2012 IL App (1st) 112504-U

SIXTH DIVISION
OCTOBER 5, 2012

No. 1-11-2504

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIO VARA, Plaintiff-Appellant, v. ABE POLATSEK, INTEGRA PROPERTIES, INC., MICHAEL STRICK, ESTHER CHROMAN, RHONDA MASHIACH, and S&M CORPORATION, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 07 L 6586 Honorable Susan Ruscitti Grussel, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* Where a real estate contract has no mortgage contingency clause and provides the purchaser with a security deposit if the closing is not performed on a specific date, the purchaser will lose his security deposit when he fails to close on that date. The purchaser has no causes of action for violations of the Illinois Real Estate License Act, the Lanham Act, the Uniform Deceptive Trade Practices Act, and the Illinois Consumer Fraud Act, and as a result, the trial court's decision on a bench trial will be affirmed.

¶ 2 This case involves litigation over a real estate contract for the sale and purchase of a single room occupancy (SRO) hotel, where the purchaser lost his earnest money deposit because

he was unable to close without financing and did not have a mortgage contingency clause.

¶ 3 Plaintiff Mario Vara filed a complaint against defendants Abe Polatsek, Integra Properties, Inc., Michael Strick, Esther Chroman, Rhonda Mashiach, and the S&M Corporation, alleging counts of (1) breach of contract, (2) violation of the Illinois Real Estate License Act (the License Act), (3) violations of the Uniform Deceptive Trade Practice Act, (4) violations of the Lanham Act, (5) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, and (6) promissory estoppel. Following a bench trial, and the trial court found in favor of defendants on all counts. Plaintiff appeals the trial court's decisions on all counts except promissory estoppel, and also claims that the trial court erred by refusing to pierce the corporate veil and by refusing to sanction defendants under Illinois Supreme Court Rule 137. For the reasons discussed below, we affirm.

¶ 4 BACKGROUND

¶ 5 In 2006, plaintiff, a retired Chicago police officer, was interested in purchasing a single room occupancy (SRO) type hotel. Plaintiff owns and manages other properties in Chicago, but has no experience with an SRO hotel. He met with his friend Lori Lee, a real estate agent employed by the realty firm of Keller Williams, to discuss his plans. Lee found various property listings, including an SRO hotel located on East 47th Street in Chicago (the subject property).

¶ 6 Defendant S&M Corporation owns the subject property, and defendants Michael Strick and Esther Chroman are the owners of all of S&M's corporate stock. Defendant Rhonda Mashiach is the property manager of the hotel and is Esther Chroman's daughter. Defendant Integra Properties, Inc., is a corporation that is the listing broker for the subject property, and

defendant Abe Polatsek is its president. Polatsek was the person that plaintiff or Lee negotiated with to purchase the subject property.

¶ 7 Plaintiff signed a written agreement to purchase the subject property without a mortgage contingency clause. Plaintiff was not able to close the sale on the agreed upon date, and was informed that he was in default. Plaintiff then filed a lawsuit against defendants, alleging that they breached the contract by failing to provide him with financial information required under the contract that he needed to secure a mortgage.

¶ 8 I. Undisputed Facts

¶ 9 Plaintiff worked with Lee to assist him in purchasing an SRO hotel. Lee found listings that conformed to plaintiff's requirements, including the listing for the subject property. The subject property was listed at a price of $1,499,000, and the listing disclosed the "total" fixed operating expenses for the subject property, including the real estate property tax, insurance, and utilities, but did not include the expenses for operating the SRO hotel business, such as payroll, repairs, and the general expenses that are necessary for operating an SRO hotel.

¶ 10 Lee submitted two written offers on behalf of plaintiff, both of which had mortgage contingency clauses. The first offer was for $1,333,000, and the second was for $1,499,00, the listed price of the subject property. Both offers were rejected. Plaintiff then fired Lee as his agent. Plaintiff continued negotiations with Polatsek to purchase the subject property.

¶ 11 Plaintiff consulted with his attorney, Jonathan Aven, who drafted a third written offer without a mortgage contingency clause for $1,000,000, which was also rejected.

¶ 12 On or about August 17, 2006, plaintiff met with Polatsek and Strick at Polatsek's office,

and received "profit and loss statements," which detailed income and expenses for the subject property during the years 2004 and 2005. Plaintiff submitted the profit and loss statements to John Frazier, his mortgage advisor, and they discussed the contents of the profit and loss statements.

¶ 13 Plaintiff continued to make written offers to defendants that contained mortgage contingency clauses, and defendants rejected these written offers. Plaintiff submitted a written offer on August 31, 2006, which included a written comment from plaintiff stating that he was not being represented by a broker. This offer was also rejected.

¶ 14 Plaintiff commissioned an inspection of the subject property, which was conducted on September 10, 2006. The inspector determined that the subject property was in need of extensive repairs, but did not provide a cost estimate. The inspector opined that the cost of all of the repairs, except those necessary for the roof, would not be cost prohibitive to purchasing the subject property. The inspector stated that the necessary repairs for the roof would be the greatest expense.

