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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ESAD LIVNJAK,)	
)	
)	
Plaintiff-Appellant,)	
)	
v.)	Appeal from the Circuit Court
)	of Cook County.
RIGHT RESIDENTIAL II FUND 2 LLC,)	
CHRISTOPHER SHAXTED, and UNKNOWN)	No. 2016 L 009555
AGENTS OF RIGHT RESIDENTIAL II FUND)	
2, LLC,)	The Honorable
)	Daniel J. Kubasiak,
Defendants)	Judge Presiding.
)	
(Right Residential II Fund 2 LLC and Christopher)	
Shaxed,)	
Defendants-Appellees).)	
)	

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court lacks jurisdiction to consider plaintiff’s claims concerning the dismissal of his second amended complaint where plaintiff’s prior appeal had been dismissed and plaintiff failed to file a new notice of appeal or move for reconsideration of the earlier appeal. The trial court’s grant of summary judgment in defendant’s favor on defendant’s counterclaim is affirmed where defendant

established that it was entitled to payment of rent for the use and occupancy of its property and the court's entry of a damages award after prove-up is affirmed where the record is insufficient to support any claim of error.

¶ 2 The instant appeal arises from plaintiff Esad Livnjak's contention that defendants Right Residential II Fund 2 LLC and Christopher Shaxted¹ impermissibly disposed of plaintiff's personal property after a final judgment in a foreclosure action and after possession of the real property was awarded to defendant. Plaintiff filed a lawsuit alleging negligence, trespass to chattels, and intentional infliction of emotional distress. Defendant filed a counterclaim, seeking rent for use and occupancy for the period of time in which plaintiff was in wrongful possession of defendant's property, as well as a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). The trial court granted the motion to dismiss on October 10, 2017, and plaintiff filed a notice of appeal. We dismissed the appeal for lack of jurisdiction, because the dismissal order was not a final order and did not contain the required language under Illinois Supreme Court Rule 304(a) (eff. Mar. 3, 2016). *Livnjak v. Right Residential II Fund 2, LLC*, 2018 IL App (1st) 172879. The trial court subsequently granted summary judgment as to the liability on defendant's counterclaim and, after a prove-up of damages on June 5, 2018, entered judgment in defendant's favor in the amount of \$12,500. Plaintiff filed a new notice of appeal, listing only the orders concerning the counterclaim. On appeal, plaintiff challenges both the dismissal of his complaint as well as the orders concerning the counterclaim. For the reasons that follow, we lack jurisdiction to consider the claims concerning the dismissal of the complaint and affirm the trial court's judgment on the counterclaim.

¹ Plaintiff's complaint alleges that defendant Christopher Shaxted is the manager of defendant Right Residential II Fund 2 LLC, and all allegations against defendant Shaxted are in that capacity. Accordingly, we refer to the singular "defendant" and do not differentiate between the two, other when discussing Shaxted's affidavit and deposition testimony.

¶ 3

BACKGROUND

¶ 4

As noted, this case was previously before us on the dismissal of plaintiff's complaint. Accordingly, we take the facts from our prior decision where appropriate.

¶ 5

On September 27, 2016, plaintiff filed a complaint against defendant in the circuit court of Cook County after a federal district court declined to exercise supplemental jurisdiction over state-law claims in a federal lawsuit plaintiff had previously filed against defendant, *Livnjak v. Right Residential II-Fund2, LLC*, No. 16 C 1518, 2016 WL 4734404 (N.D. Ill. Sept. 12, 2016). The complaint in the case at bar was amended twice, and it is the second amended complaint that plaintiff contends was improperly dismissed. Plaintiff alleged that, on July 28, 2015, the trial court had entered an order of possession in favor of defendant with respect to plaintiff's residence and that, on October 27, 2015, defendant arrived at the residence with the Cook County sheriff to evict anyone residing within the property.² Plaintiff alleged that no one was present at the residence and that defendant removed all personal property belonging to plaintiff from the residence, which "were then scattered and strewn about in public view." The complaint set forth four causes of action: (1) negligence, (2) trespass to chattels, (3) bailment, and (4) intentional infliction of emotional distress.

