2017 IL App (1st) 153009-U

SIXTH DIVISION
MAY 12, 2017

No. 1-15-3009

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHHABRIA FAMILY LIMITED PARTNERSHIP, Plaintiff-Appellee, v. JAMES MASON, Defendant-Appellant (Joy Nelson, Defendant).	)	Appeal from the Circuit Court of Cook County.
	)	No. 12 L 12265
	)	Honorable Eileen O'Neill Burke, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in awarding attorney fees to plaintiff landlord in connection with plaintiff's breach of contract claim. However, the court's findings that defendants did not validly terminate the lease, and that the landlord made sufficient efforts to mitigate damages after defendants' breach, were not against the manifest weight of the evidence.

¶ 2 In this landlord-tenant dispute, defendant James Mason appeals the trial court's judgment awarding plaintiff, Chhabria Family Limited Partnership, damages of $45,950 for breach of the parties' lease, as well as $50,771.45 for plaintiff's attorney fees. For the following reasons, we reverse the award of attorney fees to plaintiff but otherwise affirm the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Plaintiff initiated this action against its former tenants, Mason and Joy Nelson (defendants). Nelson is not a party to this appeal. We note that pursuant to Illinois Supreme Court Rule 323(d) (eff. Dec. 13, 2005), plaintiff and Mason stipulated that the statement of facts in Mason's brief contained the facts material to the controversy. However, plaintiff's brief stated that it "d[id] not accept the facts" in Mason's brief and offered conflicting facts. Mason filed a motion for sanctions, which this court granted in an October 3, 2016 order, which specified that "The Agreed Statement of Facts stipulated to by the parties [will] be considered the true and correct statement of the facts material to this controversy." Thus, our recitation of the relevant facts is drawn from the statement of facts in Mason's brief, as well as our independent review of the record.

¶ 5 Plaintiff is the owner of a condominium unit at 910 South Michigan Avenue in Chicago (the unit). Plaintiff and defendants executed a lease in July 2010, with a one-year term. It is undisputed that, after raising several complaints regarding conditions in the unit, defendants vacated the unit by the end of November 2010.

¶ 6 On October 29, 2012, plaintiff filed a verified complaint against defendants, pleading a single count for breach of contract. The complaint alleged that defendants had only paid $1,850 in rent for October 2010, "inexcusably moved out" of the unit in November 2010, and had made no further monthly rent payments for the duration of the lease term. The complaint alleged outstanding monthly rent of $47,700, as well as late fees of $2,250. The complaint also sought attorney fees, pursuant to a lease provision.

¶ 7 Mason filed his answer and affirmative defenses on May 8, 2013. The answer admitted that defendants only paid $1,850 for October 2010 rent, claiming that Mason and plaintiff had

reached an agreement for the reduced rent due to issues with the refrigerator and air conditioning. Mason denied owing any further rent under the lease. Mason's affirmative defenses claimed that (1) plaintiff had breached the implied warranty of habitability; (2) that plaintiff failed to maintain the unit in violation of section 5-12-070 of the Residential Landlord Tenant Ordinance of the City of Chicago (RLTO) and (3) that defendants had terminated the lease pursuant to section 5-12-110 of the RLTO, after giving plaintiff sufficient notice.

¶ 8 Nelson's answer, filed May 20, 2013, pleaded that she "neither admits nor denies" that defendants made no rent payments after October 2010. Nelson denied that defendants had "inexcusably moved out" of the unit and further stated that plaintiff "caused a condition to exist in violation of the terms of the Lease."

¶ 9 Mason also filed counterclaims against plaintiff, including counts for (1) violation of section 5-12-070 of the RLTO for failure to maintain the unit in compliance with the rental agreement and municipal code; (2) breach of the implied warranty of habitability; (3) violations of RLTO section 5-12-80 for failing to give Mason a receipt for the $4000 security deposit and failing to disclose the bank where those funds were held; (4) violation of section 5-12-80(d) of the RLTO for failing to return the security deposit after termination of the lease; and (5) breach of various provisions of the lease and addendums thereto.

¶ 10 On September 25, 2013, plaintiff filed answers to Mason's affirmative defenses and counterclaims, which denied that plaintiff had failed to properly maintain the unit or had breached the implied warranty of habitability.

¶ 11 Following discovery and motion practice, a bench trial was held on May 26, 2015. Although there are no transcripts of the trial testimony in the record, the testimony of the witnesses is described in the agreed statement of facts.