¶ 15 On September 15, 2006, Strick requested Polatsek to prepare a written offer to induce plaintiff to purchase the subject property for a price of $1,100,000, using a Chicago Association of Realtors standardized form. In its preparation, three clauses were stricken: (1) the mortgage contingency clause; (2) the dual agency clause; and (3) the building operational warranty clause (often referred to as the "mechanicals" clause). After plaintiff received the written offer, he unilaterally changed the closing date from October 30 to November 15, 2006, and the attorney modification clause from five days to zero. The offer provided that the purchaser would pay

$25,000 in earnest money into an escrow account with seller's broker, Integra Properties, upon the execution of the contract. The offer further provided that upon a default, the earnest money would be paid to seller as liquidated damages. The offer also provided that the purchaser would receive copies of all *existing* leases and a rent roll. The seller accepted the offer on September 20, and never provided leases or a rent roll to plaintiff, claiming none existed.

¶ 16 Even though the agreement did not include a mortgage contingency clause, plaintiff still needed financing in order to purchase the subject property and sought to obtain a mortgage from three sources: Silver Hill Financing, LaSalle Bank, and American Chartered Bank. Plaintiff retained Integra Realty Resources (unrelated to Polatsek's company Integra Properties, Inc.) to appraise the subject property so that financing would be easier to obtain. On October 2, 2006, an appraisal of the subject property was sent to Silver Hill showing the fair market value at $1,150,000. The appraisal report indicated that some of the tenants were "unresponsive" to the appraiser, who worked without income and expense statements to formulate its appraisal of the subject property. Silver Hill made a mortgage offer to plaintiff for a 10% annual interest rate, which was rejected because plaintiff needed a lower rate. Plaintiff received a letter from First Columbia Capital, dated November 16, 2006, informing him that his application for a loan from LaSalle Bank was accepted on October 20, and that LaSalle Bank typically requires 45-60 days to close a loan. No terms of that acceptance are indicated in the record of this case, nor are they material to the issues in this case.

¶ 17 As the closing date approached, plaintiff requested defendants for additional time to close the sale so he could secure a mortgage. No additional time was given. After the November 15

closing date passed, plaintiff received a loan commitment from American Chartered Bank. Again, no terms of that commitment are indicated in the record of this case, nor are they material to the issues in this case. S&M notified plaintiff that he was in default by a letter dated December 7, 2006.

¶ 18 II. Witness Testimony

¶ 19 Although the above facts are undisputed, the parties assert additional facts that are in dispute.

¶ 20 A. Plaintiff Mario Vara

¶ 21 Plaintiff testified that he asked Lee to waive her representation because he was directed to do so by Polatsek. Plaintiff testified that Polatsek said that "the only way this building is going to be sold is, one, get rid of your agent ***." Polatsek denied that he required or asked plaintiff to remove his real estate agent.

¶ 22 Plaintiff testified that he attended a meeting with Polatsek and Strick to discuss the profit and loss statements. Plaintiff testified that "they said that [the profit and loss statement] was for tax purposes only. It does not reflect the actual income." Plaintiff also testified to a phone call with either Polatsek or Strick, where he was told that some of the rooms were rented by the day and on some occasions by the hour, which generated "a lot of cash."

¶ 23 Plaintiff testified that he met with Polatsek at a Krispy Kreme donut shop to sign the written offer, which was "blurry" and "barely legible," but he signed it anyway.

¶ 24 Plaintiff testified that he needed a mortgage to close the sale. On cross examination, defense counsel read a written interrogatory answered by plaintiff in which he stated that Silver

Hill offered him an annual interest rate of 9.5%.

¶ 25 B. Lori Lee

¶ 26 Lee testified on cross examination to the following:

> "Q: *** [I]sn't it a fact that he told you that he felt that if [Mr. Vara] went directly with the listing broker, he would have a better chance of purchasing the property even though you had already wrote a contract offering full price?
>
> ***
>
> A: Yes."

¶ 27 Lee testified that she never told Polatsek that plaintiff would need to finance the purchase.

¶ 28 C. John Frazier

¶ 29 John Frazier, plaintiff's mortgage broker, testified on behalf of plaintiff that he helped plaintiff in his attempts to secure a mortgage prior to the closing. He met with plaintiff and requested the rent rolls, expenses, and real estate taxes, because he needed to submit them to lending institutions for purposes of obtaining a mortgage. Frazier testified that he contacted Polatsek and Strick to obtain the leases and rent roll and never received them.

¶ 30 He did receive the profit and loss statements for the subject property and he submitted them to the lending institutions.

¶ 31 D. Real Estate Experts

¶ 32 Plaintiff called David Schonback to testify about the standards and practices in the real estate profession. Schonback testified on direct examination that if a broker is acting as a dual

agent, he has a duty to both the buyer and the seller. On cross examination, he testified that when a seller desires to sell a property on a cash-only basis, it is not unethical to strike the mortgage contingency clause. He also testified that if a seller desires to sell a property "as is," it is not unethical for the seller's agent to strike the operations and mechanicals clause. Schonback did not opine that Polatsek acted as a dual agent. Schonback also testified on cross examination that when a broker is not a dual agent, he has no duty to explain the legal significance of striking the terms of a contract to the party he is not representing.