¶ 6

On November 15, 2016, defendant filed a counterclaim against plaintiff, alleging that plaintiff initially owned the property, which was the subject of a foreclosure suit by Citimortgage, Inc., that resulted in a judgment of foreclosure and sale. At the auction, defendant was the successful bidder and, on January 9, 2015, an order confirming sale was entered in the foreclosure suit. This order also granted defendant possession of the property

² We note that, while plaintiff's initial complaint alleged that the sheriff accompanied defendant for the eviction, the second amended complaint alleges that "[i]t is unknown to the Plaintiff whether the Defendants were accompanied by the Cook County Sheriff or proceeded with the eviction of Plaintiff's property on their own."

30 days after the entry of the order; on January 21, 2015, defendant tendered a 90-day written demand for possession of the property, requiring all occupants to turn over possession of the property by April 21, 2015. However, plaintiff continued to reside at the property despite this written demand and, on October 27, 2015, defendant enforced its order for possession and the sheriff ejected plaintiff from the property. Defendant's counterclaim alleged that plaintiff wrongfully possessed the property from April 21, 2015, through October 27, 2015, and failed to tender rent or otherwise compensate defendant for the period of time during which he wrongfully possessed the property. Defendant alleged that it was entitled to recover from plaintiff a fair and reasonable sum for the use and occupancy of the property and requested \$2800 per month, for a total of \$17,398.36.

¶ 7 Attached to the counterclaim was a copy of the January 9, 2015, order approving the report of sale and distribution, confirming the sale, and ordering possession by the successful bidder 30 days after the entry of the order; the order directed the sheriff to evict plaintiff 30 days after the entry of the order. Also attached to the counterclaim was a letter, dated January 21, 2015, from defendant to Mili Livnjak, plaintiff's son who was residing at the property, in which defendant provided notice that it would be terminating the tenancy 90 days after the date of the notice and that defendant demanded possession of the property at that time.

¶ 8 On January 3, 2017, plaintiff filed a motion to dismiss the counterclaim on the basis of *res judicata*, claiming that defendant could have sought compensation for use and occupancy of the property in a forcible entry and detainer action that defendant had previously filed against plaintiff's son. In response, defendant claimed there was no identity of causes of action or parties, so *res judicata* did not apply.

¶ 9 On February 28, 2017, the trial court denied plaintiff's motion to dismiss defendant's counterclaim and, on March 20, 2017, plaintiff filed an answer and affirmative defenses to the counterclaim. As affirmative defenses, plaintiff alleged: (1) that the counterclaim failed to state a claim, (2) that *res judicata* or collateral estoppel barred the counterclaim, (3) that the July 28, 2015, order of possession was void because defendant did not properly provide a notice of termination of occupancy in conformance with the law, (4) that defendant possessed unclean hands because the counterclaim was filed in retaliation to plaintiff's lawsuit, (5) that the lawsuit was barred by laches, (6) that defendant had failed to mitigate its damages by failing to enter into a lease with plaintiff, (7) that defendant was seeking to be unjustly enriched because it was seeking rent prior to September 11, 2015, the date when the judgment of possession against plaintiff's son could be enforced in the forcible entry and detainer action, and (8) that the damages requested were speculative.

¶ 10 On August 3, 2017, defendant filed a combined motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code, arguing that plaintiff had failed to remedy the defects of the prior two complaints. With respect to dismissal under section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), defendant argued that plaintiff had failed to establish that a duty applied with respect to the negligence count; had failed to establish that he had an absolute and unconditional right to his personal property after the completion of a lawful eviction as required for a trespass to chattels; had failed to establish a relationship giving rise to a bailment; and had failed to establish that the disposition of plaintiff's personal property was extreme and outrageous conduct as required for intentional infliction of emotional distress, since the eviction was conducted in accordance with Illinois law. With respect to dismissal under section 2-615 (735 ILCS 5/2-615 (West 2016)), defendant argued that

plaintiff had failed to allege extreme and outrageous conduct because he failed to allege that defendant lacked the right to dispose of plaintiff's personal property. In response, plaintiff voluntarily dismissed his count for bailment.