¶ 12 Sameer Chhabria, an attorney, testified that he acted as plaintiff's agent, handling day-to-day affairs, including responding to maintenance requests for the unit. In July 2010, Mason and Nelson jointly executed a lease agreement to rent the unit from plaintiff. The lease called for monthly rent of $5,300, with a one-year term to commence August 1, 2010 and end on July 31, 2011. The lease included a provision that:

> "Lessee shall pay upon demand all Lessor's costs, charges, and expenses, including the fees of agents and others retained by Lessor and, as provided by applicable laws and court rules, the fees of counsel, incurred in enforcing Lessee's obligations hereunder or incurred by Lessor in any litigation *** in which Lessee causes Lessor, without Lessor's fault, to become involved or concerned."

¶ 13 At Mason's request, the parties added addendums to the lease. One of the addenda, dated July 10, 2010, stated that defendants "Would like prior access to unit"; and "Would like the status of roof deck availability." A separate addendum, dated July 13, 2010, specified that "Lessee shall have access for inspections to the unit immediately upon execution of the Lease."

¶ 14 Chhabria testified that there was a preexisting problem with the leaks in the roof; the condominium association began work to fix the leaks in 2010, which rendered the unit's roof deck inaccessible. Chhabria testified that he discussed the issue with defendants prior to execution of the lease, and told them that he expected the roof deck to be usable by spring 2011.

¶ 15 The lease called for a security deposit of $4,000, which defendants paid by check on July 12, 2010. It is not disputed that plaintiff accepted the check without giving a receipt to defendants or disclosing the bank at which the deposit would be held.

¶ 16 Defendants moved into the unit on or about August 2, 2010. It is undisputed that the air conditioner in the unit did not function properly for a number of days in August 2010. Mason and Chhabria spoke about the issue, after which Chhabria contacted a technician, Gabe, to address the problem. On August 27, 2010, Mason wrote to plaintiff, stating that, due to the air conditioning issue, Mason sought rent abatement in the amount of $1,575 to be deducted from the September 2010 rent. Plaintiff agreed to the amount of rent abatement. According to Chhabria, after that time Gabe "service[d] the [air conditioning] unit as needed" but there were no complaints about the unit being uninhabitable due to that issue.

¶ 17 A domestic dispute between Nelson and Mason arose on September 13 and 14, 2010, which resulted in police being called to the building. Chhabria recalled that Nelson told him that defendants had ended their relationship and could not reside together. Chhabria stated that he informed both defendants that they would remain liable for the rent until a new tenant was located.

¶ 18 On October 1, 2010, Mason sent a letter to plaintiff detailing certain issues with the unit. The letter stated that defendants would pay only $1,850 for October 2010 rent, after deducting amounts due to the refrigerator being "out 15 days" and for resulting loss of food. In addition, Mason's letter stated there was "No hot water in Kitchen, creating unsanitary conditions." The letter also complained of "Water damage on the hardwood floor due to the last storm" and a "leak from an unrepaired hole in the bedroom." Mason sent plaintiff another letter regarding these issues on October 11, 2010.

¶ 19 Chhabria testified that he spoke with Mason about the issues raised in these letters. According to Chhabria, the refrigerator was fixed by October 5, 2011. Chhabria testified that his technician, Gabe, told him it "took a minute or so" to get hot water in the unit. Regarding the

complaint of water damage to the floor, Chhabria "assumed the sweep at the bottom of the [balcony] door needed to be updated or the weather stripping replaced, but subsequent tenants noted that if the door was not closed and locked properly water would come in."

¶ 20 On October 27, 2010, defendants' attorney sent a letter to plaintiff stating that defendants had found housing elsewhere "due to a number of health and safety risks." That letter complained of problems with the air conditioning unit and refrigerator; water damage to hardwood floors; water leaking from a hole in the bedroom; and insufficient hot water in the kitchen and bathroom. That letter also complained that defendants could no longer access the roof deck. The October 27, 2010 letter purported to give notice that defendants were "terminating the lease pursuant to [section] 5-12-110 of the RLTO" and would vacate the unit by November 30, 2010.

¶ 21 On November 12, 2010, Chhabria sent a letter to defendant's counsel, stating that the complained-of issues had been or were being resolved and "clearly do not rise to the level of not 'providing a habitable apartment.' " Chhabria's letter also stated that he had been assured by defendants "that even though they had some domestic issues *** the rent would be paid."

