2015 IL App (1st) 132916-U

FIRST DIVISION
MARCH 23, 2015

No. 1-13-2916

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALECTA REAL ESTATE USA, LLC, by MID-AMERICA ASSET MANAGEMENT, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 11 M1 713866
BAB OPERATIONS, INC.,	)	Honorable Martin P. Moltz,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's denial of defendant's motion for summary judgment is not reviewable on appeal; the trial court properly relied on extrinsic evidence at trial and entered judgment in favor of lessor and against prior tenant-assignor of lease in the amount of $84,000; the trial court did not abuse its discretion in awarding lessor $70,030.40 in attorney's fees and costs under a fee-shifting provision in the lease.

¶ 2 This appeal arises from the August 15, 2013 order entered by the circuit court of Cook County, which awarded a total of $154,030.40 in judgment and attorney's fees in favor of plaintiff Alecta Real Estate USA, LLC (Alecta) and against defendant BAB Operations, Inc.

(BAB), in a breach of lease action. On appeal, BAB argues that: (1) the trial court erred in entering judgment against it, where it had been released from liability under the terms of a lease assignment and a lease amendment and, thus, could not be liable for damages caused by a subsequent assignee of the lease; (2) the trial court improperly denied BAB's motion for summary judgment; (3) the trial court erred in relying on extrinsic evidence at trial in determining the intent of the parties with regard to the lease assignment and lease amendment; and (4) the trial court abused its discretion in awarding $70,030.40 in attorney's fees and costs to Alecta pursuant to a fee-shifting provision in the lease. For the following reasons, we affirm the judgment of the circuit court of Cook County and remand the case to the circuit court for a hearing to determine postjudgment attorney's fees and costs.

¶ 3 BACKGROUND

¶ 4 Alecta is the landlord of a shopping center suite located in the Plaza Del Prado Shopping Center at the corner of Willow Road and Pfingsten Road in Glenview, Illinois (the property). Mid-America Asset Management, Inc. (Mid-America), is Alecta's management agent for the property. From 1996 to 2011, Alecta and its predecessors-in-interest leased the property to a variety of bagel franchises at the shopping center.

¶ 5 On May 6, 1996, a five-year commercial lease was executed between Alecta, by its predecessors-in-interest, and Bruegger's Corporation (Bruegger's), for the operation of a bagel shop on the property. The lease was revised on July 1, 1996 (the original 1996 lease). Pursuant to section 39 of the original 1996 lease, Bruegger's, as tenant of the property, had two options to renew the lease for a term of five years each. Section 39(B) specified the first option to renew period as "9/1/01-08/31/06" and the second renewal period as "9/1/06-8/31/11." An annual rent of $40,000.08 would be in effect for the first renewal period, while a "Fair Market Rent" would

be effective for the second renewal period. Section 39(C) provided that the options to extend the lease would be "personal" to the tenant and stated that "[t]his option is not transferable, except as indicated in Insert L." Insert L provided that franchisees or assignees of Bruegger's could exercise the options to renew. Section 39(D) stated that, "[u]pon exercise of the renewal option, [t]enant shall have no further right to extend the term of the [l]ease." Pursuant to section 19.3, "in any litigation between [l]andlord and [t]enant arising out of this [l]ease, the non-prevailing party shall be responsible for the reasonable attorney's fees and costs of the prevailing party."

¶ 6 After its execution, the original 1996 lease was assigned multiple times. On February 10, 1998, Bruegger's assigned its rights and obligations under the original 1996 lease to assignee Jacobs Bros., L.L.C. (Jacobs), a Delaware limited liability company, pursuant to an "[a]ssignment and [a]ssumption of [l]ease and [l]andlord's [c]onsent" (the first assignment).

¶ 7 On February 1, 1999, Jacobs, as assignor, assigned its interest under the lease to assignee BAB, pursuant to an "[a]ssignment, [a]ssumption and [m]odification of [l]ease and [c]onsent of [l]andlord" (the second assignment).

¶ 8 On October 23, 2001, BAB, as assignor, assigned its interest under the lease to assignee K&J Bagels, Inc. (K&J), pursuant to a "[l]ease [a]mendment and [a]ssignment [a]greement" (the third assignment). Joe and Kris Vetter (collectively, the Vetters) served as the "assignee guarantors." The third assignment noted that the lease terms under the original 1996 lease expired on September 30, 2001, and the parties "are also desirous of providing for the extension of the [l]ease terms pursuant to the first option [to renew]." Paragraph 9 of the third assignment specified that Bruegger's, "as a prior party to this [l]ease, is hereby deemed to no longer be a party to this [l]ease." Paragraph 10 noted that, pursuant to section 39 of the original 1996 lease, "the tenant shall be deemed to have exercised the first option to renew the terms of the [l]ease,

and such [l]ease term is deemed hereby extended" as follows: extended term of "10/01/01-09/30/06"; annual rent of $40,000; and monthly installment of annual rent of $3,333.33. Paragraph 10 also stated that the tenant shall retain the right to further extend the lease terms for one additional 5-year term pursuant to section 39 of the original 1996 lease. Paragraph 3(a) provided that the assignor, BAB, "shall remain liable for the payment and performance of all obligations of the tenant under the [l]ease, including, without limitation, the payment of all rent and other sums specified herein." Paragraph 3(c) provided that the landlord "may consent to subsequent assignments or sublettings of the [l]ease or to any amendments or modifications thereto without notifying [a]ssignor and without obtaining [a]ssignor's consent thereto, and no such action shall serve to release or relieve [a]ssignor from its liability under the [l]ease."

¶ 9 On June 5, 2002, K&J assigned its interest under the lease to assignees Jerry Brooks (Brooks) and the Vetters, pursuant to a "[l]ease [a]greement and [a]ssignment [a]greement" (the fourth assignment). Paragraph 9 of the fourth assignment reiterated that Bruegger's, "as a prior party to this [l]ease, is hereby deemed to no longer be a party to this [l]ease."

¶ 10 Between June 5, 2002 and April 20, 2005, Brooks assigned his interest in the lease to assignees Bukharis, Inc. (Bukharis), and Arshad and Salma Hussain (the Hussains), pursuant to a "[l]ease [a]mendment and [a]ssignment [a]greement" (the fifth assignment). On the signature page of the fifth assignment, the Hussains signed as "assignee guarantors." Although the fifth assignment listed Alecta as a "landlord," the signature block for Alecta was left blank. Paragraph 8 of the fifth assignment provided that Bruegger's and BAB, as "prior [parties] to this [l]ease, [are] hereby deemed to no longer be [parties] to this [l]ease." Paragraph 9 reiterated verbatim the language of paragraph 10 in the third assignment regarding the options to renew.

¶ 11 On March 3, 2004, Anthony Cervini (Cervini), as Director of Development of BAB Systems, Inc.[1] (BAB Systems), faxed a copy of the proposed fifth assignment to Martha Coronado (Coronado) of Mid-America. Evidence presented at trial showed that Bukharis and Arshad Hussain were eventually approved as franchisees by BAB Systems, which allowed them to "use Big Apple Bagel's branding, and collected franchise fees from them during the period that [they] were in possession."

¶ 12 On April 20, 2005, assignors Bukharis and the Hussains assigned their interest under the lease to assignee Kareena Corporation (Kareena), pursuant to a "[s]ixth [a]ssignment of the [l]ease" (the sixth assignment). Under the sixth assignment, Alecta was listed as the landlord and the signature page contained Alecta's signature. Arshad Hussain, as a representative of Bukharis, and Jayantilal Patel (Patel), as the president of Kareena, also signed the document. Recital H of the sixth assignment expressly stated that, as of the effective date of the sixth assignment, prior assignors Bruegger's, Jacobs, BAB, K&J, the Vetters, Brooks, Bukharis, and the Hussains "remain jointly and severally liable and obligated under the [l]ease." Recital H also stated that Bukharis and Arshad Hussain, as the "sixth assignor," represented that "(i) it is the only person/entity actually in possession of the [p]remises as of the [e]ffective [d]ate of this [s]ixth [a]ssignment, and (ii) it has full right and authority to assign the [l]ease to [Kareena]." Paragraph 14 provided a conflict provision stating that to the extent that the sixth assignment terms conflicted with the terms of the previous lease and amendments of the lease, the sixth assignment "shall control." Evidence presented at trial showed that BAB Systems approved Kareena as a franchisee and Kareena operated as a Big Apple Bagels store.