¶ 11 On October 10, 2017, the trial court entered an order granting defendant's motion to dismiss the second amended complaint. In dismissing each count of the complaint, the court found that plaintiff had been given multiple chances to amend his complaint to state a cause of action, but had continually failed to do so. In its dismissal order, the court included a finding that "[t]his is a final order disposing of this case in its entirety." On November 6, 2017, plaintiff filed a notice of appeal.

¶ 12 On November 9, 2017, defendant filed a motion to modify the October 10, 2017, judgment order pursuant to section 2-1203(a) of the Code (735 ILCS 5/2-1203(a) (West 2016)). Defendant took issue with the finding that the October 10 order was a final order, claiming that "this final finding in the Order is not entirely accurate because Right Residential has a pending counterclaim (the 'Counterclaim') against Livnjak, which Livnjak has answered. Consequently, the dismissal of Livnjak's claims did not dispose of this case in its entirety because this Court must still adjudicate the Counterclaim. This Motion is thus brought to modify the Order to state that this case remains ongoing based on the Counterclaim."³

¶ 13 On November 22, 2017, the trial court entered an order granting defendant's motion to modify the October 10 order, which provided, in relevant part, that "[t]he court's order of Oct. 10, 2017 is amended to delete the final sentence in the order because this case remains

³ In his brief, plaintiff characterizes this motion, and the order granting it, as defendant "mov[ing] to reinstate" the counterclaim. This is simply not the case. The counterclaim was never dismissed or otherwise ruled on, so there was nothing to "reinstate." Defendant's motion to modify merely pointed out an error in the October 10 order, which the trial court corrected when it modified the order.

pending and active due to Right Residential's pending counterclaim." As noted, the final sentence of the October 10 order that was deleted was as follows: "This is a final order disposing of this case in its entirety."

¶ 14 On appeal, we dismissed plaintiff's appeal for lack of jurisdiction, because the October 10, 2017, order was not a final order as a result of the pending counterclaim and the trial court had not made any findings pursuant to Rule 304(a). *Livnjak*, 2018 IL App (1st) 172879, ¶ 27.

¶ 15 While plaintiff's appeal was pending, on February 6, 2018, defendant filed a motion for summary judgment on the counterclaim. Defendant claimed that, under section 9-201 of the Forcible Entry and Detainer Act (735 ILCS 5/9-201 (West 2016)), it was entitled to the recovery of rent for the use and occupancy of the property from April 21, 2015, through October 27, 2015. Defendant claimed that there were no genuine issues of material fact, as the incontrovertible evidence established that on January 9, 2015, an order confirming the sale of the property to defendant was entered in the trial court; that the order granted defendant possession of the property within 30 days and specifically identified plaintiff as a party against whom the order was to be enforced; that defendant obtained the deed to the property; that on January 21, 2015, defendant issued a demand for delivery of the property, which required all occupants to vacate the property within 90 days; that 90 days from January 21, 2015, was April 21, 2015; that plaintiff refused to turn over the occupancy of the property on April 21, 2015; that on September 14, 2015, defendant requested that the sheriff evict all occupants from the property; that the sheriff lawfully evicted plaintiff from the property; that plaintiff wrongfully possessed the property from April 21, 2015, through October 27, 2015; and that during that time, plaintiff did not pay rent or otherwise

compensate defendant for the unlawful use and possession of the property. Accordingly, defendant requested that the trial court enter summary judgment in its favor.

¶ 16 Attached to the motion for summary judgment was the affidavit of Shaxted, who averred that he was the sole member of defendant and that, on January 21, 2015, he issued and delivered a demand for delivery of the property. The other averments contained in the affidavit were identical to those set forth in the motion for summary judgment.