¶ 33 Plaintiff also called David Hanna to testify about the standards and practices in the real estate profession. Hanna also testified on direct examination that dual agents have a duty to both the buyer and the seller. Hanna also did not opine that Polatsek acted as a dual On cross examination, Hanna testified that it is not unethical for a broker who is not a dual agent to strike clauses on behalf of his client and not inform the other party of the legal significance of striking the clauses.

¶ 34 E. Defendant Abe Polatsek

¶ 35 Polatsek testified for the defense. He testified that Strick instructed him to sell the subject property to someone with experience managing SRO hotels. When he received the first offer from Lee, which contained a mortgage contingency clause, he passed it on to S&M and Strick told him that he would not consider an offer with contingencies.

¶ 36 Polatsek testified that the ad flyer for the subject property contained expenses related only to owning the subject property, and not managing the hotel business. He stated that utilities and property taxes are fixed costs, but that costs related to managing the hotel could change based

upon different management styles, and that experienced purchasers apply their own projected expenses when considering purchasing SRO hotels.

¶ 37 Polatsek denied requesting plaintiff to fire Lee, and was skeptical that Lee had the authority to waive her representation because she was working for a realty company.

¶ 38 Polatsek testified that he relayed plaintiff's offers to purchase the subject property to Strick, and that he informed plaintiff of Strick's response to each offer. Polatsek testified that he did nothing more than act as his client's agent.

¶ 39 Polatsek also testified that no one at the August 17 meeting represented that income was not reflected in the profit and loss statements, and denied representing that there was "cash off the books." Polatsek testified that no one asked him for additional financial information. Polatsek testified that plaintiff never informed him that he needed a mortgage. Polatsek testified that after the agreement was signed, plaintiff informed him that he was seeking a mortgage, but not that he needed one to close the sale.

¶ 40 Polatsek testified there were no existing leases for the property, and SROs typically do not have rent rolls.

¶ 41 F. Defendant Michael Strick

¶ 42 Strick testified for the defense about his reluctance to sell the property to plaintiff because banks are reluctant to offer financing to purchasers who lack experience managing SROs. Strick testified that he did not want to take the subject property off the market while a buyer struggled to obtain a mortgage.

¶ 43 III. Motion for Sanctions

¶ 44 Before the trial court issued its ruling, plaintiff filed a written motion to sanction S&M pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 1967), because it was delinquent in paying some of its corporate fees. Defendant responded by introducing documents showing that it had paid all of its outstanding fees and was in good standing with the Illinois Secretary of State. The trial court denied sanctions.

¶ 45 IV. Trial Court's Findings

¶ 46 At the conclusion of the bench trial, the trial court made the following findings of fact. Plaintiff's first offer to purchase was conditioned on "two contingencies, one was for the mortgage with an interest rate of 9.5 percent and the other was for financial information." S&M rejected the offer, and demanded a cash offer. Plaintiff made a written offer at the full asking price, with the same contingencies, which was again rejected. On August 17, 2006, plaintiff received profit and loss statements for the years 2004 and 2005, and made his third offer on August 31, 2006, contingent upon receiving an appraisal of the subject property for $1,125,000 within 10 business days, which was again rejected.

¶ 47 On September 14, 2006, S&M prepared a written offer for $1,100,000. On the offer form, the mortgage contingency, dual agency, and representation of mechanicals clauses were stricken, with a closing date of October 30, 2006. Plaintiff unilaterally changed the closing date to November 15, 2006. On September 19, 2006, plaintiff sent a letter to S&M stating that "all concerns have been met," and demanded that S&M either accept his offer by the next day or return his earnest money. S&M accepted the written offer on the same day. The transaction did

not close by November 15, 2006, and on December 7, 2006, defendants notified plaintiff that he was in default.

¶ 48 The trial court found that plaintiff's termination of Lee as his agent did not terminate his broker relationship with Keller Williams, and found that there was no evidence that Polatsek was a dual agent who represented both plaintiff and S&M.

¶ 49 The trial court found the testimony of the two real estate experts credible, who stated that when a seller requests an all-cash deal and is unwilling to warrant the mechanicals, it is not unethical for the seller's agent, who is preparing an offer, to strike the mortgage contingency clause and mechanicals warranty clause.

¶ 50 The trial court found that the evidence showed that plaintiff knowingly, voluntarily, and intelligently signed the agreement, despite describing it as "illegible." The trial court found no evidence that plaintiff was forced to act or think in a certain way due to pressure, threats, or intimidation or by false representation or misrepresentations.

¶ 51 On July 28, 2011, the trial court found in favor of defendants on all counts. This appeal followed.