[1] The parties stipulated that BAB is a "wholly owned subsidiary of BAB, Inc. BAB Systems, Inc., the franchisor of Big Apple Bagels, is also a wholly owned subsidiary of BAB, Inc." Thus, BAB and BAB Systems are affiliated entities that are subsidiaries of BAB, Inc.

¶ 13 On June 22, 2006, Kareena, as tenant of the property, and Alecta, as landlord of the property, executed a first lease amendment (the first amendment). Recital I of the first amendment reiterated that prior assignors Bruegger's, Jacobs, BAB, K&J, the Vetters, and Brooks, "remain jointly and severally liable and obligated under the [l]ease." However, Recital G noted that Bukharis and the Hussains were "relieved of [their] obligations under the [l]ease." Under the first amendment, the second renewal option of the original 1996 lease was exercised to extend the lease terms for five years—October 1, 2006 to September 30, 2011. Recital J set forth a schedule of fixed minimum annual rent rates for each extended five-year term, which culminated in an agreed minimum annual rent rate of $51,773.41 for the "10/1/10-09/30/11" year. Paragraph 5 of the first amendment contained a provision limiting any liability on the part of Alecta to its equity in the property, rather than any personal liability on the part of Alecta as the landlord of the property. Paragraph 10 contained a conflicts provision stating that to the extent that the terms of the first amendment conflicted with the terms of the previous lease and amendments of the lease, the first amendment "shall control."

¶ 14 The parties stipulated to the following facts. Kareena, "individually and d/b/a 'Big Apple Bagels,' " was the last business entity operating at the property. Kareena stopped paying rent on the property in late April 2010. During the summer of 2010, Alecta attempted to negotiate a resolution of the outstanding arrearage with Kareena, "but those negotiations and efforts proved unsuccessful." However, BAB was not informed of or made a party to the negotiations with Kareena. In September 2010, Kareena ceased operations on the property but did not surrender possession of the premises at that time. On September 22, 2010, Alecta issued a notice of default to "all parties affiliated" with the lease, including Bruegger's, Jacobs, BAB, K&J, Brooks, the Vetters, the Hussains, Patel, and Kareena. The notice of default stated that a sum of $38,418.38

in rent and other charges was owed on the property. On October 27, 2010, in a letter to Alecta, BAB denied owing any liability to Alecta for the rent arrearage.

¶ 15 Beginning in September 2010, and continuing over several months, BAB corresponded with Alecta regarding proposals for a prospective replacement tenant for the property, which Alecta ultimately rejected as unacceptable on March 25, 2011.

¶ 16 On March 25, 2011, Alecta issued another notice of default to "all parties affiliated or alleged by [Alecta] to be affiliated" with the lease, including BAB, in which Alecta asserted that a total of $68,765.57 in arrearage was owed on the property. On April 15, 2011, Alecta issued a "statutory notice of default" to "all parties affiliated" with the lease, including BAB. Neither the March 25, 2011 nor the April 15, 2011 notices of default included Bruegger's or Jacobs. Kareena never surrendered possession of the premises at issue.

¶ 17 On June 28, 2011, Alecta filed a complaint in the circuit court of Cook County, alleging a forcible entry and detainer claim against Kareena (count I), and breach of lease claims against the Hussains (count II); Bukharis (count III); the Vetters (count IV); Brooks (count V); K&J (count VI); and BAB (count VII). The complaint alleged damages in the amount of $85,975.91, plus attorney's fees and costs.

¶ 18 On July 27, 2011, the trial court entered an order of possession in favor of Alecta.

¶ 19 On October 19, 2012, BAB filed an amended[2] motion for summary judgment. On November 22, 2012, Alecta filed a combined response to BAB's amended motion for summary judgment and a cross-motion for summary judgment. On December 12, 2012, the trial court denied the parties' cross-motions for summary judgment, and the case proceeded to trial.

[2] It does not appear that the original motion for summary judgment was included in the record on appeal.

¶ 20 On April 17, 2013, a bench trial commenced and was held over several days in May 2013. At trial, the parties stipulated to entering various documents into evidence (Exhibits A to W and Y to BB). The parties also stipulated to a "joint statement of stipulated and admitted facts," which contained 29 statements of stipulated facts and was entered into the record as part of Alecta's case-in-chief. At trial, Mid-America's Senior Asset Manager Susie Dressler (Dressler); Cervini; and BAB's Vice President and General Counsel Michael Murtaugh (Murtaugh), testified. No court reporter was present for trial, but the trial court subsequently certified a bystander's report prepared by Alecta and BAB.

¶ 21 On July 8, 2013, the trial court entered an $84,000 judgment in favor of Alecta for unpaid rent, other charges and costs, as well as legal fees "in an amount to be determined." The court found that the $84,000 judgment amount had been reduced by $20,092.27 because Alecta had failed to mitigate its damages. The court further granted Alecta leave to file a petition for attorney's fees and costs. The order also included Supreme Court Rule 304(a) language that there was "no just reason to delay enforcement or appeal or both of this order."

¶ 22 On July 19, 2013, Alecta filed a petition for attorney's fees and costs (petition for fees) in the amount of $87,538.[3]

¶ 23 On July 23, 2013, BAB filed a motion to vacate the portion of the court's July 8, 2013 order finding that the order was final and appealable under Rule 304(a). BAB argued that, in the interest of judicial economy and in avoiding piecemeal appeals, the court should vacate its Rule 304(a) ruling from the July 8, 2013 and make the order final and appealable only after the court

[3] Both parties erroneously state in their briefs on appeal that Alecta's petition for fees requested an amount of $88,651.81.

resolves the pending petition for fees. On July 29, 2013, the trial court granted BAB's motion to vacate and struck the Rule 304(a) language from the court's July 8, 2013 order.

¶ 24 On August 5, 2013, BAB filed an objection to Alecta's petition for fees.

¶ 25 On August 15, 2013, following oral arguments, the trial court entered an order granting Alecta 80% of its claimed legal fees and costs, in the amount of $70,030.40. In the August 15, 2013 order, the trial court entered a final judgment against BAB in the total amount of $154,030.40, which included the $84,000 judgment as of July 8, 2013.

¶ 26 On September 11, 2013, BAB filed a notice of appeal, which was later amended.

¶ 27 ANALYSIS

¶ 28 This court has jurisdiction over this appeal pursuant to Rules 301 and 303. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 1, 2007). While Alecta sued multiple defendants, including BAB, in the instant litigation, the record reveals that Alecta's claims against the other defendants are no longer pending in the trial court. At the August 15, 2013 hearing on Alecta's petition for fees, counsel for BAB alluded to the fact that a default judgment had already been entered against Kareena; that Alecta had already obtained "attorney's fees judgments against the other defendants"; and that the other defendants, which had either gone "out of business" or had "declared bankruptcy," "were out of this case a long time ago." Alecta's brief on appeal also represents to this court, which BAB does not dispute, that its claims against the other defendants were "unsuccessful" because it was "unable to collect the judgments obtained against those defendants." Therefore, we have jurisdiction over this appeal.

¶ 29 Turning to the merits of this appeal, we determine: (1) whether the issue of the trial court's denial of BAB's motion for summary judgment is reviewable on appeal; (2) whether the trial court erred in entering judgment in favor of Alecta and against BAB in the amount of

$84,000; (3) whether the trial court erred in relying on extrinsic evidence at trial in determining the intent of the parties with regard to the fifth assignment and the first amendment of the lease; and (4) whether the trial court abused its discretion in awarding Alecta $70,030.40 in attorney's fees and costs.

¶ 30 We first determine whether the issue of the trial court's denial of BAB's motion for summary judgment is reviewable on appeal.