¶ 17 In response, plaintiff claimed that defendant relied solely on Shaxted's affidavit and that the affidavit did not comply with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) because it contained argument and legal conclusions and was not based on Shaxted's personal knowledge. Plaintiff claimed that, in his deposition, Shaxted demonstrated unfamiliarity with the contents of the affidavit, and that Shaxted did not even have personal knowledge of whether plaintiff had been residing at the property at the time in question. Plaintiff further noted that the order confirming sale "cast[ed] doubt" as to whether defendant even had standing to bring the counterclaim, as it only contained a reference to Right Residential II, Fund 1, LLC, not defendant—Right Residential II Fund 2 LLC.⁴

¶ 18 Attached to the response was the transcript from the discovery deposition of Shaxted, who testified that he was the sole manager of defendant and that the purpose of the business was "[t]o buy properties, fix them up, and resell them." Shaxted testified that he purchased the property at issue on behalf of defendant at a sheriff's sale; Shaxted testified that he purchased the property in "2014, maybe, something like that," but was unable to recall the month or the price he paid. Shaxted first testified that he purchased the property directly at the auction, but then testified that it "could have been the case" that Assign It, LLC,

⁴ We note that plaintiff did not raise lack of standing as an affirmative defense in his answer and affirmative defenses to the counterclaim.

purchased the property and assigned it to defendant; Shaxted testified that “[a]ll the auction houses are a little bit different.”

¶ 19 Shaxted testified that, within 48 hours of the purchase, Tom Keough, an independent contractor working for defendant, visited the property; Shaxted testified that Keough would normally visit a property and attempt to speak with the previous owner. Shaxted testified that Keough was able to make contact with plaintiff “at some point,” and that plaintiff expressed an unwillingness to talk or to vacate the premises. Keough was then contacted by an attorney instructing him not to speak with plaintiff; Shaxted testified that it was not uncommon to receive such a call and that defendant usually honored such requests.

¶ 20 Plaintiff’s counsel then went through the affidavit with Shaxted line-by-line, asking Shaxted, “what is your personal knowledge of that fact?” after each statement contained in the affidavit. With respect to the first several statements, which concerned the entry of the order confirming sale and the contents of that order, Shaxted expressed confusion at the question, indicating that the information was located on the order itself. When asked whether Shaxted personally delivered the demand for delivery of the property, Shaxted testified that he would need to see the document in order to answer that question, but testified that he recalled posting a notice on the door of the property. With respect to the statement that plaintiff refused to vacate the property on April 21, 2015, Shaxted testified that he had personal knowledge of that fact because Keough visited the property that day and it was still occupied; Shaxted did not visit the property with Keough. Shaxted testified that his knowledge of the statement that defendant asked the sheriff to evict all occupants came from his attorney informing him that the request had been made.

¶ 21 Shaxted testified that he had personal knowledge of the eviction because he was present when the sheriff's deputies went to the property; Shaxted was unable to recall the date of the eviction. Shaxted testified that the deputies knocked on the door and rang the doorbell and, when no one answered, broke the door and went inside; when they emerged, they instructed Shaxted to remove plaintiff's possessions. Shaxted and Keough, who was with him, then removed plaintiff's possessions and placed them on the curb. Shaxted then contacted the office of plaintiff's attorney and informed the office that everything had just been moved outside. Shaxted testified that his personal knowledge of the statement that plaintiff wrongfully possessed the property from April 21, 2015, through October 27, 2015, was based on the fact that he knew someone was living at the property and "[i]t must have been him because that's who sued us, I guess." Shaxted testified that he had personal knowledge that plaintiff did not pay any rent because defendant did not receive any payment or any communication indicating that he was willing to pay. Shaxted testified that he did not contact plaintiff about paying rent because plaintiff's attorney had instructed him not to contact plaintiff.

¶ 22 On May 21, 2018, the trial court issued an opinion concerning defendant's motion for summary judgment, in which it granted defendant's motion as to liability. The court found that defendant had made a *prima facie* showing that it was entitled to recover rent for the time in which plaintiff wrongfully possessed the property and that, in response, plaintiff had failed to raise any affidavits, evidence, or arguments establishing that a question of fact existed as to his liability. With respect to Shaxted's affidavit, the trial court found that Shaxted had averred that he was the sole member of defendant and that, following the entry of the order confirming sale, he personally demanded the property's delivery. The trial court