¶ 52 ANALYSIS

¶ 53 On appeal, plaintiff argues that the trial court erred in finding in favor of defendants on his counts for breach of contract, violations of the License Act, 225 ILCS 454/1-1 *et seq.* (West 2006), violations of the Lanham Act, 15 U.S.C. § 1051 *et seq.*, violations of the Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.* (West 2006), and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (West 2006).

Plaintiff further argues that the trial court erred in refusing to pierce the corporate veil to hold the shareholder defendants personally liable, and argues that the trial court erred in failing to sanction defendants, under Illinois Supreme Court Rule 137 (eff. Jan. 1, 1967). For the following reasons, we affirm.

¶ 54 I. Standards of Review

¶ 55 Since this case proceeded to trial issues of credibility and conflicting testimony were presented. Manifest weight of the evidence is the proper standard of review for those issues. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). "Where the trial court sits without a jury, its findings of fact will not be disturbed unless they are against the manifest weight of the evidence." *Harris Trust & Savings Bank v. Barrington Hills*, 133 Ill. 2d 146, 157 (1989). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo*, 164 Ill. 2d at 215.

¶ 56 The decision to impose sanctions on a party lies within the sound discretion of the trial court, and will not be reversed absent an abuse of discretion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004). "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 802 (2002).

¶ 57 II. Breach of Contract

¶ 58 Plaintiff argues that the trial court erred in finding that he breached the contract when he failed to close the sale on the agreed date. Plaintiff asserts that defendants breached the contract

first when they failed to provide the financial information promised, and that defendants' breach excuses his non-performance.

¶ 59 In order to prove a claim for breach of contract, a plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid contract; (2) that plaintiff performed all conditions precedent; (3) that the defendant breached the contract, and; (4) that damages resulted from the defendant's breach. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (2004). Preponderance of the evidence means that the proposition must be "more probably true than not true." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005). The parties do not dispute that a valid contract existed, and that plaintiff did *not* perform all conditions precedent. Plaintiff argues that he was prevented from closing the sale on the agreed date because defendants breached paragraph 6 of the contract, which stated that "Seller shall present to Buyer a complete copy of all *existing* leases affecting the subject property and a rent roll within three business days of the Acceptance Date." (Emphasis added.)

¶ 60 Under general contract principles, only a material breach of a contract provision will justify nonperformance by the other party. *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 346 (2005). A material breach is one that defeats the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party. See *Sahandi v. Continental Illinois National Bank & Trust Co.*, 706 F.3d 193, 196 (1983). Therefore, even if defendants' conduct had amounted to a breach of paragraph 6, it was not a material breach because defendants had no duty to assist plaintiff in obtaining a mortgage, and the breach did not justify plaintiff's failure to close the sale on the agreed date.

¶ 61 Plaintiff argues that because defendants did not provide him with leases and a rent roll, he was unable to obtain financing and could not complete the purchase, and that this failure to provide the documents absolved him of his duty to perform. The language of the contract stated that defendants shall present plaintiff with all *existing* rent rolls and leases, and the evidence in the record shows that there were no existing rent rolls or leases. Since defendants had nothing to give to plaintiff, his arguments are not persuasive.

¶ 62 Furthermore, the contract did not contain a mortgage contingency clause, and plaintiff's failure to obtain a mortgage would not excuse him from performing his obligation under the contract. The contract did not contain any provisions that required defendants to help him obtain a mortgage or obtain documents that did not exist.

¶ 63 Plaintiff argues that defendants' conduct caused him monetary damage. Plaintiff claims as damages his lost earnest money, his "costs of appraisals," and the lost profits he would have received from operating the SRO hotel. Since there was no evidence of a breach of the contract, we need not discuss the claimed damages.

¶ 64 Plaintiff next argues that defendants violated the implied covenant of good faith and fair dealing when they failed to provide the financial information. Every contract contains an implied covenant of good faith and fair dealing. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367 (1995). "The obligation of good faith and fair dealing is essentially used to determine the intent of the parties where a contract is susceptible to two conflicting constructions." *Northern Trust Co.*, 276 Ill. App. 3d at 367. The covenant exists to ensure that parties "vested with contractual discretion exercise that discretion reasonably, not arbitrarily,

capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Northern Trust Co.*, 276 Ill. App. 3d at 367. Problems involving the implied covenant of good faith and fair dealing generally arise when one party to a contract is given broad discretion in performance. *Northern Trust Co.*, 276 Ill. App. 3d at 376. "In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead the existence of a contractual discretion." *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004). Plaintiff has not done so here. Instead, plaintiff reasserts his argument that defendants breached the contract, and argues, without any citation to authority, that the breach amounts to a violation of the covenant of good faith and fair dealing. If a party fails to cite to authority to support its argument, the argument is deemed waived. *People v. Sambo*, 197 Ill. App. 3d 574, 585-86 (1990); *People v. Trimble*, 181 Ill. App. 3d 355, 356 (1989) (holding that appellate courts are entitled to have the parties' issues clearly defined, and would be overburdened by having to perform a party's research in addition to judging the merits of its argument). Most importantly, the record does not disclose evidence of a violation of the covenant of good faith and fair dealing.

