basis relied upon by the circuit court. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 54 (2009).

¶ 52 As this court recently summarized:

"To state a claim for unjust enrichment, 'a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of

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the benefit violates the fundamental principles of justice, equity, and good conscience.' [Citation.] Unjust enrichment is not an independent cause of action.

[Citation.] Rather, 'it is [a] condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence' (internal quotation marks omitted) [citation], or, alternatively, it may be based on contracts which are implied in law [citation]. This theory is inapplicable where an express contract, oral or written, governs the parties' relationship. [Citation.] A plaintiff is permitted to plead breach of contract claims in addition to unjust enrichment. [Citation.] Thus, although a plaintiff may plead claims alternatively based on express contract and an unjust enrichment, the unjust enrichment claim cannot include allegations of an express contract. [Citation.]" *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25.

Essentially, a claim of unjust enrichment asks the court to impose a "quasi-contract." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 8-9 (2004). "A quasi-contract, or contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice. [Citation.] The prevention of unjustness is the fundamental aspect of the doctrine of quasi-contracts." *Id.*

¶ 53 In addition to its breach of contract claim, Affinity's operative fourth-amended complaint also included a second count seeking to recover in the alternative for unjust enrichment. Affinity was careful not to allege the existence of an express contract in this count. Rather, Affinity generally alleged: (1) Green Oaks had requested Affinity to "perform real estate brokerage services for the procurement of a purchaser for the Property;" (2) Green Oaks accepted such services from Affinity pursuant to that request; (3) as a result of Affinity's services, the property

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was sold; and (4) a commission was owed to Affinity for that sale to prevent Green Oaks from being "unjustly enriched by this benefit which was requested and voluntarily accepted."

¶ 54 At trial, the parties presented evidence establishing that on February 27, 2007, within 10 days of the time the listing agreement ostensibly expired upon its own terms, Mr. Swan sent Mr. Bild an email in which Mr. Swan stated his belief that the listing agreement had "lapsed." Mr. Swan therefore wanted to confirm with Affinity that Green Oaks would not owe a commission upon a possible future sale to Inland. Noting that he was "not here to ruffle feathers," Mr. Swan asked Mr. Bild to confirm this understanding of the parties' relationship.

¶ 55 Mr. Bild responded to this email with one of his own later that same day. In that email, Mr. Bild indicated that it was his understanding that the listing agreement had been extended to July 30, 2007, due to the prior sales contracts with Glenstar and Inland that did not close. Mr. Bild concluded his email by stating "[i]f you disagree with any of the above statements, please advise" and indicating that Affinity "look[ed] forward to continuing marketing the property for [Affinity] and concluding a sale [on its] behalf."

¶ 56 Mr. Swan acknowledged at trial that he never directly responded to these assertions regarding an extension of the listing agreement. However, in a separate email exchange that also took place on February 27, 2007, Mr. Swan inquired if Affinity would be willing to accept a reduced commission of \$100,000 for a possible \$8.4 million "quick deal" with Inland. Mr. Swan concluded this email by stating: "[If] not, the project is still on the market and under contract with you to find a better offer." In his deposition, Mr. Bild stated that Affinity had ultimately agreed to a \$150,000 commission upon the closing of any such a deal, but a final deal with Inland never materialized.

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¶ 57 The evidence at trial also showed that Affinity did in fact continue to market the property on Green Oaks' behalf well after February of 2007. Its sign advertising the property for sale remained on the property through July of 2007. Representatives of Affinity were in contact with Mr. Oko, one of Green Oaks' partners and the person who signed the original listing agreement on behalf of Green Oaks, in the spring and summer of 2007 regarding possible sales opportunities. Mr. Scardino testified that he, Mr. Bild, and Mr. Oko meet with various interested parties and developers with respect to the property during this time. Indeed, Mr. Bild and Mr. Scardino both testified that in July of 2007, they specifically spoke with Mr. Oko regarding a *further extension* of the listing agreement. Mr. Oko offered to extend the listing if Affinity was willing to accept a 3% commission, specifically referencing the fact that Green Oaks was negotiating a possible deal involving *Bradford*, but Bradford was of the opinion the Affinity's 6% commission would be too high. No agreement with respect to such a further extension was ever reached.