further found that Shaxted averred that defendant provided the order confirming sale to the sheriff, who evicted plaintiff. The court found that Shaxted had established personal knowledge of the facts in the affidavit and that the affidavit was admissible to support the motion for summary judgment. The court rejected plaintiff's contention that Shaxted lacked personal knowledge that plaintiff possessed the property from April 21, 2015, to October 27, 2015, noting that plaintiff's second amended complaint specifically alleged that, prior to October 27, plaintiff had possession of the subject property. The trial court also found that plaintiff had not presented any evidence showing that the eviction was unlawful. Finally, the trial court rejected plaintiff's suggestion that defendant may not have standing, noting that the order confirming sale did not list the purchaser of the property but only listed contact information. The court also noted that plaintiff's argument contradicted the allegations that plaintiff had previously made against defendant, as the second amended complaint specifically alleged that defendant obtained an order of possession, and that plaintiff had not provided any counteraffidavit to rebut Shaxted's affidavit, meaning that the court was required to take Shaxted's averment that the property had been sold to defendant as true.

¶ 23 However, the trial court denied defendant's motion for summary judgment as to the amount of damages, finding that defendant had not provided any evidence or affidavits establishing the amount of damages it was entitled to recover. Accordingly, the court continued the case for a prove-up on the issue of damages.

¶ 24 On June 5, 2018, after prove-up, the trial court entered judgment in the amount of \$12,500 in favor of defendant and against plaintiff.

¶ 25 On July 3, 2018, plaintiff filed a notice of appeal, which indicated that plaintiff was appealing "from the order entered in this case by the Honorable Judge Daniel J. Kubasiak on

May 21, 2018, granting Defendants’ Motion for Summary Judgment, *** and [the] June 5, 2018 order proving up damages and awarding judgment, *** thereby disposing of the entirety of the matter.” Plaintiff’s notice of appeal further noted that plaintiff “has a pending appeal before the Court, Appellate No. 1-17-2879, which is in the briefing process on the Court’s dismissal of Plaintiff’s causes of action with prejudice.”⁵ Plaintiff concluded:

“By this appeal, Plaintiff-Appellant requests that the Appellate Court of Illinois for the First Judicial District reverse the Circuit Court’s orders entered on May 21, 2018 and June 5, 2018 and remand the case for re-instatement and further proceedings as seen fit by the Appellate Court.”

¶ 26

ANALYSIS

¶ 27

On appeal, plaintiff challenges both the trial court’s dismissal of his second amended complaint and its entry of summary judgment in defendant’s favor. Defendant did not file a brief, so we take the instant appeal on plaintiff’s brief and the record alone. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). However, before considering the merits of plaintiff’s arguments, we must discuss our jurisdiction to review those claims. As an appellate court, we are required to consider our jurisdiction, even if the parties do not raise the issue. *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67. The question of whether we have jurisdiction over the instant appeal presents a question of law, which we review *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25; *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

⁵ We note that our decision on appeal no. 1-17-2879 was entered on August 30, 2018.

¶ 28 In the case at bar, there are two dispositive orders at issue—the order dismissing the second amended complaint and the order granting summary judgment on the counterclaim, followed by the judgment entered after prove-up. However, the notice of appeal lists only the summary judgment order and judgment arising from that order; it does not list the order dismissing the second amended complaint.

¶ 29 The filing of a notice of appeal “ ‘is the jurisdictional step which initiates appellate review.’ ” *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (quoting *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998), citing 155 Ill. 2d R. 301). “Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it.” *Smith*, 228 Ill. 2d at 104. Under Illinois Supreme Court Rule 303(b)(2) (eff. July 1, 2017), a notice of appeal “shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court.” “A notice of appeal confers jurisdiction on a court of review to consider the judgments or parts of judgments specified in the notice of appeal.” *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011).

¶ 30 In the case at bar, the notice of appeal lists two orders: the May 21, 2018, order granting summary judgment as to liability on defendant’s counterclaim and the June 5, 2018, order entering judgment after prove-up. The October 10, 2017, order dismissing plaintiff’s second amended complaint is not listed as one of the orders being appealed. Accordingly, we do not have jurisdiction to consider plaintiff’s claims as to the propriety of that dismissal.