¶ 31 Generally, "when a motion for summary judgment is denied and the case proceeds to trial, the denial of summary judgment is not reviewable on appeal because the result of any error is merged into the judgment entered at trial." *Belleville Toyota, Inc. v. Toyoto Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355 (2002). "The rationale for this rule is that review of the denial order would be unjust to the prevailing party, who obtained a judgment after a more complete presentation of the evidence." *Id.* at 355-56.

¶ 32 Notwithstanding the general rule, BAB argues that the trial court's December 12, 2012 order denying its motion for summary judgment against Alecta, is reviewable on appeal because the court's ruling was based on a question of law involving contract interpretation. BAB cites *River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill. App. 3d 874 (2004), in which the reviewing court, in resolving issues of law by interpreting an easement agreement between the parties, found that the agreement unambiguously established that the City of Naperville did not have the right to create a bicycle path on its easement on the plaintiff's property, and thus held that the trial court should have granted summary judgment in favor of the plaintiff. *Id.* at 880-82. Consequently, the *River's Edge Homeowners' Ass'n* court reversed the trial court's order denying the plaintiff's motion for summary judgment, which disposed of all issues as a matter of law in the case; vacated the trial judgment in favor of the City of Naperville; and entered judgment in

favor of the plaintiff. *Id.* at 882-83. BAB argues that, like *River's Edge Homeowners' Ass'n*, the trial court's denial of its summary judgment is reviewable on appeal, and the court should have granted summary judgment in its favor based on the plain language of the fifth assignment.

¶ 33 We find that the trial court's denial of BAB's motion for summary judgment is not reviewable on appeal, where, unlike *River's Edge Homeowners' Ass'n*, the issues before the trial court at the summary judgment stage were not confined to mere interpretation of the terms of the fifth assignment. The record shows that, on October 19, 2012, BAB filed an amended motion for summary judgment, arguing that the unambiguous terms of the fifth assignment released BAB from liability for damages incurred by Alecta. On November 22, 2012, Alecta filed a combined response to BAB's amended motion for summary judgment and a cross-motion for summary judgment, arguing, *inter alia*, that it never accepted the terms of the fifth assignment because it never signed the document and was thus not a party to the fifth assignment; that BAB's subsequent stipulation to the substance of the sixth assignment and the first amendment in essence ratified and confirmed BAB's liability under the lease; and that a material issue of fact existed as to the parties' intent to release BAB from liability. On December 12, 2012, the trial court denied Alecta's and BAB's cross-motions for summary judgment. However, the record does not reveal the court's specific basis or reasoning for denying the parties' cross-motions for summary judgment. We find that BAB incorrectly characterizes the issue before the trial court at the summary judgment stage as strictly one of contract interpretation. Because the fifth assignment did not bear the signature of Alecta or Alecta's representative, there was a genuine issue of material fact as to whether Alecta was even a party to the fifth assignment, whether Alecta had agreed to the terms of the fifth assignment and, if so, whether the parties intended BAB to be released from liability under the terms of the fifth assignment. Therefore, we find

that the trial court's denial of BAB's motion for summary judgment is not reviewable before us on appeal.

¶ 34 We next determine whether the trial court erred in entering judgment in favor of Alecta and against BAB in the amount of $84,000.

¶ 35 BAB argues that the plain language of the fifth assignment showed that it was released from liability as of the fifth assignment when its privity of contract with Alecta terminated and, thus, it could not be liable for damages caused by Kareena's breach. In support of its argument that it could not be held liable, BAB relies specifically on paragraph 8 of the fifth assignment, which stated that BAB was deemed to "no longer be a party to this [l]ease." BAB further argues that although the parties had stipulated to the existence of the original 1996 lease and its subsequent assignments, and BAB does not dispute that it was liable under the lease *prior* to the fifth assignment, BAB argues that it was not liable under the lease terms *after* the execution of the fifth assignment. BAB further contends that Alecta was a party to the fifth assignment despite the lack of Alecta's signature on the document, where Alecta's signature on the subsequent sixth assignment clearly showed that Alecta knew of the existence of the fifth assignment. BAB argues that, even if Alecta was not a party to and did not consent to the fifth assignment, BAB was not liable for damages caused by Kareena because there was no privity of contract between Alecta and BAB, and the subsequent tenants' exercise of the renewal option was made outside of the lease terms that could not bind prior assignors like BAB. BAB also contends that Bruegger's had successfully used the exact same language in the third assignment to release itself from liability under the lease and that Alecta did not sue Bruegger's.

¶ 36 Alecta counters that the terms of the fifth assignment did not release BAB from liability because Alecta was not a party to the fifth assignment. Alecta points out that there was no

evidence that it drafted or signed the fifth assignment, that it agreed to release BAB from liability, or that it ever agreed to the terms of the fifth assignment. Rather, Alecta argues that it merely waived its right to object to the assignment of Brooks' tenant rights to Bukharis pursuant to the fifth assignment. Alecta further argues that the fifth assignment did not break its privity of contract with BAB, where Alecta never consented to the terms of the fifth assignment that were executed between two tenant parties. Alecta contends that, even assuming that it had agreed to and was bound by the terms of the fifth assignment, paragraph 8, upon which BAB relies, did not constitute a clear and unequivocal release of BAB from liability. Moreover, Alecta counters that its litigation strategy in not naming Bruegger's as a defendant in the instant action has no relevance to the issues on appeal.

¶ 37 Generally, the interpretation of a contract presents a question of law that is subject to *de novo* review. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D.., S.C.*, 403 Ill. App. 3d 468, 488 (2010). However, the threshold issue of whether Alecta was a party to, and was bound by, the fifth assignment, is a factual determination that must be reviewed under a manifest weight of the evidence standard. See *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 55 ("[i]n a bench trial, it is the function of the trial judge, as the trier of fact, to weigh the evidence and make factual determinations"). Whether a contract exists between the parties, the parties' intent in forming it, and the contract's terms are all questions of fact." *Id.* "Where the evidence is close and the findings of fact must be determined from the credibility of the witnesses, as a court of review, we defer to the trial court's factual findings unless they are against the manifest weight of the evidence." *Id.* A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on the evidence. *Id.*

¶ 38 In its June 28, 2011 complaint, Alecta alleged a breach of lease claim against BAB (count VII). A lease is a type of contract and is generally governed by the rules of contract law. *Midland Management Co. v. Helgason*, 158 Ill. 2d 98, 103 (1994). To establish a breach of contract claim, the plaintiff must prove the existence of a contract, the performance of the contract's conditions by the plaintiff, a breach by the defendant, and damages as a result of the breach. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007). The crux of BAB's arguments is that no valid contract existed between BAB and Alecta at the time Kareena breached its agreement to pay rent and, thus, BAB was not liable to Alecta for damages.

¶ 39 The original 1996 lease for the property was executed between Alecta's predecessors-in-interest and Bruegger's, which was later assigned to Jacobs pursuant to the first assignment on February 10, 1998. On February 1, 1999, Jacobs assigned its interest under the lease to BAB pursuant to a second assignment. On October 23, 2001, pursuant to the third assignment, BAB assigned its interest under the lease to K&J. Paragraph 10 of the third assignment noted that, pursuant to section 39 of the original 1996 lease, "the tenant shall be deemed to have exercised the first option to renew the terms of the [l]ease, and such [l]ease term is deemed hereby extended" for the term of "10/01/01-09/30/06." Paragraph 3(a) of the third assignment also provided that the assignor, BAB, "shall remain liable for the payment and performance of all obligations of the tenant under the [l]ease, including, without limitation, the payment of all rent and other sums specified herein." On June 5, 2002, pursuant to the fourth assignment, K&J assigned its interest under the lease to assignees Brooks and the Vetters. Between June 5, 2002 and April 20, 2005, Brooks assigned his interest in the lease to assignees Bukharis and the Hussains under the fifth assignment. The fifth assignment listed Alecta as a "landlord," but the

signature block for Alecta was left blank and unsigned. Paragraph 8 of the fifth assignment provided that BAB, as a "*prior party to this [l]ease, is hereby deemed to no longer be a party to this [l]ease*." (Emphasis added.) It is this specific provision (paragraph 8) in the fifth assignment that BAB relies upon to argue that it had been released from liability for any subsequent damages incurred by Alecta as a result of overdue rent payments owed by Kareena under the April 20, 2005 sixth assignment and the June 22, 2006 first amendment. The sixth assignment and first amendment both expressly stated that prior assignors, including BAB, "remain jointly and severally liable and obligated under the [l]ease."