¶ 58 Most important, of course, is the clear evidence that it was Affinity that first contacted Bradford with new information regarding the property in 2007, and it was based upon this contact that the property was eventually sold to Midwest. While Green Oaks had been in contact with Bradford and Mr. Pagnotta on previous occasions regarding the property, the record establishes that Mr. Bild specifically contacted Bradford via Mr. Pagnotta in May of 2007 with additional information. Specifically, on May 9, 2007, Mr. Bild sent Mr. Pagnotta an email indicating that "the price is reduced and you may want to re-visit it." Mr. Bild further indicated that Mr. Oko was interested in moving on from the project and would accept a reduced price of \$8.5 million. Mr. Bild also provided updated "due diligence" information, including information regarding a new "Phase II" environmental report that was only completed in April of 2007. Mr.

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Pagnotta responded to this email with one of his own the following day, in which he stated that he "wanted to take a run at this site again." Mr. Bild immediately apprised Green Oaks of Bradford's renewed interest in the property in an email to Mr. Loeb, one of Green Oaks' three partners.

¶ 59 Moreover, it is also clear from the testimony of Mr. DeAngelis and the affidavits of Mr. Wheeler and Mr. Dams that: (1) it was Mr. Pagnotta that first contacted Midwest about the property in June or July of 2007, only after Affinity had brought new information and new terms regarding the sale of the property to Mr. Pagnotta's attention; (2) Bradford and Midwest were in negotiations regarding the possibility of a joint venture with respect to the property, with Bradford initiating these negotiations; and (3) significant negotiations between Bradford and Midwest began before Mr. Swan's July 24, 2007, email to Midwest.

¶ 60 Thus, it is apparent that in May of 2007, Green Oaks was immediately made aware of Affinity's efforts with respect to Bradford, and indeed was well aware that throughout the spring and summer of 2007 Affinity was still marketing the property on behalf of Green Oaks in expectation of receiving a commission. Moreover, it is also clear that it was Affinity's efforts in providing new information to Bradford in May of 2007 that initiated a chain of activity that directly led to the sale of the property to Midwest. While Green Oaks contends that this process actually began with its own July 24, 2007, email to Midwest, the evidence belies this argument.

¶ 61 Upon this record, we conclude that even if the evidence presented at trial was insufficient to establish that the parties' listing agreement was actually extended to July 30, 2007, the evidence was sufficient to establish that Green Oaks unjustly retained a benefit to Affinity's detriment and that Green Oaks' retention of that benefit would violate the fundamental principles of justice, equity, and good conscience. *Gagnon*, 2012 IL App (1st) 120645, ¶ 25. We note that

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"it is the policy of Illinois law to protect brokers who were employed to act and in good faith do act. [Citation.] Courts rely on the policy that it is inequitable for a seller to enjoy the benefits from a broker's services without paying a commission. [Citation.]" *Schaller v. Weier*, 319 Ill. App. 3d 172, 178 (2001). Thus, even absent the existence of any actual, explicit agreement between Green Oaks and Affinity covering the period following February of 2007, Affinity sufficiently established its claim of unjust enrichment such that a contract implied in law should be imposed to prevent injustice. *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 8-9.

¶ 62 We therefore conclude that under either theory pleaded in the fourth-amended complaint—breach of contract or unjust enrichment—Affinity was entitled to a commission on the sale of the property to Midwest.

¶ 63 C. Amount of Commission

¶ 64 We now turn to the issue raised in Affinity's appeal; *i.e.*, whether the trial court properly determined that Affinity was entitled to a recovery of a 2% commission on the sale of the property. We find that this determination was correct under either a theory of breach of contract or unjust enrichment.

¶ 65 "In Illinois, the measure of damages is a question of fact to be decided by the trier of fact, and a reviewing court should not substitute its judgment for that of the trier of fact." *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 595 (2008). Thus, "[w]here an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. [Citation.] A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. [Citation.] \*\*\* An award of damages is not against the manifest weight or manifestly erroneous if there is an

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adequate basis in the record to support the trial court's determination of damages." *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 14. If the record contains any evidence to support the circuit court's damages award, that award should be affirmed. *InsureOne Independent Insurance Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 81.

¶ 66 We first address Affinity's contention that the award of a 2% commission was not the proper measure of damages for Green Oaks' purported breach of the listing agreement. "The basic theory of damages for breach of contract is that the plaintiff must establish an actual loss or measurable damages resulting from the breach in order to recover. [Citation.] In a breach of contract action, 'the proper measure of damages is the amount of money that will place the injured party in as satisfactory a position as [it] would have been in had the contract been performed.' [Citation.]" *Id.* at ¶ 82. "However, the claimant should not be placed in a better position, providing a windfall recovery. [Citation.] Damages which 'naturally and generally result from a breach are recoverable.' [Citation.] Damages which are not the proximate cause of the breach are not allowed. [Citation.]" *In re Illinois Bell Tel. Link-Up II*, 2013 IL App (1st) 113349, ¶ 19.