¶ 31 We recognize that the unusual procedural posture of the instant case likely led to some confusion. As noted, plaintiff filed a notice of appeal in appeal no. 1-17-2879 immediately following the October 10, 2017, dismissal of the second amended complaint. The summary

judgment proceedings on defendant's counterclaim were occurring while that appeal was pending, and both the order granting summary judgment and the order entering judgment after prove-up were entered prior to our August 30, 2018, decision. Thus, at the time that plaintiff filed his notice of appeal in the instant appeal on July 3, 2018, the only orders remaining to be appealed were those orders.

¶ 32 Nevertheless, the fact remains that we dismissed plaintiff's earlier appeal based on a lack of jurisdiction. *Livnjak*, 2018 IL App (1st) 172879, ¶ 27. Thus, appeal no. 1-17-2879 was resolved. Plaintiff cannot now use that same notice of appeal to receive a second appeal. If plaintiff wished to appeal the dismissal of the second amended complaint, he had two options once the initial jurisdictional defect had been resolved: (1) he could have filed a new notice of appeal, or (2) he could have filed a petition for rehearing in appeal no. 1-17-2879 in which he explained that the jurisdictional defect had been resolved during the pendency of the appeal, permitting us to consider the merits of the appeal. See *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1050 (2007) (once a pending claim is resolved, the appellant can file a new notice of appeal or, if the time for filing a notice of appeal has passed, the appellant may file a petition for rehearing and to supplement the record in order to establish the appellate court's jurisdiction under the initial notice of appeal). In the case at bar, he did neither.⁶ Instead, plaintiff simply included his arguments relating to that earlier appeal in his briefing on the instant appeal. Plaintiff provides no authority that permits us to consider these claims, and our research has revealed no such authority.

⁶ It appears that plaintiff still does not recognize the jurisdictional defect that led to the dismissal of his earlier appeal, which may be part of the problem. In his brief's jurisdictional statement, he claims that our jurisdiction on that appeal was based on Rule 304. However, this overlooks the fact that no Rule 304(a) language was entered and, as we noted in our prior decision, the trial court instead "effectively made the *opposite* of such a finding, by expressly finding that 'this case remains pending and active due to [defendant's] pending counterclaim.'" (Emphasis in original.) *Livnjak*, 2018 IL App (1st) 172879, ¶ 22.

¶ 33 There are circumstances under which an order that is not specified in the notice of appeal may nonetheless be appealed. Our supreme court has made clear that a notice of appeal is to be construed liberally. *Smith*, 228 Ill. 2d at 104. “The notice of appeal should be considered as a whole and will be deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal.” *General Motors*, 242 Ill. 2d at 176. “ ‘Where the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal.’ ” *Smith*, 228 Ill. 2d at 105 (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 230 (1991)). Thus, our supreme court has long found that a judgment that is not specified in the notice of appeal is nonetheless reviewable “if it is a ‘step in the procedural progression leading’ to the judgment specified in the notice of appeal.” *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979) (quoting *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977)); see *In re Marriage of O’Brien*, 2011 IL 109039, ¶ 23 (finding a denial of petition for substitution of judge was a “step in the procedural progression leading to the final judgment” specified in the notice of appeal).

¶ 34 The dismissal of plaintiff’s second amended complaint does not fall within such a category. The counterclaim was wholly independent of the claims asserted in the second amended complaint—the second amended complaint challenged the disposal of plaintiff’s personal property, while the counterclaim sought damages for use and occupancy. There is thus simply no way that the notice of appeal can be interpreted to advise defendant that plaintiff was appealing the dismissal of his complaint in addition to the orders concerning the

counterclaim. Accordingly, we lack jurisdiction to review plaintiff's claims concerning the dismissal of the second amended complaint.

¶ 35 We turn, then, to consideration of the issue properly before us on appeal, namely, the grant of summary judgment in defendant's favor. A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). As noted, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 36 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The movant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). " 'The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable

issue of fact exists.’ ” *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 37 In the case at bar, the trial court found that defendant had established that it was owed rent under section 9-201 of the Forcible Entry and Detainer Act, which provides, in relevant part:

“The owner of lands, his or her executors or administrators, may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by a civil action in any of the following instances:

* * *

4. When land has been sold upon a judgment of court, when the party to such judgment or person holding under him or her, wrongfully refuses or neglects to surrender possession of the same, after demand, in writing, by the person entitled to the possession.” 735 ILCS 5/9-201 (West 2016).