¶ 40 A lease creates a privity of contract and a privity of estate between the lessor and the lessee. *Nassau Terrace Condominium Ass'n, Inc. v. Silverstein*, 182 Ill. App. 3d 221, 225 (1989). It is well-established that "if the assignee of a lease does not assume the obligations thereof, then, as between the original lessor and such assignee there is privity of estate but not privity of contract; and the assignee is liable for rent only while such privity of estate continues, and may terminate further liability by assigning the lease and going out of possession." *Leitch v. New York Central R.R. Co.*, 388 Ill. 236, 242 (1944). On the other hand, however, "if there is an assumption of the lease obligations, then privity of contract also results and the assignee cannot shake off his contractual liability by making an assignment or going out of possession." *Id.*, see *Kagan v. Gillett*, 269 Ill. App. 311, 321 (1933) (holding assignee defendant liable upon covenants of the lease where he had expressly assumed the lessee's obligations under the lease and afterward assigned his interest upon the condition that he should remain liable upon all the covenants of the lease; thus, defendant was in privity of estate and privity of contract with lessors, and the effect of the subsequent assignment by defendant with the consent of the lessors

was to destroy the privity of estate, but not the privity of contract, and defendant therefore remained liable upon his covenants under the lease).

¶ 41 In the case at bar, BAB, as assignee, assumed Jacobs' obligations and interest under the lease pursuant to the second assignment. Subsequently, pursuant to the third assignment, BAB assigned its interest under the lease to K&J. The third assignment expressly stated in paragraph 3(a) that BAB "shall remain liable for the payment and performance of all obligations of the tenant under the [l]ease, including, without limitation, the payment of all rent and other sums specified herein." Thus, we find that both a privity of estate and a privity of contract existed between BAB and Alecta, and BAB's assignment of its interest under the lease to K&J pursuant to the third assignment only extinguished BAB's privity of estate, but not the privity of contract, with Alecta. Accordingly, BAB remained liable to Alecta for damages incurred subsequent to the second and third assignments, unless and until Alecta released BAB from its obligations under the lease. See *Amelong v. Peacock*, 278 Ill. App. 142, 145 (1934) ("[i]n order to release the lessee after an assignment by him of his interest in the lease, there must be a release by the lessor or an agreement to absolve the lessee from his obligation").

¶ 42 BAB relies on paragraph 8 of the fifth assignment in arguing that it had been released from its obligations under the lease and consequently, it could not be held liable for damages incurred by Alecta as a result of Kareena's failure to pay rent. Paragraph 8 of the fifth assignment stated that BAB was deemed to "no longer be a party to this [l]ease." Alecta argues that it was never a party to the fifth assignment, that there was no evidence that it drafted or signed the document, that it never agreed to the terms of the fifth assignment and, thus, privity of contract remained and BAB was not released from liability.

¶ 43 During the bench trial, the parties stipulated to entering various documents into evidence (Exhibits A to W and Y to BB). The parties also stipulated to a "joint statement of stipulated and admitted facts," which contained 29 statements of stipulated facts and was entered into the record as part of Alecta's case-in-chief. At trial, the court heard testimony from Dressler, as representative of Mid-America; Cervini, as Director of Development of BAB Systems; and Murtaugh, as BAB's Vice President and General Counsel.

¶ 44 According to the bystander's report of the trial, which was certified by the trial court, Dressler testified on behalf of Alecta that she was a senior asset manager of Mid-America, which managed the relevant property in the instant case. Dressler testified that she took over management of the property in 2010 and that Kareena defaulted under the lease in April 2010. During the summer of 2010, Alecta and Kareena negotiated a resolution regarding the outstanding rent payments. The negotiations were unsuccessful and in September 2010, Kareena ceased operations at the property but did not surrender the premises to Alecta. Beginning in September 2010, over several months, BAB corresponded with Alecta regarding proposals for a prospective replacement tenant for the property, which Alecta ultimately rejected. Dressler also described her correspondences with Cervini regarding the proposals for a prospective replacement tenant.

¶ 45 Counsel for Alecta then called Cervini as an adverse witness. Cervini testified that BAB prepared the fifth assignment document by copying "an earlier form used in a prior assignment of the [l]ease." He faxed the proposed fifth assignment to Coronado, who was a representative of Mid-America. The transmittal correspondence page did not reference a release of BAB. Cervini acknowledged that he had neither seen a copy of the fifth assignment that was executed by Alecta, nor did Coronado ever agree to release BAB or represented to him that Alecta agreed

to release BAB. Cervini testified that he had "no record" of Alecta agreeing to a release, whether by a separate document or by a signed fifth assignment. He only assumed that Alecta had agreed to and executed the fifth assignment document because he never received an objection from Alecta. Cervini testified that BAB Systems, as franchisor, approved Bakharis and Arshad Hussain as franchisees, allowed them to use Big Apple Bagels' branding, and collected franchise fees from them during the period that they were "in possession." Kareena was also approved as a franchisee and operated as a Big Apple Bagels store.

¶ 46 Following Alecta's case-in-chief, the trial court denied BAB's motion for a directed verdict and found that, in considering the matter in a light most favorable to Alecta, Alecta had stated a *prima facie* case that BAB was liable under the lease.

¶ 47 BAB, in its case-in-chief, presented the testimony of Cervini and Murtaugh. Cervini testified that he was "under instructions from [BAB] management that he should have BAB released as a condition of the approval of Bukharis and [Arshad] Hussain as franchisees." In March 2004, a copy of the proposed fifth assignment was sent to Coronado, who never informed Cervini that Alecta did not accept the terms of the fifth assignment. Cervini never followed up to see if Alecta had agreed to the fifth assignment document, and he assumed BAB had been released as of March 2004. Cervini, on behalf of the franchisor BAB Systems and "in the interest of generating a revenue stream under a franchise agreement," continued to take an interest in the placement of a proposed replacement tenant for the property even after he believed BAB to have been released from its lease obligations. Cervini then described his correspondences with Dressler regarding BAB's proposals for a prospective replacement tenant, which were ultimately unsuccessful. On cross-examination, Cervini admitted that he never received verbal or written affirmation that Alecta either signed the fifth assignment document or

agreed to the terms therein. Cervini admitted that Alecta, in a March 25, 2011 letter, had requested additional financial information from Cervini regarding a prospective replacement tenant, but that he never responded. Cervini admitted that, under the third assignment by which BAB assigned its interest to K&J, BAB agreed to remain liable for all obligations and payments under the lease—including the payment of all rent. Under the third assignment, BAB waived any rights to object to future assignments or amendments to the lease. Cervini admitted that Kareena was an "approved assignee" under the sixth assignment.

¶ 48 Murtaugh testified that he was vice president and general counsel of BAB. He stated that BAB operated a store at the property until it could sell the store to a franchisee, who would pay royalties to BAB Systems as the franchisor of Big Apple Bagels stores. In March 2004, Murtaugh instructed Cervini that BAB should be released from the lease obligations as a condition to the approval of Bukharis and Arshad Hussain as franchisees. If BAB had been informed by Alecta that the fifth assignment had been rejected, BAB "could have refused to approve the sale to Bukharis and [Arshad] Hussain or actually taken over the operations of the store through the end of the September 30, 2006 term and declined to exercise its renewal option under the lease." On October 27, 2010, upon receipt of Alecta's September 22, 2010 notice of default, Murtaugh presumed that the notice was only sent to BAB because it had owned the store "some 10 years prior." BAB had a security interest in the restaurant equipment, but that it had taken no action to enforce such security interest and Alecta never requested BAB to release its lien on the equipment prior to October 2011. Murtaugh testified that BAB should have been advised of the tenant's breach promptly, but admitted that Alecta was not obligated under the lease to notify BAB and that BAB never asked Alecta to notify BAB of any tenant default. Murtaugh testified that he had never seen a copy of the fifth assignment that had been executed

by Alecta, and that he received no correspondence from Alecta acquiescing to the release of BAB.