¶ 67 On appeal, Affinity notes the listing agreement clearly provided: (1) Green Oaks would pay to Affinity "a broker's commission as stipulated in this agreement;" (2) the listing agreement explicitly provided that "[t]he real estate commission for vacant land is six percent (6%) of the selling price;" and (3) "[n]o amendment or alterations in the terms hereof with respect to the amount of commission or to the time of payment of commission shall be valid or binding unless made in writing and signed by [Affinity]." Contending that no such written and signed amendment was executed by the parties, Affinity contends that the circuit court therefore improperly looked beyond the four corners of this explicit and unambiguous contract language to

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determine Affinity's recovery as a 2% commission in line with the parties' "usual and customary practice of negotiating commission fees."

¶ 68 We disagree with this argument. We acknowledge that the agreement provides that Affinity would be entitled to a 6% commission upon the sale of the property and there is no evidence in the record that a reduction in that amount was ever agreed to in any written document signed by Affinity with respect to the sale to Midwest. However, we also note that the agreement just as clearly indicates that the property would be "priced for sale at \$11,000,000." The listing agreement is completely silent as to the proper amount of commission to be paid to Affinity if the property was sold for an amount less than \$11 million. Moreover, while such amendments were to be in writing and signed, the contract clearly contemplated that "amendment[s] or alterations \*\*\* with respect to the amount of commission" were possible.

¶ 69 The circuit court was also presented with clear evidence of two prior potential sales for less than \$11 million that were negotiated prior to the sale to Midwest. In the potential Glenstar deal, the property was to be sold for \$7.3 million and the parties negotiated for a \$148,000 commission to be paid to Affinity. In the potential Inland deal, the property was to be sold for \$8.25 million and the parties negotiated for a \$150,000 commission to be paid to Affinity. In each case, Affinity would be paid approximately 2% of the final, reduced purchase price.

¶ 70 Based upon this record, we conclude that it was not against the manifest weight of the evidence for the circuit court to conclude that—assuming the listing agreement had been extended—Affinity was entitled to a commission of \$169,000. This amount represented, in light of all the evidence and the parties' past practice, 2% of the final purchase price of \$8.45 million paid by Midwest. We certainly cannot say that an opposite conclusion is apparent from the record or that the circuit court's finding in this regard appears to be unreasonable, arbitrary, or

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lacked any evidentiary support in the record. *Hallberg*, 2012 IL App (1st) 092385, ¶ 81. Indeed, while we do not ultimately need to decide the issue, we note that one of Affinity's primary arguments below and on appeal was that Midwest was the alter ego of Inland. Again, the record clearly reflects that prior to any possible breach of the listing agreement by Green Oaks, Affinity agreed to an approximately 2% commission on a sale to Inland of \$8.25 million. Allowing Affinity to recover its full 6% commission upon an \$8.45 million sale to Midwest, Inland's supposed alter ego, would improperly allow Affinity to recover a windfall recovery.

¶ 71 Second, even if we assumed that the listing agreement had not been extended, we conclude that a 2% commission would also represent the proper amount of Affinity's recovery under its unjust enrichment claim. We reiterate that under such a claim, a contract is implied by law only to prevent injustice. *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 8-9. As such, the measure of damages for unjust enrichment focuses on the benefit received and retained by the defendant as a result of the activities of the plaintiff. *Stark Excavating, Inc. v. Carter Construction Services, Inc.*, 2012 IL App (4th) 110357, ¶ 37. As revealed by the evidence presented at trial, the benefit that Green Oaks received from Affinity was assisting in locating a buyer who was willing to pay \$2.5 million less than the original asking price of the property. The evidence further established that this benefit was worth only 2% of that reduced purchase price. Indeed, we fail to see why Affinity would be entitled to a greater commission based upon a contract implied in law than it would under its breach of contract claim.

¶ 72 D. Dismissal of Green Oaks' Third-Party Complaint

¶ 73 Finally, we consider Green Oaks' contention that the circuit court improperly denied its motion for default judgment against Equities and dismissed its third-party complaint with prejudice. We disagree.

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¶ 74 Initially, we must address Green Oaks' contention that the circuit court merely entered a DWP of its third-party complaint and improperly indicated that this dismissal was "with prejudice." Green Oak therefore contends that the dismissal could not have been made, and was not actually made, with prejudice.