Plaintiff claims that summary judgment was inappropriate because defendant failed to establish that it owned the property or that it had demanded that plaintiff turn over possession of the property. We do not find these arguments persuasive.

¶ 38 Defendant attached Shaxted’s affidavit in support of its motion for summary judgment. In his affidavit, Shaxted specifically averred that defendant obtained the deed to the property, and that Shaxted personally delivered a demand for delivery of the property. Additionally, attached to the counterclaim was a copy of the order confirming sale, which also included an order of possession to take effect 30 days after the entry of the order and which specifically

directed the sheriff to evict and dispossess plaintiff 30 days after the entry of the order. The counterclaim also included a copy of a January 21, 2015, demand for possession, directed at plaintiff's son—who was living at the property at the time—as well as to “Unknown Occupants,” which demanded possession of the premises 90 days from the date of service of the letter. Accordingly, defendant has presented evidence to support its claim that it was entitled to recovery of rent for the use and occupancy of the property during the period in which plaintiff wrongfully possessed the property.

¶ 39 Plaintiff introduced no evidence to contradict defendant's evidence concerning ownership of the property or the demand for possession. Instead, on appeal, plaintiff raises several arguments to challenge defendant's evidence, none of which are persuasive. Plaintiff's primary argument, which was also his only response to defendant's motion for summary judgment, is to challenge Shaxted's affidavit under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). Specifically, plaintiff claims that Shaxted's affidavit was not based on personal knowledge. We do not find this argument persuasive.

¶ 40 In his affidavit, Shaxted averred that he was the sole member of defendant and detailed his involvement in the underlying proceedings. He averred that an order confirming the sale of the property to defendant was entered on January 9, 2015, which granted defendant possession of the property within 30 days and specifically identified plaintiff as a party against whom the order was to be enforced. Shaxted further averred that defendant obtained the deed to the property and that he personally delivered a demand for delivery of the property on January 21, 2015, which required all occupants to vacate the property within 90 days. Shaxted averred that plaintiff refused to vacate the property by April 21, 2015, and that on September 14, 2015, defendant requested the sheriff to evict all occupants. Finally,

Shaxted averred that plaintiff did not pay rent or otherwise compensate defendant for use of the property from April 21, 2015, through October 27, 2015.

¶ 41 Plaintiff is correct that several statements contained in the affidavit veer into becoming legal conclusions. For instance, Shaxted made several statements characterizing the eviction as “lawful” and plaintiff’s possession as “wrongful[].” Such statements are inappropriate under Rule 191. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013) (an affidavit in support of a motion for summary judgment “shall not consist of conclusions but of facts admissible in evidence”). However, these few statements do not render the rest of the affidavit improper. See *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22 (“ ‘[W]hen only portions of an affidavit are improper under Rule 191(a), a trial court should only strike the improper portions of the affidavit.’ ” (quoting *Roe v. Jewish Children’s Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003))). The rest of the affidavit makes clear that Shaxted’s knowledge comes from his position as the sole member of defendant.

¶ 42 We find unpersuasive plaintiff’s attempt to use Shaxted’s deposition testimony to suggest that he lacked knowledge of the statements contained in his affidavit. In his deposition, Shaxted was asked to go through his affidavit line-by-line, but was unable to recall from memory some of the details contained in the affidavit. For instance, he was unable to recall particular dates. However, many of the facts contained in the affidavit were supported by documentation—the order confirming sale and the demand, for example. Being unable to recall the specific details of those documents from memory does not suggest that Shaxted lacked personal knowledge of them. Accordingly, we agree with the trial court that Shaxted’s affidavit could be properly considered in deciding defendant’s motion for summary judgment.