¶ 22 At trial, Chhabria testified that all maintenance issues were remedied as soon as they could be, and he disagreed that the unit was ever uninhabitable. Chhabria testified that defendants vacated the unit in November 2010; he believed they left because they had ended their relationship. Defendants paid no further rent after the partial payment in October 2010. Plaintiff retained the $4,000 security deposit.

¶ 23 By letter dated December 4, 2010, defendants informed plaintiff they had vacated the unit on November 30, 2010 "pursuant to the notice that they were terminating the lease due to the

conditions within the premises which constitute a violation of the RLTO." Chhabria did not respond to that letter.

¶ 24 Chhabria testified that, after defendants indicated their intention to vacate the unit, he contacted a real estate agent and relisted the unit on October 15, 2010. According to the agreed statement of facts, "The unit was listed on the MLS in October 2010 for the same amount it had been listed at before ($5,800)." Although this asking rent exceeded the $5,300 rent in defendants' lease, Chhabria testified "he felt $5,800 was fair market rent for the unit."

¶ 25 According to Chhabria, the agent showed the unit "here and there," although he did not know how many showings there were. Chhabria told the agent he would accept less than $5,800, although he did not decrease the rent in the MLS listing. The unit eventually rented in September 2011 (after the expiration of defendants' lease term) for $4,800.

¶ 26 Nelson also testified at trial. She admitted she did not read defendants' lease before signing it in July 2010 and claimed she did not understand that she would be liable for rent.

¶ 27 Nelson testified that after moving into the unit, she told Mason and Gabe "of the ceiling leaking, water coming from the balcony door, [and] the hot water in the kitchen." However, she acknowledged they "all must have been fixed" because they "didn't exist upon move out." Nelson gave conflicting statements about the air conditioner; at one point she stated that it was not fixed before she left, but she also testified that "after Gabe's fix it was better." She also testified that the refrigerator had stopped working and was not repaired by the time she left.

¶ 28 Nelson recalled a telephone conversation with Chhabria around the time of the September 2010 domestic incident. She said the "purpose of the call was to be free of the lease" and she "believed the lease was null and void" after the call. Nelson testified that she did not take part in drafting the letters complaining of issues with the unit.

¶ 29 Nelson testified that after the domestic dispute with Mason, she moved in with her parents. She and Mason eventually reconciled, and together they moved in to a different residence in Wheaton, Illinois.

¶ 30 Mason testified at trial that he and Nelson rented the apartment because of the roof deck, but that the building "tarped the roof in October." Mason testified that Gabe came to the unit four or five times in July and August to service the air conditioner. Mason admitted that the rent abatement for the air conditioner, as well as the broken refrigerator, was sufficient.

¶ 31 Mason testified that a water leak in the bedroom ceiling began in August and "once reported it took the building 2 weeks to fix." Mason testified that "it took 8 minutes for the water to become hot in the kitchen." Regarding the issue of rainwater entering from under the balcony door, he testified "when it rained sideways rain came in."

¶ 32 Mason testified that he called Chhabria each time a problem arose. Although Chhabria sent Gabe a number of times to service the unit, Mason claimed that none of the problems had been fully fixed. Mason fully moved out of the unit on November 27, 2010. He and Nelson "each moved to separate places initially but then moved to Wheaton 2 weeks later."

¶ 33 After trial, following the parties' submissions of proposed findings of fact and conclusions of law, the trial court entered an order on June 1, 2015. The trial court found, based on the trial testimony, "that Chhabria disclosed all problems with the terrace deck, including that it was not useable by defendants at the outset of their tenancy." Regarding the hot water issue, the court found, based on the lease and testimony, that Mason had "the opportunity to test the functionality of the amenities within the unit" before executing the lease and that defendants "possess no claim as to habitability with respect to the alleged hot water issue."

¶ 34 With respect to the air conditioner and refrigerator, the court found that "Chhabria endeavored to repair these defects upon notice from Defendants" and that Mason received sufficient abatement. Thus, the court found that defendants "may assert no claim for breach of warranty of habitability, or *** the RLTO due to the alleged defects relating to the air conditioner and refrigerator." The court also found, based on the trial testimony, that "Chhabria fixed the bedroom ceiling issue within a reasonable time." The court also found that the water damage to the hardwood flooring "does not constitute an issue of habitability given that the issue predominated from Defendant's improperly latching the patio door shut" and "the flooring never sustained significant damage so as to make the unit un-livable as a whole."