¶ 65 Plaintiff also argues that Polatsek forced him to sign a contract that was illegible, in order to support his claim that this conduct violated the implied covenant of good faith and fair dealing. When plaintiff filed his second amended complaint, he attached a copy of the contract, which was indeed illegible. However, the contract attached to plaintiff's initial complaint, filed June 26, 2007, in the clerk's office, was perfectly legible, and plaintiff fails to show that the contract he signed was not the agreement he consented to.

¶ 66 III. Illinois Real Estate License Act Violations

¶ 67 Plaintiff claims that defendants violated section 15-35 of the License Act, which states as follows:

> "(a) A licensee shall advise a consumer in writing of the following no later than beginning to work as a designated agent on behalf of the consumer:
>
> (1) That a designated agency relationship exists, unless there is a written agreement between the sponsoring broker and the consumer providing for a different brokerage relationship.
>
> (2) The name or names of his designated agent or agents. The written disclosure can be included in a brokerage agreement or be a separate document, a copy of which is retained by the sponsoring broker for the licensee.
>
> (b) The licensee representing the consumer shall discuss with the consumer the sponsoring broker's compensation and policy with regard to cooperating with brokers who represent other parties in a transaction.
>
> (c) A licensee shall disclose in writing to a customer that the licensee is not acting as the agent of the customer at a time intended to prevent disclosure of confidential information from a

> customer to a licensee, but in no event later than the preparation of the offer to purchase or lease real property." 225 ILCS 454/15-35 (West 2006).

Plaintiff claims that section 15-35 prevents defendants from requesting plaintiff to have Lee waive her representation of plaintiff.

¶ 68 Polatsek denied that he requested the waiver, and Lee testified that the reason plaintiff asked her to waive her representation was because plaintiff believed he had a better chance of purchasing the hotel without her. The record does not disclose whether Lee had the authority to waive the representation agreement for Keller Williams, the realty company she worked for. The trial court heard the conflicting testimony of the witnesses and made credibility determinations. A witness' credibility is an issue to be determined by the trial court. *Bazydlo*, 164 Ill. 2d at 215; *Hall*, 194 Ill. 2d at 332. We cannot say that it was against the manifest weight of the evidence for the trial court to determine that Polatsek did not require or force plaintiff to remove Lee as his agent, or that Lee's removal did not affect Keller Williams' representation of plaintiff.

¶ 69 Plaintiff next argues that Polatsek acted as a dual agent by operation of law. Plaintiff argues that he was "working with" Polatsek during negotiations, and that under section 15-10 of the License Act, "[l]icensees shall be considered to be representing the consumer they are working with as a designated agent" unless a written agreement to the contrary exists or the licensee performs only ministerial tasks for the consumer. 225 ILCS 454/15-10 (West 2006).

¶ 70 The evidence discloses that Polatsek's interactions with plaintiff were ministerial in nature. Section 1-10 defines "ministerial acts" as acts that are informative or clerical in nature,

which do not rise to the level of active representation of a client. 225 ILCS 454/1-10 (West 2006). Examples of ministerial acts include responding to questions about a property and "completing business or factual information for a consumer on an offer or contract to purchase on behalf of a client." 225 ILCS 454/1-10 (West 2006).

¶ 71 The evidence shows that it was Lee who did the substantive work of finding the subject property. She testified to searching for property listings, presenting them to plaintiff, and satisfying the due diligence that is required for a realtor. Polatsek testified that in his dealings with plaintiff, he relayed plaintiff's offers to his client, and he informed plaintiff of his client's position regarding these offers. He also prepared an offer form on behalf of his client and forwarded it to plaintiff. Polatsek denied doing anything for plaintiff.

¶ 72 Consent to form an agency relationship may be oral, written, or implied from the actions of the parties, and may be established by circumstantial evidence. *Bhayani v. Sood*, 293 B.R. 911, 916 (N.D. Ill. 2003). In *Bhayani*, the buyer asserted that he hired an agent to represent him as a realtor in the purchase of property, and that the agent subsequently purchased the property for herself, in violation of the License Act. *Bhayani*, 293 B.R. at 913. The agent denied that she had entered into an agent-principal relationship with the buyer because there was no written agreement concerning the agency relationship, and that all of her actions on behalf of the buyer, including faxing a copy of the listing in response to an inquiry about the property and scheduling a viewing of the property, were ministerial. *Bhayani*, 293 B.R. at 916. The bankruptcy court found that those acts, standing alone, were ministerial in nature. *Bhayani*, 293 B.R. at 916-17. However, the bankruptcy court found that the agent's testimony, in which she stated that she did

not believe that the buyer wanted her to be his agent, was not credible. *Bhayani*, 293 B.R. at 917. The agent contradicted herself in her testimony, which indicated to the bankruptcy court that she knew that the buyer intended for her to be his agent. *Bhayani*, 293 B.R. at 917. The bankruptcy court determined that this knowledge created an agency relationship. *Bhayani*, 293 B.R. at 917.