¶ 43 Plaintiff also makes several additional arguments on appeal. We note that most of these arguments were not raised in the briefing on the summary judgment motion below. However, as they were at least peripherally raised at various points of the litigation, we address them briefly. Plaintiff first argues that defendant cannot prove that it placed the winning bid on the property because the order confirming sale “listed the ‘winning bidder’ as Right Residential II *Fund 1*—LLC, *not* the Counter-Plaintiff Right Residential II—*Fund 2* LLC.” (Emphasis in original.) However, this is not an accurate description of the order. The order states “[t]hat the holder of the Certificate of Sale or the person to whom the deed will be issued can be contacted through” and then provides the contact information for Right Residential II Fund 1, LLC. Nowhere does the order indicate that Right Residential II Fund 1, LLC, was the successful bidder—the order is silent as to the identity of the bidder, and no report of sale appears in the record on appeal. The trial court correctly recognized this fact in rejecting plaintiff’s same argument below.

¶ 44 Additionally, plaintiff notes that he alleged in his affirmative defenses that Assign It, LLC, was the winning bidder of the property and subsequently assigned the deed to defendant. However, a party may not stand on his pleadings in order to create a genuine issue of material fact in opposing a motion for summary judgment. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49. Moreover, even if plaintiff’s allegation was supported by the evidence, section 9-201 provides that “the owner of lands” may file suit for the recovery of rent, meaning that it is irrelevant whether the property was sold directly to defendant or if defendant was assigned the title by the successful bidder—the dispositive fact is that defendant is the “owner of lands,” which the evidence establishes it was. See 735 ILCS 5/9-201 (West 2016). Indeed, we cannot ignore the fact that the counterclaim was filed

in the context of plaintiff's initial suit against defendant, which was based on defendant's actions in evicting plaintiff from the property. While plaintiff made a number of claims in that suit, he has never alleged that defendant was not the owner of the property and lacked the right to possession.

¶ 45 We also find unpersuasive plaintiff's claim that defendant is not entitled to recover rent because it did not demand possession from plaintiff because the demand letter served on plaintiff's son was not directed at plaintiff. First, the letter was also directed to "Unknown Occupants," meaning that the demand encompassed even those occupants of whom defendant was unaware. Additionally, the order confirming sale expressly included a direction to the sheriff to evict and dispossess plaintiff 30 days after the entry of the order. That order itself therefore served as a demand for possession. Under section 15-1701 of the Illinois Mortgage Foreclosure Law, "[t]he holder of the certificate of sale or deed issued pursuant to that certificate or, if no certificate or deed was issued, the purchaser, *** shall be entitled to possession of the mortgaged real estate, as of the date 30 days after the order confirming the sale is entered, against those parties to the foreclosure whose interests the court has ordered terminated, without further notice to any party, further order of the court, or resort to proceedings under any other statute other than this Article." 735 ILCS 5/15-1701(d) (West 2016). Thus, defendant was not required to provide any additional notice to plaintiff before being entitled to possession.

¶ 46 Since the trial court properly concluded that defendant had raised a *prima facie* case for the recovery of rent for the use and occupancy of the property, and plaintiff failed to present any evidence to rebut that *prima facie* case, we affirm the trial court's grant of summary judgment on the issue of liability. Plaintiff also makes a brief argument attacking the award

of damages entered after prove-up. However, the record contains nothing from the prove-up hearing: no briefing, no report of proceedings, and no documentation.⁷ Accordingly, we have no way of knowing what evidence was presented to the trial court in connection with the damages award. It is plaintiff, as the appellant, who has the burden of providing a sufficiently complete record of the proceedings to support a claim of error and, in the absence of such a record, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. In the case at bar, in the absence of any evidence in the record showing that the trial court erred in calculating the rent owed to defendant, we must affirm the trial court's judgment in all respects.

¶ 47

CONCLUSION

¶ 48

For the reasons set forth above, we lack jurisdiction to consider plaintiff's claims concerning the dismissal of his second amended complaint and affirm the trial court's grant of summary judgment and award of damages in favor of defendant on defendant's counterclaim.

¶ 49

Affirmed in part and dismissed for lack of jurisdiction in part.

⁷ There is a brief supplemental record, which contains two affidavits marked "Exhibit A" and "Exhibit B." These affidavits appear to be from defendant's employees and concern the preparation of a list of comparable sales. However, it is not clear what motion these affidavits are intended to be exhibits to, or the content of such motion.