¶ 49 On July 8, 2013, the trial court entered judgment in favor of Alecta in the amount of $84,000 for unpaid rent, other charges and costs, as well as legal fees "in an amount to be determined."[4] The court found that the $84,000 judgment amount had been reduced by $20,092.27 because Alecta had failed to mitigate damages.

¶ 50 We find that the evidence presented at trial supported a finding that Alecta was not a signatory or party to the fifth assignment. Trial evidence showed that in March 2004, a copy of the proposed fifth assignment was faxed by Cervini to Coronado of Mid-America as Alecta's management agent for the property. The facsimile cover sheet contained no description of the proposed fifth assignment or the purported release language in the document. There was no evidence that a copy of the fifth assignment bearing Alecta's signature actually existed. By Cervini's own testimony, he admitted that he never received verbal or written affirmation that Alecta either signed the fifth assignment or agreed to the terms therein. Further, BAB agreed, under paragraph 14 of the third assignment by which BAB assigned its interest to K&J, that the lease could not be amended without the written consent of the landlord. Thus, because the evidence supports a finding that Alecta did not sign the fifth assignment, we find that Alecta did not agree to the terms—including paragraph 8—of the fifth assignment.

¶ 51 Nonetheless, BAB argues that although Alecta did not sign the fifth assignment, Alecta assented to the terms of the fifth assignment through its acts and conduct. Specifically, BAB argues that the fact that there exists a "sixth assignment" clearly showed that Alecta knew of the

[4] It does not appear in the record that the court's order reflected details of the court's reasoning or findings of fact.

fifth assignment. BAB cites *Compass Environmental, Inc. v. Polu Kai Services, L.L.C.*, 379 Ill. App. 3d 549 (2008) and *Amelco Electric Company, Inc. v. Arcole Midwest Corp.*, 40 Ill. App. 3d 118 (1976), for support. We find those cases to be distinguishable, where they concerned a party who made an offer to enter into a contract with a subcontractor and sent the terms of the contract to the subcontractor, and the subcontractor accepted the offer by acting upon the contract terms even though the contract was not signed. Unlike BAB's cited cases, here, Alecta neither received an offer nor acted upon an offer to perform work under a contract. Under the terms of the third assignment, of which BAB was a signatory, the landlord "may consent to subsequent assignments or sublettings" of the lease without notifying BAB or obtaining BAB's consent, and "no such action shall serve to release or relieve [BAB] from its liability under the [l]ease." By not signing the subsequent fifth assignment and remaining silent regarding the assignment, Alecta did not agree to the terms of the fifth assignment, and only waived its right to object to the assignment of the lease from Brooks to Bukharis and the Hussains. Indeed, the sixth assignment, which Alecta *did* sign as landlord of the property, acknowledged the existence of the fifth assignment, but expressly stated that BAB and other prior assignors remained "jointly and severally liable and obligated under the [l]ease." Thus, the evidence supports a finding that Alecta did not assent to the terms of the fifth assignment by its conduct.

¶ 52 BAB argues that, even if Alecta was not a party to the fifth assignment, BAB was still not liable for damages because Alecta "loses privity of contract with BAB." BAB contends that, without a fifth assignment, Brooks (the then-tenant), could not have assigned its interest and tenant rights to Buhkaris and the Hussains. From there, BAB infers that the subsequent grant of a new five-year term to Kareena was impermissibly "made outside the terms" of the lease. In support of its argument, BAB cites *Consolidated Coal Co. of St. Louis v. Peers*, 97 Ill. App. 188

(1900) and *Montgomery Ward & Co., Inc. v. Wetzel*, 98 Ill. App. 3d 243 (1981). We find these cases to be inapposite. Neither *Peers* nor *Wetzel* stands for the proposition that an assignment by one tenant party to a new tenant party, with or without the consent of the landlord, terminates the privity of contract between the landlord and a previous lessee. See *Peers*, 97 Ill. App. at 196 ("[a]n assignee of a lessee is bound, by reason of the privity of estate, to a performance of all express covenants that run with the land"); *Wetzel*, 98 Ill. App. 3d at 248 (parties who did not acquire their beneficial interests in the land trust until after the lease had been executed could be held responsible for obligations that accrued during the period prior to the acquisition of their interests). Thus, we find that, even though Alecta was a not party to the fifth assignment, Alecta's privity of contract with BAB—which was established by BAB's assumption of the lease obligations in the second and third assignments—survived.

¶ 53 Likewise, we reject BAB's arguments that Alecta "cannot have it both ways" by reaping the benefit of opposite interpretations of the contract. BAB argues that if Alecta accepted the fifth assignment as written, then BAB was released as a party to the lease. BAB argues that, on the other hand, if Alecta was not a party to the fifth assignment, then the fifth assignment was invalid and Bukharis and the Hussains never acquired interest in the property from Brooks and, thus, Kareena, who subsequently acquired its interest pursuant to the sixth assignment, was a tenant "without the right to exercise the option to renew the lease in a manner binding" to BAB. BAB reasons that the option to renew the lease is "personal" to the tenant under section 39 of the original 1996 lease, such that Kareena's exercise of the option to renew the lease under the first amendment was invalid and not binding upon BAB where it was made outside the terms of the lease. BAB concludes that if the fifth assignment was invalid and Kareena's exercise of the lease renewal option was also invalid, then the lease expired in September 2006 and BAB could not be

held liable for any damages incurred thereafter. For support, BAB cites *American Nat'l Trust Co. of Chicago v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill. App. 3d 106 (1999) and *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702. We find these cases to be distinguishable from the facts in the case at bar. In *American Nat'l Trust Co. of Chicago,* the reviewing court held that the lessor of commercial real estate could not seek damages from a prior assignee, where the lessor had executed, and filed with a bankruptcy court, a settlement agreement that contained a general release of the then-current tenant entity and all of its predecessors-in-interest, including the prior assignee. *American Nat'l Trust Co. of Chicago,* 308 Ill. App. 3d at 119. The *American Nat'l Trust Co. of Chicago* court noted that the lessor, in drafting the contract, could have excluded the prior assignee from the general release but that the lessor failed to do so. *Id.* In *Finley*, this court affirmed the dismissal of an action brought by a lender's assignee to enforce a limited personal guaranty against a guarantor, based on the interpretation of the terms of the guaranty agreement that were drafted and signed by the lender. *Finley*, 2013 IL App (1st) 121702, ¶ 27. Unlike *American Nat'l Trust Co. of Chicago* and *Finley*, in the instant case, Alecta neither drafted nor signed any release which terminated BAB's obligations under the lease. Moreover, with regard to BAB's argument that the fifth assignment was invalid without Alecta's consent to that specific assignment, we find that privity of contract between Alecta and BAB was not extinguished where the sixth assignment, which Alecta did sign, ratified the fifth assignment as a valid assignment by acknowledging its existence. See generally *Axelrod v. Giambalvo*, 129 Ill. App. 3d 512, 521 (1984) (ratification may take place through an express statement or may be implied through conduct).

¶ 54 Even assuming, *arguendo*, that Alecta did agree to and was bound by the terms of the fifth agreement, we find that the trial court properly entered judgment against BAB. Paragraph 8

of the fifth assignment, which BAB claims released it from liability, provided that BAB, as a "prior party to this [l]ease, is hereby deemed to no longer be a party to this [l]ease." Alecta counters that paragraph 8 did not constitute a release of BAB from liability.