¶ 73 Unlike in *Bhayani*, the trial court here found that the claimed agent, Polatsek, was more credible than plaintiff. Polatsek did not research any properties for plaintiff, and when Lee submitted her waiver, he believed that plaintiff was still represented by Keller Williams, Lee's firm. The trial court determined that Polatsek, unlike the agent in *Bhayani*, had no reason to believe that an agency relationship existed between himself and plaintiff. We cannot say that the trial court's ruling finding no dual agency is against the manifest weight of the evidence. As we previously noted, witness credibility is a determination for the trial court, and will not be set aside unless that determination is against the manifest weight of the evidence. *Bazydlo*, 164 Ill. 2d at 215; *Hall*, 194 Ill. 2d at 332. As a result, the trial court did not err in finding that Polatsek was not a dual agent.[1]

¶ 74 Finally, plaintiff argues that Strick violated the License Act by failing to disclose in the property listing that he is a licensed real estate broker. Section 10-30 of the License Act states

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[1] Plaintiff claims that the trial court erred in determining that he had judicially admitted that he was still represented by the managing broker Keller Williams, the firm that employed Lee, after Lee submitted her waiver letter. Since the evidence shows that Polatsek was not a dual agent, whether or not plaintiff was represented by Keller Williams is irrelevant to his claim under the License Act.

that "[a] licensee shall disclose, in writing, to all parties to a transaction his or her status as a licensee and any and all interest the licensee has or may have in the real estate constituting the subject matter thereof." 225 ILCS 454/10-30(c)(1) (West 2006). However, plaintiff lacks standing to bring a private cause of action under this section.

¶ 75 Article 20 of the License Act sets forth the available disciplinary measures available under the License Act. 225 ILCS 454/20-5 *et seq.* (West 2006). Section 125 states that "[e]xcept as otherwise expressly provided in this Act, nothing in this Act shall be construed to grant a private right of action for damages or to enforce the provisions of this Act or the rules issued under this Act." 225 ILCS 454/20-125 (West 2006). See *Stefani v. Baird*, 157 Ill. App. 3d 167, 174 (1987) (holding that a plaintiff's private cause of action to enforce the License Act was properly dismissed because the General Assembly amended the License Act to prohibit private causes of action while the plaintiff's case was pending before the trial court). Article 15 of the License Act contains an exception allowing private parties to bring causes of action. 225 ILCS 454/15–5(c) (West 2006) (stating that "[a]rticle 15 may serve as a basis for private rights of action ***. The private rights of action, however, do not extend to the provisions *of any other Articles of this Act*). (Emphasis added.) No such exception is made for Article 10, and therefore, plaintiff lacked standing to pursue his claim under article 10, section 30.

¶ 76 IV. Lanham Act Violations

¶ 77 Plaintiff asserts that defendants violated section 43(a) of the Lanham Act because the flyer advertising the subject property did not list expenses such as payroll expenses or the cost of

repairs under an approximation of "total" expenses. Section 43(a) of the Lanham Act prohibits false advertising among competitors, and states that

> "[a]ny person who, on or in connection with goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she has been damaged by such act." 15 U.S.C. § 1125(a)(1)(B).

The intent of the Lanham Act is to protect persons engaged *in commerce* against unfair competition. 15 U.S.C. § 1127. To establish a claim under the deceptive advertising prong of § 43(a) of the Lanham Act, a plaintiff must prove:

> "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false

> statement, *either by direct diversion of its sales from itself to defendant or by a loss of goodwill associated with its products*." (Emphasis added.) *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999).

In addition, a plaintiff must prove actual damages and a causal link between the damages and defendant's conduct in order to recover monetary damages. *Hot Wax*, 191 F.3d at 819-20.

¶ 78 Plaintiff argues that defendants' conduct resulted in the loss of his earnest money, "appraisal costs," and future profits. However, plaintiff did not present any evidence that defendants' conduct caused anti-competitive damages that the Lanham Act protects against. 15 U.S.C. § 1127. See *Hot Wax*, 191 F.3d at 819. The burden of proof is on the plaintiff to prove a violation of the Lanham Act by a preponderance of the evidence. *World Wide Association of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1140 (10th Cir. 2006). As stated above, preponderance of the evidence means that the proposition must be "more probably true than not true." *Avery*, 216 Ill. 2d at 191.

¶ 79 Plaintiff failed to show any evidence that defendant published a false statement of fact in any commercial advertisements. Plaintiff claimed that defendants' listing on the subject property showed nearly $300,000 in annual net income while at the same time filing tax returns showing "either a few thousand dollars in income, or a loss of income." Before plaintiff signed his offer for the subject property, he had the benefit of the advice of his mortgage broker and attorney. Plaintiff was a sophisticated real estate owner who owned and operated two large apartment buildings. The profit and loss statements he received showed income in excess of $300,000, but

showed less than $1,000 in profit. We cannot say that the trial court's ruling that defendant's listing of the property did not violate the Lanham Act was against the manifest weight of the evidence. We need not decide whether plaintiff and defendants were competitors under our ruling.