¶ 35 As defendants "fail[ed] to illustrate any breach of the implied warranty of habitability," the court found that they remained responsible for payment of rent through the term of the lease. The court also found that plaintiff "undertook sufficient efforts to re-let the premises upon Defendants' abandonment of the property." The court's June 12, 2015 order also held that "pursuant to the lease," plaintiff was entitled to recover court costs and attorney fees.

¶ 36 With respect to Mason's counterclaims, the court found that plaintiff had committed three violations of RLTO provisions concerning the security deposit, by (1) failing to disclose the financial institution holding the deposited funds; (2) improperly commingling the security deposit funds with its own monies; and (3) failing to provide a receipt for the security deposit. However, the court held that plaintiff "was within its rights to deduct from the security deposit provided the unpaid rent for the relevant time period."

¶ 37 The court held that each of the three RLTO violations entitled Mason to damages in an amount equal to two times the $4,000 security deposit, resulting in a total of $24,000 in damages on the counterclaims. Thus, the June 12, 2015 order entered judgment for Chhabria for breach of

the lease, "in the principal amount of $45,950, which includes a $4,000.00 deduction for the retained security deposit, plus interest" as well attorney fees and costs associated with enforcement of the lease. With respect to the counterclaims, the court awarded a $24,000 judgment to Mason, in addition to Mason's related attorney fees and costs.

¶ 38 Plaintiff and defendants each filed motions for reconsideration. Plaintiff's motion, filed June 22, 2015, did not dispute the three RLTO violations regarding the security deposit, but argued that, even for multiple violations, the court may only award *one* penalty of twice the security deposit. Thus, plaintiff urged that Mason's damages were limited to $8,000.

¶ 39 On June 25, 2015, defendants filed a joint motion for reconsideration, which asserted that the June 12 order contained a number of erroneous factual findings. In addition, the motion disputed the June 12 order's award of plaintiff's attorney fees. Defendants contended that plaintiff could not seek attorney fees because (1) its complaint did not cite the RLTO, and (2) the lease provision referencing attorney fees was unenforceable under section 5-12-140 of the RLTO, which prohibits a rental agreement from providing that "in the event of a lawsuit arising out of the tenancy the tenant will pay the landlord's attorney's fees except as provided for by court rules, statute, or ordinance." Chicago Municipal Code § 5-12-140 (amended November 6, 1991).

¶ 40 Defendants' motion to reconsider separately contended that the court failed to make an express finding as to whether the letters of October or November 2010 constituted termination of the lease pursuant to section 110 of the RLTO. Defendants' motion to reconsider also urged that the court erred in finding that plaintiff made sufficient efforts to mitigate damages.

¶ 41 On July 23, 2015, plaintiff's response to defendants' motion to reconsider argued that it could recover attorney fees under the terms of the lease. Plaintiff also argued that its complaint

was premised on a tenant's obligation to pay rent under the RLTO and thus independently warranted attorney fees under section 5-12-180 of the RLTO, notwithstanding the complaint's failure to cite the RLTO. In addition, the response contained a footnote in which plaintiff argued: "Alternatively, Plaintiff should be permitted to amend its complaint to change the heading of its breach of contract count" to plead a violation of section 5-12-130(a) of the RLTO, concerning a landlord's right to sue for failure to pay rent. Chicago Municipal Code § 5-12-130(a) (amended November 6, 1991).

¶ 42 On August 9, 2015, Mason filed a reply in support of defendants' motion to reconsider. That reply did not address the footnote in plaintiff's brief regarding a possible amendment.

¶ 43 On September 17, 2015, the court entered an order in which it granted plaintiff's motion to reconsider, but denied defendants' motion. With respect to plaintiff's motion, the court agreed that plaintiff's liability for its violations of the RLTO's security deposit provisions only warranted damages of $8,000. That finding is not challenged on appeal.

¶ 44 The court's order otherwise rejected the arguments in defendants' motion to reconsider. To the extent defendants disputed the court's factual findings, the court reasoned that, whether the court "worded [the facts] differently" did not have any bearing on "the application of existing law."