¶ 55 In construing a contract, a court looks to the plain language of the agreement in determining the intent of the parties. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). The contract is to be construed as a whole, giving effect to every provision, because it must be assumed that each provision was intended to serve a purpose. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141 (2004). If the language is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence. *Air Safety, Inc.*, 185 Ill. 2d at 462. If, however, the trial court finds that the language of the contract is susceptible to more than one meaning, then an ambiguity is present. *Id.* Only then may parol evidence be admitted to aid the trier of fact in resolving the ambiguity. *Id.* at 462-63. When parties dispute the meaning of a contract provision, the initial question is whether the contract is ambiguous. *Finley*, 2013 IL App (1st) 121702, ¶ 19. An ambiguity does not exist simply because the parties disagree as to the meaning of a contractual provision. *Id.* An ambiguity exists when the contractual provision contains language that is susceptible to more than one reasonable interpretation. *Id.* Whether an ambiguity is present is a matter of law, subject to *de novo* review. *Central Illinois Light Co.*, 213 Ill. 2d at 154. However, a trial court's factual determinations regarding the meaning of contract language should not be reversed unless they are against the manifest weight of the evidence. *Bunge Corp. v. Northern Trust Co.*, 252 Ill. App. 3d 485, 493 (1993).

¶ 56 We find paragraph 8 of the fifth assignment to be ambiguous. An assignment operates to transfer to the assignee all of the assignor's right, title or interest in the thing assigned, and the

assignee by acquiring the same rights as the assignor, stands in the shoes of the assignor. *Community Bank of Greater Peoria v. Carter*, 283 Ill. App. 3d 505, 508 (1996). As discussed, BAB's assignment of its interest to K&J in the third assignment, terminated BAB's privity of estate with Alecta, but not its privity of contract. The language of paragraph 8 stating that BAB "is hereby deemed to no longer be a party to this [l]ease," was ambiguous because it was susceptible to more than one reasonable interpretation. The phrase could be interpreted to mean that BAB no longer possessed its tenant rights and interest (privity of estate) that were transferred to its assignee, or could be interpreted to mean that BAB no longer retained its tenant rights and interest (privity of estate) *and* was released from its contractual obligations with Alecta (privity of contract). Thus, because paragraph 8 of the fifth assignment was ambiguous, the trial court properly admitted extrinsic evidence at trial. At trial, Cervini testified that he was under the direction by BAB's management to obtain a release for BAB under the lease as a condition for approving Buhkaris and Arshad Hussain as franchisees. However, Cervini acknowledged that Coronado neither agreed to release BAB nor represented to him that Alecta agreed to release BAB from its lease obligations. We find that, based on the trial evidence, the trial court could have found that Alecta never intended paragraph 8 to release BAB from its lease obligations. Moreover, any ambiguity with paragraph 8 in the fifth assignment must be construed against BAB as the drafter of the assignment. See *Hot Light Brands, L.L.C. v. Harris Realty, Inc.*, 392 Ill. App. 3d 493, 499 (2009) (an ambiguous agreement is generally construed against the drafter). While BAB argues that it did not draft the ambiguous provision but rather the language in paragraph 8 had been copied from a prior assignment prepared by Alecta, Cervini's testimony revealed that BAB had prepared the fifth assignment. Similarly, we reject BAB's claim that it was released from its lease obligations pursuant to paragraph 8 of the fifth

assignment, on the basis that the exact language was included in the third assignment to release Bruegger's from liability, as evidenced by the fact Alecta did not sue Bruegger's in the instant action. Alecta's subjective litigation strategy not to name Bruegger's as a defendant in the instant action is irrelevant to the issues before this court. Thus, even assuming that Alecta had agreed to, and was bound by, the terms of the fifth assignment, the trial court's finding that BAB remained liable under the lease was not against the manifest weight of the evidence.

¶ 57 BAB next argues that the plain language of the June 22, 2006 first amendment, which was executed by Kareena as the tenant and Alecta as the landlord of the property, created a new agreement between Kareena and Alecta that served to release BAB from liability. Specifically, BAB claims that the first amendment set forth material changes that created a new contract binding only on Kareena and Alecta, but extinguished BAB's privity of contract with Alecta. BAB argues that the material changes in the first amendment included a lease extension for an additional five-year term; an increase in annual rent; the addition of language limiting Alecta's personal liability; and the modification of a "conflicts" provision.

¶ 58 Alecta counters that the first amendment merely exercised a renewal option that was in the original 1996 lease and was confirmed in the subsequent assignments, as well as made other insignificant immaterial changes that did not affect BAB's obligations under the lease.

¶ 59 A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract and cancels others, but leaves the general purpose and effect undisturbed. *Nebel, Inc. v. Mid-City National Bank of Chicago*, 329 Ill. App. 3d 957, 964 (2002). However, an amendment does not necessarily create a new agreement where the original contract was changed to some extent. *Id.* at 965. Rather, modifications must effect a material alteration of the parties' rights and obligations before it can be said that the parties intended a

new contract or agreement. *Id.* at 965-66. Generally, a guarantor of a lease is not released from his obligations "unless the essentials of the original contract have been changed and the performance required of the principal is materially different from that first contemplated." *Chicago Exhibitors Corp. v. Jeepers! of Illinois, Inc.*, 376 Ill. App. 3d 599, 607 (2007).

¶ 60 On April 20, 2005, assignors Bukharis and the Hussains assigned their interest under the lease to assignee Kareena pursuant to the sixth assignment. Alecta signed the sixth assignment as landlord of the property. Paragraph 14 provided a "conflict" provision stating that if the sixth assignment terms conflict with the terms of the previous lease and amendments of the lease, the sixth amendment "shall control." On June 22, 2006, Kareena, as tenant, and Alecta, as landlord of the property, executed the first amendment. The first amendment extended the lease period for five years—October 1, 2006 to September 30, 2011—and set forth a schedule of fixed minimum annual rent rates for each of the extended five-year terms, which culminated in an agreed minimum annual rent rate of $51,773.41 for the "10/01/10-09/30/11" year.

¶ 61 We find that BAB's arguments regarding the extension of the lease term and the increase in the annual rent rate under the first amendment, must fail. First, the plain language of paragraph 3(c) of the third assignment, by which BAB assigned its interest to K&J, provided that the landlord "may consent to subsequent assignments or sublettings of the [l]ease or to any amendments or modifications thereto without notifying [a]ssignor and without obtaining [a]ssignor's consent thereto, and *no such action shall serve to release or relieve [a]ssignor from its liability under the [l]ease*." (Emphasis added.) Based on this language, BAB, as assignor in the third assignment, had waived its right to object to any subsequent modifications to the lease, including any modifications made in the first amendment of which BAB now complains. Second, even if not waived, the first amendment's five-year lease extension and the increase in

the annual rent rate were not modifications to the lease; it merely exercised the second renewal option of the original 1996 lease. As expressly stated in section 39 of the original 1996 lease, the tenant had two options to renew the lease for five-year terms—specifically, the second renewal period would occur between 2006 and 2011 and a "Fair Market Rent" would be effective for the second renewal period. Further, when BAB assigned its interest in the third assignment, BAB agreed under paragraph 10 that the tenant shall retain the right to further extend the lease terms for one additional five-year term pursuant to section 39 of the original 1996 lease.

¶ 62 BAB next argues that the addition of language limiting Alecta's personal liability under the lease in the first amendment was a "material change" that constituted a new agreement between Alecta and Kareena and severed BAB's privity of contract with Alecta. We find this argument unpersuasive. The original 1996 lease limited the landlord's liability as follows:

> "41. LIMITATION OF LANDLORD'S LIABILITY
>
> Redress for any claim against Landlord under this Lease shall be limited to and enforceable only against and to the extent of Landlord's interest in the Shopping Center. The obligations of Landlord under this Lease are not intended to and shall not be personally binding on, nor shall any resort be had to the private properties of, any of its trustees or board of directors and officers, as the case may be, its investment manager, the general partners thereof, or any beneficiaries, stockholders, employees, or agents of Landlord or the investment manager."