¶ 75 Green Oaks is certainly correct—as discussed briefly above—that a DWP of a suit is not a final order which can be appealed because a plaintiff has an absolute right to refile that suit within one year of the dismissal. 735 ILCS 5/13-217 (West 2012); *Tandon*, 2013 IL App (1st) 113152, ¶¶ 7-8; *Wold v. Bull Valley Management Co., Inc.*, 96 Ill.2d 110, 112 (1983); *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). It is only after the period for refiling provided by section 13-217 expires that a DWP order operates as a termination of the litigation between the parties, and constitutes a final and appealable order. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill.2d 489, 508 (1998). Thus, if indeed the circuit court had merely entered a DWP of Green Oaks' third-party complaint, then Green Oaks is correct that it should not have been dismissed with prejudice. Furthermore, there would be serious consequences for our jurisdiction over these two appeals.

¶ 76 However, it is evident that the circuit court did not merely enter a DWP. While the circuit court did reference Green Oaks' failure to prosecute its case, it did so in specific reference to the failure to do so *at trial* and in support of the conclusion that Green had thus "*waived* the third party claim." (Emphasis in original.) The circuit court clearly intended that Green Oaks' third-party claim against Equities should be dismissed *with prejudice* due to Green Oaks' affirmative waiver of that claim.

¶ 77 Moreover, we also conclude that the circuit court did not commit reversible error with respect to the dismissal of the third-party complaint with prejudice. As an initial matter, it is

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doubtful that Green Oaks should be entitled to challenge the dismissal of its complaint on such a basis. "The rule of invited error or acquiescence is a form of procedural default also described as estoppel. [Citation.] The rule prohibits a party from requesting to proceed in one manner and then contending on appeal that the requested action was error. [Citation.] The rationale for the rule is that it would be manifestly unfair to grant a party relief based on error introduced into the proceedings by that party. [Citation.]" *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33.

¶ 78 Here, the record shows that the unclear status of the third-party complaint was specifically addressed prior to trial. The circuit court made it clear that the matter was proceeding to trial under the assumption that the third-party complaint was not going to be heard at trial unless Green Oaks or Equities informed the court otherwise. The court further specifically indicated that it did not want Green Oaks to come back at a later date and attempt to have any such claim heard after the trial on the underlying complaint was tried. Mr. Swan, on behalf of Green Oaks, responded to the circuit court's proposed course of action with nothing more than "[t]hat's fine, your Honor." We fail to see how Green Oaks can now complain about the natural consequences of an action it specifically acquiesced to below.

¶ 79 Moreover, even if we did consider the circuit court's decision to dismiss the third-party complaint on the merits, we would affirm. "We review for an abuse of discretion a circuit court's decision to dismiss a complaint with prejudice. [Citations.] When doing so, we consider whether the trial court, before dismissing with prejudice, took into account the unique and particular circumstances of the case before it; if so, the court did not abuse its discretion. [Citation.]" *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28.

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¶ 80 Here, it is evident that the circuit court did in fact consider the circumstances of this case before dismissing the third-party complaint. Green Oaks brought its third-party complaint against Equities pursuant to section 2-406(b) of the Code of Civil Procedure. 735 ILCS 5/2-406(b) (West 2012). The purposes behind this section, which allows "for the bringing of third-party complaints, are to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant." *Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc.*, 122 Ill. App. 3d 504, 510 (1984).

¶ 81 Here, Green Oaks made no effort to prosecute its third-party complaint at trial, after being warned by the trial court that it would not be separated from the trial on the underlying complaint. Indeed, the circuit court noted that Green Oaks did not take any action to prosecute the third-party complaint until many months after the trial, when it filed what the court considered to be an untimely post-trial motion for default. Any further proceedings against Equities on the merits would require the duplication of much of the evidence presented at the bench trial at issue here. Thus, allowing Green Oaks to pursue its third-party complaint against Equities on such a record would violate many of the very purposes behind allowing for third-party practice in the first instance. We cannot say that the circuit court abused its discretion in concluding that Green Oaks' third-party complaint against Equities should be dismissed with prejudice.

¶ 82

### III. CONCLUSION

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¶ 83 For the foregoing reasons, we affirm the \$169,000 judgment of the circuit court in favor of Affinity and against Green Oaks. We also affirm the dismissal of Green Oaks' third-party complaint with prejudice.

¶ 84 Affirmed.