¶ 45 The court rejected defendants' argument that the complaint's failure to cite the RLTO precluded the award of attorney fees. The court found "it is apparent that in the context of seeking damages for breach of the lease itself, [plaintiff] seeks damages for non-payment of rent"; and that defendants' failure to pay rent "relates directly to the provisions of the RLTO." Nevertheless, recognizing that the complaint was "silent as to its seeking a remedy under the RLTO," the court further ordered: "without objection by Defendants to [plaintiff's] request to

amend its pleadings, the Court shall permit [plaintiff] to amend its Complaint in order to remedy t[he] technical defect."

¶ 46 With respect to whether the letters sent to plaintiff had constituted termination of the lease, the court noted that it had "determined as a factual matter that [plaintiff] never breached the warranty of habitability, but rather adequately addressed Defendants' issues with the unit by endeavoring repairs, and providing Mason with rent abatement, which Mason accepted." Thus, the court reasoned that "the letters submitted by Defendants, while considered by the Court in the overall context of the dispute, are immaterial given the lack of any existing habitability issue."

¶ 47 The court further reasoned that:

> "[I]n connection with finding the property habitable at all relevant times the Court correctly determined that Defendants possessed no basis for abandoning their lease obligations. Therefore *** even if the letters operated as a form of notice of termination, the Court determined from the facts and testimony presented that no basis for termination of the lease existed. Therefore, [plaintiff] was within its right to retain the entirety of the security deposit to cover the unpaid rent due to Defendants' non-payment."

¶ 48 Finally, the court's September 17, 2015 order maintained the finding that plaintiff had taken adequate measures to mitigate its damages. The court noted that "Defendants do not contest *** that [plaintiff] placed the unit back on the market subsequent to Defendants' domestic dispute, for the same amount as originally marketed, and never rejected any applicant for the unit during the relevant time." Thus, the court granted plaintiff's motion to reduce its damages to $8,000; denied defendants' motion to reconsider, and directed plaintiff to "amend its

pleadings to reflect its claims pursuant to the [relevant] provision of the RLTO as discussed above."

¶ 49 On September 25, 2015, plaintiff filed an amended complaint, which, in addition to the breach of contract count, added a count pleading defendants' violation of section 5-12-130(a) of the RLTO for failure to pay rent.

¶ 50 Following a prove-up hearing, on September 25, 2015, the court entered a final order awarding plaintiff $45,950.00 in damages; an additional $50,771.45 in attorney fees and costs, and $30,154.36 in interest, against defendants, jointly and severally. The same order also entered judgment in favor of Mason in the amount of $8,000 for his counterclaims, and awarded Mason attorney fees in the amount of $37,760.75 and interest in the amount of $331.14.

¶ 51 On October 19, 2015, Mason filed a notice of appeal. Nelson did not appeal.

¶ 52 ANALYSIS

¶ 53 Before we address the merits, we note that we have appellate jurisdiction, as Mason filed a timely notice of appeal following the September 25, 2015 final order. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303(a) (eff. June 4, 2008).

¶ 54 Mason asserts three challenges: (1) that plaintiff was not entitled to an award of attorney fees; (2) that the court erred in "failing to make a finding of fact as to whether defendants terminated the lease"; and (3) the trial court erred in finding that plaintiff made reasonable efforts to mitigate its damages.

¶ 55 We first address Mason's contention that the trial court erred in awarding plaintiff its attorney fees and costs. Mason relies on section 5-12-180 of the RLTO, which states, in relevant part: "the prevailing plaintiff in any action arising out of a landlord's or tenant's application of

the rights or remedies made available in this ordinance shall be entitled to all court costs and reasonable attorney's fees ***." Chicago Municipal Code § 5-12-180 (amended Nov. 6, 1991).

¶ 56 Mason claims that this provision does not apply to allow plaintiff to recover attorney fees, because "Plaintiff never sought a remedy made available in the RLTO in its complaint." Mason emphasizes that plaintiff's original complaint pleaded a single count of breach of contract, but did not cite to the RLTO.

¶ 57 Mason argues the situation is governed by *Willis v. Naico Real Estate Property*, 379 Ill. App. 3d 486 (2008). In that case, the appellate court concluded that a landlord was not entitled to attorney fees pursuant to section 5-12-180, despite succeeding on a breach of contract counterclaim against plaintiff tenant. *Id.* at 490. The court explained: "[A]lthough the language of section 5-12-180 of the RLTO entitles any prevailing plaintiff to be awarded attorney fees [citation], defendant's counterclaim is for breach of contract, a common law claim. The fee and cost provision relied on by defendant, section 5-12-180 of the RLTO, applies only to actions arising out of 'the rights or remedies made available *in this ordinance*.' " (Emphasis added by the *Willis* court). *Id.* at 490. Because the landlord "does not cite or rely on the RLTO in its counterclaim," but relied on a provision of its lease, the court concluded the "counterclaim has nothing to do with rights or remedies made available in this ordinance." (Internal quotation marks omitted.) *Id.* *Willis* thus indicates that a landlord will not be entitled to an award of attorney fees under section 5-12-180 where it prevails on a breach of contract complaint that does not reference the RLTO.