Under the first amendment, the landlord's liability was limited as follows:

> "5. *** It is specifically understood and agreed by Landlord and Tenant that there shall be absolutely no personal liability on the part of Landlord or any of its officers, directors, shareholders, beneficiaries, mortgagees, trustees, successors, assigns or sureties of Landlord or any mortgage (collectively referred to as "Succesor") with respect to any of the terms, conditions and covenants of this Amendment, and that Tenant shall look solely to the equity of the Landlord or Successor in the Center for the satisfaction of each and every remedy of Tenant in the event of a breach by Landlord or Successor of any of the terms, conditions or covenants of this Amendment to be observed or performed by Landlord or Successor, if any."

¶ 63 We find that while different wording was used in the above-quoted paragraphs, the liability limitation clause in the first amendment did not constitute a material change from that in the original 1996 lease. Both clauses limited the landlord's liability under the lease to its interest in the shopping center property. Thus, we find that the change in wording between the two clauses did not affect BAB's substantive rights or obligations under the lease and was not a material alteration of the lease terms.

¶ 64 We further reject BAB's claim that the "conflicts" provision in the first amendment constituted a material change that created a new agreement between Kareena and Alecta and extinguished BAB's privity of contract with Alecta. In the sixth assignment, Kareena and Alecta included a conflicts provision which stated that to the extent that the six assignment conflicted with the terms of the previous lease and amendments of the lease, the sixth assignment "shall

control." The first amendment also included a conflicts provision which stated that, to the extent that the first amendment terms conflicted with the terms of the previous lease and amendments of the lease, the first amendment "shall control." Based on our review of the provisions at issue, we find that the conflicts provision in the first amendment did not materially alter BAB's rights and obligations under the lease in any way. We find that, even if the conflicts provision in the first amendment constituted a "material change," BAB remained liable under a privity of contract with Alecta. Although BAB relies on *Nebel, Inc.*, 329 Ill. App. 3d 957 and *Pennsylvania Life Insurance Co. v. Pavlick*, 265 Ill. App. 3d 526 (1994), neither of these cases stands for the proposition that where an amendment contains a material change in its terms, a prior assignor, rather than a guarantor of a lease, is automatically released from all of its obligations under the lease and its privity of contract with the landlord is severed. Therefore, we reject BAB's argument that the first amendment created a new agreement between Kareena and Alecta that served to release BAB from liability. Accordingly, because BAB was not released from its obligations under the lease, we hold that the trial court properly entered judgment in favor of Alecta and against BAB in the amount of $84,000 for breach of lease.[5]

¶ 65 We next determine whether the trial court erred in relying on extrinsic evidence at trial in determining the intent of the parties with regard to the fifth assignment and the first amendment of the lease. BAB argues that that the trial court erred in finding BAB liable to Alecta because it improperly relied on extrinsic evidence at trial where the witnesses were never questioned

[5] As discussed, on July 8, 2013, the trial court entered an $84,000 judgment in favor of Alecta for unpaid rent, other charges and costs, as well as legal fees "in an amount to be determined." The court found that the $84,000 judgment amount had been reduced by $20,092.27 because Alecta had failed to mitigate damages. We note that Alecta does not appeal the court's reduction in the judgment award. Thus, the issue of mitigated damages is not before us on appeal.

directly about paragraph 8 of the fifth assignment and none of the testimony related to the language in the first amendment. Alecta responds that the trial court properly considered evidence at trial as to whether Alecta had agreed to the terms of the unsigned fifth assignment. We find BAB's argument to be unpersuasive. Without belaboring the point, we note that, as discussed, the fifth assignment on its face did not show that Alecta either signed the document or agreed to the terms therein. As such, the trial court properly considered evidence outside the four corners of the fifth assignment to determine whether Alecta consented to its terms. Further, as discussed, even assuming that the Alecta consented to the terms of the fifth assignment, paragraph 8 of the fifth assignment was ambiguous because it was susceptible to more than one reasonable interpretation. Thus, we cannot conclude that the trial court erred in admitting extrinsic evidence at trial to determine whether the parties intended to release BAB from its lease obligations. While the bystander's report revealed that none of the three trial witnesses was questioned directly about the meaning of paragraph 8, the witnesses provided testimony to the trial court regarding whether they intended BAB to be released from its lease obligations. Further, although the witnesses did not testify about the first amendment, we find that this alone cannot be a basis for finding that the trial court erred in admitting extrinsic evidence at trial, where that evidence *did* assist in resolving issues relating to the fifth assignment. Therefore, BAB's arguments on this basis must fail.

¶ 66 We next determine whether the trial court abused its discretion in awarding Alecta $70,030.40 in attorney's fees and costs, which we review under an abuse of discretion standard. See *In re Estate of Elias*, 408 Ill. App. 3d 301, 322 (2011).

¶ 67 BAB argues that the trial court abused its discretion in assessing $70,030.40 in attorney's fees and cost against it pursuant to a fee-shifting provision in the lease. BAB specifically argues

that because both it and Alecta prevailed on significant issues in the litigation, the trial court should not have awarded attorney's fees and costs in favor of Alecta and against BAB. BAB contends that because it prevailed on the issue of Alecta's failure to mitigate damages, and the court reduced Alecta's award judgment by over $20,000, the proper course of action was to award attorney's fees to neither party. Further, BAB argues that the trial court awarded $70,030.40 in fees and costs to Alecta, despite the fact that Alecta's petition for fees contained flaws and the court only engaged in a cursory analysis of the petition before granting the award.

¶ 68 Alecta argues that the trial court properly determined that it was the prevailing party and awarded attorney's fees in its favor pursuant to the terms of the lease. Alecta contends that because its lawsuit against BAB arose out of the lease and Alecta obtained a judgment which enforced the rent payment portion of the lease against BAB, a reasonable person could view Alecta as the prevailing party. Alecta further argues that BAB's partial success on its mitigation defense, which resulted in a minor reduction in damages, was not sufficient to deem BAB a prevailing party under the lease. Alecta maintains that the trial court properly reviewed its petition for fees and utilized its discretion to award Alecta 80% of the requested fees.

¶ 69 The general rule is that an unsuccessful party in a lawsuit is not responsible for the other party's attorney's fees. *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001). "The parties to a contract may alter this rule, but contract provisions regarding attorney's fees should be strictly construed and enforced at the discretion of the trial court." *Id.* In the case at bar, the parties included a fee-shifting provision in the lease. Section 19.3 of the original 1996 lease provides in pertinent part the following:

> "19.3 *** [I]n any litigation between Landlord and Tenant arising out of his Lease, the non-prevailing party shall be responsible for the reasonable attorney's fees and costs of the prevailing party."

Neither the terms "non-prevailing party" nor "prevailing party" are defined in the lease. However, this court has held that a "prevailing party, for purposes of awarding attorney's fees, is one that is successful on a significant issue and achieves some benefit in bringing suit." *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007). On the one hand, a litigant does not have to succeed on all its claims to be considered a prevailing party. *Id.*; *Powers*, 326 Ill. App. 3d at 515. On the other hand, "when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party and an award of attorney's fees to either is inappropriate." *Powers*, 326 Ill. App. 3d at 515.

¶ 70 In the instant lawsuit, Alecta advanced a single claim for breach of lease against BAB (count VII). At trial, Alecta prevailed on its sole breach of lease claim against BAB, and the trial court entered judgment against BAB in the amount of $84,000. Thus, Alecta was the prevailing party in the litigation because it was successful on a significant issue and achieved some benefit in bringing the lawsuit. Nonetheless, BAB argues that it, too, was a "prevailing party," on the basis that it had won on the issue of mitigation, which resulted in the court's reduction of the judgment by over $20,000 accordingly. BAB argues that because both it and Alecta prevailed on significant issues in the litigation, the trial court should not have awarded attorney's fees and costs in favor of Alecta. In support of its argument, BAB cites *Peleton*, 375 Ill. App. 3d 222; *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597 (1999); *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853 (2000); and *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023 (1999).