¶ 80 V. Uniform Deceptive Trade Practices Act Violations

¶ 81 Plaintiff argues that the trial court erred in finding that defendants did not violate the Uniform Deceptive Trade Practices Act, 815 ILCS 510/1 *et seq.* (West 2006). However, plaintiff has waived this issue because he raises it for the first time on appeal. *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278, 306 (2000). Although plaintiff's first amended complaint contained a count under the Uniform Deceptive Trade Practices Act, plaintiff's second amended complaint, which was the complaint that the trial was based upon, did not contain a count alleging violations of the Uniform Deceptive Trade Practices Act. Plaintiff's second amended complaint did not make reference to or incorporate the Uniform Deceptive Trade Practices Act claim from the first amended complaint, and where an amended complaint is complete and does not incorporate or adopt the prior complaint, it ceases to be part of the record for most purposes, being in effect abandoned and withdrawn. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. The trial court made six holdings, one for each count in plaintiff's second amended complaint. Therefore, the trial court did not address this issue and plaintiff has waived it on appeal.

¶ 82 Even if the trial court had addressed this claim, plaintiff cannot succeed because he failed to plead a claim for relief under the Uniform Deceptive Trade Practices Act and failed to present any evidence that the Act was violated. In addition, the only remedy under the Uniform

Deceptive Trade Practices Act is injunctive relief. 815 ILCS 510/3 (West 2006). Plaintiff did not seek injunctive relief against defendants, but rather asked for attorney's fees and costs, as provided by section 3 of the Act. 815 ILCS 510/3 (West 2006). Without obtaining injunctive relief, plaintiff could not receive fees and costs. See *Community Consolidated School District No. 54 v. Illinois State Board of Education*, 216 Ill. App. 3d 90, 94 (1991) (holding that fees may be awarded to parties that are successful *in obtaining relief* from the party against whom fees are sought).

¶ 83 VI. Illinois Consumer Fraud Act Violations

¶ 84 Plaintiff argues that the trial court erred in finding that S&M did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2006)) (the Consumer Fraud Act) when defendants did not provide the leases and a rent roll. To state a claim under the Consumer Fraud Act, plaintiffs must prove that: (1) a deceptive or unfair practice occurred; (2) the defendant intended for the plaintiff to rely on the deception; (3) the deception occurred in the course of conduct involving trade or business; (4) the plaintiff sustained actual damages; and (5) the actual damages were proximately caused by the defendant's deception. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 353 (2009). Plaintiffs must prove the claims under the Consumer Fraud Act under a preponderance of the evidence standard. *Dubey*, 395 Ill. App. 3d at 353. As stated above, preponderance of the evidence means that the proposition must be "more probably true than not true." *Avery*, 216 Ill. 2d at 191. A "deceptive or unfair practice" is defined as "including but not limited to the use or employment of any deception, fraud, false pretense, misrepresentation or the concealment, suppression or omission of any material fact,

with intent that other rely on" the falsified material fact. 815 ILCS 505/2 (West 2006). Whether conduct under the act is unfair is determined on a case-by-case basis. *Dubey*, 395 Ill. App. 3d at 354. The requirements for unfair conduct are (1) whether the conduct offends public policy; (2) whether the conduct is oppressive; and (3) whether the conduct causes consumers substantial injury. *Dubey*, 395 Ill. App. 3d at 354. On appeal, the appropriate standard of review is manifest weight of the evidence. *Dubey*, 395 Ill. App. 3d at 353. "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo*, 164 Ill. 2d at 215

¶ 85 Plaintiff frames the issue by asserting that defendants' conduct was unfair because defendants failed to provide leases and a rent roll, and they knew that the profit and loss statements misrepresented the subject property's finances.[2] However, Polatsek and Strick testified that no leases or rent rolls existed, which they claim is the normal practice for SRO hotels, and that the profit and loss statements were accurate. Witness credibility is an issue to be determined by the trial court, and will not be set aside unless that determination is against the

[2] In his brief, plaintiff mentions in one sentence that he was denied "full access" to the premises during the appraisal, and that this also amounts to unfair conduct. However, plaintiff does not develop this argument beyond stating that this conduct occurred. Thus, we do not consider this argument. See *Del Real v. Northwest Illinois Regional Commuter R.R. Corp.*, 404 Ill. App. 3d 65, 74 (2010) (holding that when a party included only "two cursory paragraphs" addressing the party's claim, without explaining why the opponent's conduct violated the law, the party failed to develop its argument and waived the claim).

manifest weight of the evidence. *Bazydlo*, 164 Ill. 2d at 215; *Hall*, 194 Ill. 2d at 332. Plaintiff cites to no evidence to prove that the trial court erred in finding defendants more credible than himself. Therefore, we cannot say that it was against the manifest weight of the evidence for the trial court to determine that defendants did not engage in unfair conduct for the reasons we have previously stated.