¶ 58 Although the original complaint in this case pleaded only a breach of contract claim, the trial court's order on the motions to reconsider permitted plaintiff to amend its complaint to add a count alleging defendants' violation of section 5-12-130(a) of RLTO for their failure to pay rent.

Plaintiff asserts that this amendment corrected its initial failure to cite the RLTO and thus permits it to collect attorney fees pursuant to section 5-12-180.

¶ 59 Mason, however, urges that the amendment was procedurally improper, as it was untimely and because there was no formal motion to amend. Rather, plaintiff included a footnote in its response to defendants' motion for reconsideration in which it "alternatively" offered to amend its complaint, after arguing that it was entitled to attorney fees despite its complaint's failure to reference the RLTO.

¶ 60 Plaintiff contends that Mason has forfeited any argument as to whether the amendment was improper. Plaintiff notes that Mason filed a reply to defendants' motion to reconsider, which did not address the footnote, and thus claims he "waived this argument."

¶ 61 We acknowledge that there is nothing else in the record indicating that defendants objected in the trial court to the footnote regarding an amendment.[1] Generally, arguments not raised in the trial court are forfeited. *Kotvan v. Kirk*, 321 Ill. App. 3d 733, 750 (2001) ("'Preservation of a question for review requires an appropriate objection in the court below [citation] and failure to object constitutes waiver.'"). However, even if forfeiture applies, forfeiture is a limitation on the parties and not the reviewing court, "and this court may overlook forfeiture where necessary to obtain a just result or maintain a sound body of precedent. [Citation.]" *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 757 (2010). In this case, we overlook any potential forfeiture because the post-judgment amendment was improper under this court's precedent.

[1] Mason's reply brief contends that he "made an oral objection to the allowance of the amended pleading during the prove-up hearing." However, no hearing transcript is in the record.

¶ 62 Amendments to pleadings are governed by section 2-616 of the Code of Civil Procedure. Section 2-616(a) provides: "At any time before final judgment amendments may be allowed on just and reasonable terms ***, changing the cause of action or defense or adding new causes of action or defenses." 735 ILCS 5/2-616(a) (West 2014). Section 2-616(c) provides that "A leading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2014).

¶ 63 "The decision to allow an amendment to a complaint *** rests within the sound discretion of the trial court, and absent an abuse of discretion, we will not disturb the trial court's decision. [Citation.] A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 705-06 (2010).

¶ 64 "[A]mendments should not ordinarily be permitted after trial has begun if the proposed amendment raises matters of which the pleader had full knowledge at the time of interposing the original pleading, and there is no excuse for failing to raise those matters in the original pleading. [Citation.]" *Stringer Construction Co. v. Chicago Housing Authority*, 206 Ill. App. 3d 250, 260 (1990).

¶ 65 "A complaint 'may only be amended after judgment to conform the pleadings to the proofs.' [Citation.] Amending a complaint to add a new cause of action is not a proper postjudgment motion." *Mandel*, 404 Ill. App. 3d at 710 (citing *Fleisch v. First American Bank*, 305 Ill. App. 3d 105, 110 (1999)).

¶ 66 In this case, the amended complaint added a count pleading a violation of section 130 of the RLTO, which was premised on the very same facts as the breach of contract claim. Even if

the request to amend had been asserted through a formal motion, it "fail[ed] to adhere to the well-settled law that a complaint may not be amended postjudgment." *Mendel*, 404 Ill. App. 3d at 710.

¶ 67 As the operative complaint did not reference any right or remedy under the RLTO, it does not support the recovery of attorney fees pursuant to section 5-12-180 of the RLTO, "which applies only to actions arising out of 'the rights or remedies made available *in this ordinance*.' " (Emphasis in original.) *Willis*, 379 Ill. App. 3d at 489-90 (quoting Chicago Municipal Code § 5-12-180 (amended November 6, 1991)).