¶ 71 We find BAB's cited cases to be distinguishable from the facts in the case at bar. *Peleton*, *Fieldcrest Builders*, and *Brown & Kerr* all involved situations in which counterclaims were filed by the defendants and each party won and lost on different claims and significant issues. See *Peleton*, 375 Ill. App. 3d at 228 (trial court's refusal to grant attorney's fees was not an abuse of discretion, where plaintiff prevailed on some claims in its complaint and on defendants' counterclaim, and defendants prevailed on a significant issue in one of plaintiff's claims against it; court found neither party to be completely at fault); *Fieldcrest Builders*, 311 Ill. App. 3d at 608 (neither party was the "prevailing party," where each won and lost on claims and counterclaims in the trial proceedings; thus, no costs should have been awarded); *Brown & Kerr*, 306 Ill. App. 3d at 1034-35 (same). Unlike *Peleton*, *Fieldcrest Builders* and *Brown & Kerr*, Alecta sued BAB under one count (breach of lease), won on that single claim, and judgment was entered in Alecta's favor on that one claim. No counterclaim was filed by BAB, nor did BAB succeed on the one cause of action that was the basis of this litigation. Rather, BAB only asserted the affirmative defense of failure to mitigate damages against Alecta. See generally *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 131231, ¶ 19 (the difference between a counterclaim and an affirmative defense is that a counterclaim seeks affirmative relief whereas an affirmative defense merely attempts to defeat a plaintiff's cause of action); *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 589 (1999) (a counterclaim constitutes a separate, independent cause of action). We also find *Med+Plus Neck & Back Pain Center* to be distinguishable, where, there, an employer sued a former employee for breach of contract, the employer received a judgment that the former employee breached the employment contract, but the employer failed to prove the existence of any actual damages. Unlike *Med+Plus Neck & Back Pain Center*, in this case, Alecta obtained judgment in its favor *and* proved the existence of

actual damages. Although the judgment amount was reduced by Alecta's failure to mitigate damages, we find that Alecta was still the "prevailing party" in the litigation. See *Powers*, 326 Ill. App. 3d at 515 ("[a] successful litigant is still considered the prevailing party under a fee-shifting provision even if the judgment amount is below the amount claimed"). BAB's success on the issue of mitigation was not such that BAB could be considered a prevailing party on a significant issue of the case. Therefore, we hold that the trial court did not err in finding that Alecta was the prevailing party in the litigation and the court did not abuse its discretion in awarding attorney's fees and costs to Alecta.

¶ 72 We also reject BAB's argument that the amount of attorney's fees and costs awarded to Alecta—$70,030.40—was an abuse of discretion by the trial court. BAB argues that Alecta's petition for fees contained flaws, which should not have been overlooked by the trial court. BAB further argues that the court only engaged in a cursory analysis of Alecta's petition before granting the award. Alecta counters that the trial court properly reviewed the petition for fees and utilized its discretion to award Alecta 80% of the fees requested. Specifically, Alecta contends that the issue of attorney's fees was fully briefed by both parties, and the court heard extensive oral arguments and commented on its analysis of the issues.

¶ 73 The party seeking attorney's fees bears the burden of presenting sufficient evidence from which the trial court can render a decision as to their reasonableness. *Fitzgerald v. Lake Shore Animal Hospital, Inc.*, 183 Ill. App. 3d 655, 661 (1989). "A petition for fees must specify the services performed, by whom they were performed, the time expended thereon and the hourly rate charged therefor." *Id.* The trial court should consider a variety of additional factors, "such as the skill and standing of the attorneys, the nature of the case, the novelty and/or difficulty of the issues and the work involved, the importance of the matter, the degree of responsibility

required, the usual and customary charges for comparative services, the benefit of the client, and whether there is a reasonable connection between the fees and the amount involved in the litigation." *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987) (the *Kaiser* factors). In making a ruling as to what amount of fees would be reasonable, the trial judge may rely on his or her own experience as well. *Heller Financial, Inc. v. Johns-Byrne Co.*, 264 Ill. App. 3d 681, 691 (1994).

¶ 74 The record shows that Alecta's July 19, 2013 petition for fees detailed the hourly rate and qualifications of each attorney at the law firm representing Alecta in the litigation, as well as the total number of hours (308.3 hours) devoted to the litigation. The petition sought attorney's fees and costs in the amount of $87,538, and attached to the petition was a detailed and itemized billing statement describing the legal work performed on behalf of Alecta between September 2010 and June 2013. On August 5, 2013, BAB filed an objection to the petition for fees, citing *Kaiser* and arguing that the petition contained references to fees unrelated to Alecta's claim against BAB, and contained entries that were duplicative and excessive under Illinois law. At the August 15, 2013 hearing on Alecta's petition for fees, the trial court, after hearing counsels' arguments, found that Alecta had "prevailed on approximately 80 percent of the case" and that "BAB prevailed on the mitigation issue." The court then awarded $70,030.40, which was 80% of the requested attorney's fees and costs, in favor of Alecta.

¶ 75 We find that the trial court did not abuse its discretion in awarding $70,030.40 in attorney's fees and costs to Alecta. The trial court specifically stated that it had "read everything," including the cases cited by the parties, and the court heard arguments by counsel for both parties. During the hearing, counsel for Alecta described the "substantial amount of work" relating to this case, stating that "some of this work was to try to obtain recovery from the

other defendants which would have benefitted BAB and [Alecta]," and that the petition met the standards set forth in *Kaiser*. Counsel for BAB argued that the attorney's fees sought by Alecta were not reasonable, where some entries in the billing statement did not differentiate between the time spent on work performed in pursuit of Alecta's claims against BAB and the work done in pursuit of the claims against other defendants. Following the parties' arguments, the trial court found that Alecta's petition for fees was not "barebones" like the petition in *Kaiser*; that this was a "much more significant case than most of the cases which come before [the judge]" in the courthouse; that this was "not a simple case"; and that the fee petition was "legitimate." Based on our review of the record, we find that the trial court, which had reviewed BAB's written objections and had heard arguments by BAB's counsel relating to the alleged defects in the petition, properly used its discretion in awarding Alecta less than the full amount of the fees requested. In arguing that the trial court abused its discretion, BAB relies primarily on the holding in *Fitzgerald*, which we find to be distinguishable. In *Fitzgerald*, this court held that the trial court abused its discretion in awarding $26,836.94 in fees in a detainer action, where the only issue before the court was when the defendant would vacate the premises, and the court made a determination on the issue of fees based on a "wild guess." *Fitzgerald*, 183 Ill. App. 3d at 662. Unlike *Fitzgerald*, the trial court here reviewed the parties' opposing briefs and cited cases, reviewed the billing statement submitted by Alecta, heard the parties' arguments during the hearing, and posed multiple questions to both attorneys during the hearing. We reject BAB's characterization that the trial court merely "eyeballed" the petition in awarding fees and costs. Further, the court also found that because Alecta had prevailed on 80% of the case, it was entitled to 80% of its requested fees.[6] However, the percentage of the case that was prevailed

[6] 80% of $87,538 requested fees = $70,030.40.

upon by a party is not an enumerated *Kaiser* factor; thus, it is not part of our consideration or analysis in making our ruling. Therefore, based on our review of the record under the relevant law, we hold that the trial court did not abuse its discretion in awarding $70,030.40 in attorney's fees and costs in favor of Alecta.

¶ 76 Alecta further argues in its brief that it is also entitled to recover attorney's fees and costs for all postjudgment proceedings in this case, and requests that this court remand the matter for a determination of such fees. BAB counters that it, instead, was entitled to postjudgment attorney's fees. The fee-shifting provision in the lease provides for the recovery of fees and costs to the prevailing party from the non-prevailing party "in any litigation," which we hold includes the postjudgment fees incurred by Alecta, as the prevailing party, in this matter. See *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 953 (2004) (purchaser, who prevailed on claim for fraud in the inducement and was therefore entitled to attorney's fees under a real estate sales contract, was entitled to reasonable attorney's fees incurred on appeal from trial court's judgment).

¶ 77 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, but remand this case with directions to the circuit court for a hearing on, and determination of, Alecta's request for postjudgment attorney's fees and costs.

¶ 78 Affirmed and remanded with directions.