¶ 86 VII. Piercing the Corporate Veil

¶ 87 Plaintiff argues that the trial court should have pierced the corporate veil and held Strick, Chroman, and Mashiach personally liable. Piercing the corporate veil is an equitable *remedy* used to impose liability in an underlying cause of action. *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 186 (2009). Since we cannot say that it was against the manifest weight of the evidence for the trial court to rule in favor of defendants on all counts, the issue of whether or not the corporate veil should have been pierced is moot because no liability was imposed on the corporate entities.

¶ 88 VIII. Sanctions Against Defendants

¶ 89 Plaintiff finally argues that the trial court erred in refusing to sanction S&M, pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 1967), for its failure to pay all of its corporate fees during the pendency of the proceedings before the trial court. Rule 137 states that

> "[e]very pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney *** The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of

> his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law *** If a pleading, motion, or other paper is signed in violation of this rule, the court *** may impose upon the person who signed it, a represented party, or both, an appropriate sanction ***." Ill. S. Ct. R. 137 (eff. Jan. 1, 1967).

¶ 90 Plaintiff argues that S&M violated the Illinois Business Corporation Act (805 ILCS 5/1.01 *et seq.* (West 2006)), by failing to pay all of its corporate fees during the pendency of the litigation. Section 15.85 of the Business Corporation Act states that "[n]o corporation required to pay a franchise tax, license fee, penalty, or interest under this Act shall maintain any civil action until all such franchise taxes, license fees, penalties, and interest have been paid." 805 ILCS 15.85(c) (West 2006). Plaintiff argues that because S&M was not up to date with all of its fees at all times during the litigation, it should be sanctioned under Illinois Supreme Court Rule 137 because its attorneys signed pleadings and motions, despite knowing that S&M was delinquent in paying its fees, and was thus unable to carry on the litigation.

¶ 91 Plaintiff cites to *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15 (2001), to state why sanctioning delinquent corporations is appropriate under Rule 137. However, the facts of *Henderson-Smith* are distinguishable from the facts of the case before us. In *Henderson-Smith*, the delinquent corporation was the plaintiff, and it brought suit *seeking damages* for breach of contract. *Henderson-Smith*, 323 Ill. App. 3d at 16-17. The trial court entered judgment in favor of the plaintiff before the plaintiff had paid all of its fees,

and when the plaintiff issued a citation to discover assets in an effort to collect the judgment, the trial court quashed the citation and sanctioned the plaintiff for issuing it. *Henderson-Smith*, 323 Ill. App. 3d at 17. The plaintiff then paid its outstanding fees. *Henderson-Smith*, 323 Ill. App. 3d at 17.

¶ 92 The defendant moved for a new trial, arguing that it was improper for the trial court to grant judgment in the plaintiff's favor when it was a delinquent corporation, but the trial court denied the motion. *Henderson-Smith*, 323 Ill. App. 3d at 17. The defendant appealed the denial of its motion, and we affirmed, finding that judgments erroneously entered in favor of delinquent corporations may be validated by the corporation timely paying its outstanding fees. *Henderson-Smith*, 323 Ill. App. 3d at 17, 42. We noted in *dicta* that allowing formerly delinquent corporations to *collect judgments* after reinstatement might induce corporations to pursue causes of action while delinquent, in an attempt to "hoodwink" the court by obtaining a judgment without the court realizing that it is delinquent. *Henderson-Smith*, 323 Ill. App. 3d at 42. If the trial court notices the delinquency, the corporation would pay its fees, obtain the judgment, and be in the position it otherwise would have been in had it never been delinquent. *Henderson-Smith*, 323 Ill. App. 3d at 42. If the trial court never noticed, the delinquent corporation would obtain a judgment without having paid the required fees, and it is this kind of gamesmanship that we stated merited Rule 137 sanctions. *Henderson-Smith*, 323 Ill. App. 3d at 42.

¶ 93 In the case at bar, S&M is a defendant. Although defendant S&M did bring counterclaims, it subsequently dismissed them before trial, and thus is not seeking recovery. Therefore, S&M could not engage in the type of conduct we warned of in *Henderson-Smith*

because S&M was not seeking any relief that it would not have been entitled to because of its delinquent status.

¶ 94 Furthermore, Illinois law allows corporations involved in litigation to pay their outstanding fees and be deemed retroactively reinstated in good standing. *Jorgensen*, 21 Ill. App. 2d at 203. In response to plaintiff's motion for sanctions, S&M presented the trial court with a certified statement from the Illinois Secretary of State stating that S&M was a corporation in good standing at the time of trial, having paid its outstanding fees. The trial court then denied plaintiff's motion for sanctions, finding that the payment of its fees retroactively reinstated S&M in good standing. We further find plaintiff's argument concerning the entry of sanctions unpersuasive because the evidence showed the fees were paid. We cannot say that the trial court abused its discretion in denying plaintiff's motion for sanctions pursuant to Illinois Supreme Court Rule 137.

¶ 95 CONCLUSION

¶ 96 For the above reasons, we cannot say that the trial court erred in finding in favor of defendants on all counts.

¶ 97 Affirmed.