¶ 68 Nevertheless, plaintiff asserts an independent basis for recovery of attorney fees. Plaintiff argues that, even under the original complaint, it was entitled to attorney fees under the lease term that: "Lessee shall pay upon demand all Lessor's costs, charges, and expenses, including the fees of agents and others retained by Lessor and, *as provided by applicable laws and court rules*, the fees of counsel, incurred in enforcing Lessee's obligations hereunder ***." (Emphasis added.)

¶ 69 We disagree. The complaint in this case pleaded only a breach of contract claim and did not cite any RLTO provision. That is, plaintiff did not identify any "applicable laws and court rules" to trigger application of the lease's attorney fee provision. See *VG Marina*, 378 Ill. App. 3d at 894 (applying similar lease provision to hold that landlord could not recover attorney fees where its complaint failed to cite the RLTO). We note that this is consistent with section 5-12-140 of the RLTO, which prohibits rental agreements from including a term that "in the event of a lawsuit arising out of the tenancy the tenant will pay the landlord's attorney fees *except as provided for by court rules, statute, or ordinance.*" (Emphasis added.) Chicago Municipal Code

§ 5-12-140 (amended November 6, 1991). Thus, as in *VG Marina*, 378 Ill. App. 3d at 894, we conclude that the lease did not entitle plaintiff to attorney fees.

¶ 70 For the foregoing reasons, we reverse the portion of the trial court's September 25, 2015 judgment awarding $50,771.45 in attorney's fees and costs to plaintiff.

¶ 71 We next address Mason's second claim of error, that the trial court failed to make an express finding as to whether defendants' letters to plaintiff constituted a valid termination of the lease, pursuant to section 110 of the RLTO. Chicago Municipal Code § 5-12-110 (amended November 6, 1991). Mason contends that, in finding that defendants abandoned the lease, the court made factual findings that were contrary to the evidence. Mason further argues that the court based its findings upon irrelevant evidence, citing the principle that "a tenant's motive for invoking the right of termination *** is simply not relevant to the determination the termination is valid." *Plambeck v. Greystone Management & Columbia National Trust Co.*, 281 Ill. App. 3d 260, 267 (1996). Mason suggests that the trial court "adopted Plaintiff's claim [that] Defendants terminated the lease because of their domestic dispute," but failed to find whether defendants' "actions before vacating the premises constituted a valid termination of tenancy."

¶ 72 According to Mason, this court should rely on defendants' 2010 letters to plaintiff and find that they terminated the lease pursuant to section 110 of the RLTO, and vacate the damages awarded to plaintiff for breach of the lease. In the alternative, he asks that we remand for the trial court "to make the proper findings on Defendants' claims under § 110 of the RLTO."

¶ 73 In reviewing Mason's termination claim, we note that the construction of RLTO provisions is a question of law subject to *de novo* review. *VG Marina*, 378 Ill. App. 3d at 891. However, we review the trial court's factual findings under a deferential standard. "A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the

judgment is against the manifest weight of the evidence. [Citations.] A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence. [Citation.]" *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 859 (2008).

¶ 74 Mason's brief relies upon section 110(f) of the RLTO, which permits a tenant to give notice of termination "[i]f there is material noncompliance by the landlord with the rental agreement or with Section 5-12-070[2] either of which constitutes an immediate danger to the health and safety of the tenant." Chicago Municipal Code § 5-12-110(f) (amended November 6, 1991). The tenant may also terminate the lease if "the landlord fails to supply heat, running water, hot water, electricity, gas or plumbing" and the failure persists for more than 72 hours after the landlord is notified. *Id.*

¶ 75 Although defendants' letters to plaintiff complained of numerous problems with the unit, the trial court heard conflicting testimony about their severity and duration. "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony. [Citation.] When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza, Inc.*, 384 Ill. App. 3d at 859.

¶ 76 The court's orders reflect that it weighed the evidence regarding the condition of the unit and declined to find that there was any dangerous condition, a failure by the landlord to provide

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[2] Section 5-12-070 provides that "The landlord shall maintain the premises in compliance with all applicable provisions of the municipal code and shall promptly make any and all repairs necessary to fulfill this obligation." Chicago Municipal Code § 5-12-070 (Amended November 6, 1991).

essential services, or any other grounds for termination pursuant to section 5-12-110. Rather, as stated in its decision on its motion to reconsider, the court determined that plaintiff "never breached the warranty of habitability, but rather adequately addressed Defendants' issues with the unit."

¶ 77 Moreover, we find no support for Mason's assertion that the court improperly relied upon defendants' domestic dispute in declining to find that they terminated the lease. Rather, the court could reasonably have concluded from the relevant evidence that none of the issues raised by defendants' letters justified termination.

¶ 78 The court apparently credited Chhabria's testimony that the unit's issues were addressed promptly. Much of Nelson and Mason's testimony also supported that conclusion, including: Nelson's acknowledgment that a number of issues were fixed by the time she moved out, as well as Mason's concession that he received sufficient rent abatement for the air conditioner and refrigerator issues. Further, even if the trial court believed Mason's and Nelson's testimony, it could reasonably have concluded that none of the complained-of issues rendered the unit uninhabitable, or otherwise raised grounds for termination.

¶ 79 In this case, it is apparent that the trial court found, based on the evidence, that there were no factual circumstances to justify termination. Those findings were not against the manifest weight of the evidence. Thus, we reject Mason's argument that the court erred in finding that he and Nelson abandoned the rented unit.

¶ 80 Finally, we address Mason's third contention on appeal—that the trial court erred in finding that plaintiff satisfied its duty to mitigate damages. By statute, "a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1 (West 2014). "The landlord bears the burden of proving that it

complied with the statutory duty of mitigation. [Citation.] If a landlord cannot show that it took reasonable steps to mitigate its damages, the damages that it would otherwise recover are reduced, and losses which reasonably could have been avoided are not recoverable." (Internal quotation marks omitted.) *Danada Square, LLC v. KFC National Management*, 392 Ill. App. 3d 598, 608 (2009).

¶ 81 Whether a landlord has met its duty to mitigate damages is a question of fact, to which the deferential manifest weight of the evidence standard of review applies. We will reverse "only when the opposite conclusion is apparent" or when the trial court's findings "appear to be unreasonable, arbitrary, or not based on evidence." (Internal quotation marks omitted.) *Chicago's Pizza*, 384 Ill. App. 3d at 859.

¶ 82 In this case, the trial court determined that plaintiff made sufficient efforts to re-let the unit after defendants abandoned the premises. Given the undisputed facts, we cannot say this finding was against the manifest weight of the evidence.

¶ 83 Chhabria contacted a real estate agent and relisted the unit in October 2010, shortly after defendants' letters, and before defendants fully vacated the premises. The unit was relisted with an asking rent of $5,800 per month, or $500 more than the rent in defendants' lease. Chhabria testified that the $5,800 amount was the same rent at which the unit had been listed previously, and stated his belief that this was the fair market rent for the unit. Chhabria testified that the unit was shown "here and there," although he could not specify how many people had shown interest in the unit. He testified that he informed the agent he would accept less rent, but admitted that he had not lowered the $5,800 asking rent. The unit was eventually rented for $4,850 per month in August 2011.

¶ 84 We cannot say that it was arbitrary or unreasonable for the trial court to credit this testimony to find that plaintiff made sufficient, reasonable efforts to mitigate damages from defendants' breach of the lease. Although vague, this testimony was uncontradicted evidence of plaintiff's effort to rent the property.

¶ 85 Further, Mason cites no authority to support his arguments that the landlord must publicly lower the asking rent, or that it must "post an ad on Craig's List" or another source, to demonstrate reasonable efforts to mitigate damages. Without citation to relevant authority, consideration of this point is forfeited. Ill. S. Ct. R 341(h)(7) (eff. Jan. 1, 2016); *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. Similarly, although Mason faults plaintiff for not presenting testimony from any other witnesses regarding its efforts to re-let the unit, we cannot say that it was unreasonable for the court to rely on Chhabria's uncontradicted testimony.

¶ 86 Finally, we also note Mason's contention that a failure to mitigate is supported by plaintiff's delay in filing this suit until October 2012. He claims that plaintiff never made a demand for unpaid rent but "allowed interest to accrue for 23 months." However, Mason cites no authority suggesting that the timing of the landlord's lawsuit for breach of the lease has any bearing on whether a landlord has met its duty to mitigate damages. Thus, that point is also forfeited. *See id.*

¶ 87 For the foregoing reasons, we reverse the award of attorney fees to plaintiff in the amount of $50,771.45; we otherwise affirm the judgment of the circuit court.

¶ 88 Affirmed in part and reversed in part.