2011 IL App (2d) 100966-U
No. 2—10—0966
Order filed August 10, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STILLWELL REAL ESTATE LIMITED PARTNERSHIP, Plaintiff-Appellant, v. DELUXE AUTO INC., n/k/a DOWNERS GROVE AUTO SALES, INC., d/b/a TURBO AUTO SALES, JOE BARAKAT a/k/a JAWDAT BARAKAT, and MOHAMMED SHEHAYBER, Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. 09—L—1431 Honorable John T. Elsner, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice Birkett dissented.

ORDER

Held: Plaintiff's lawsuit did not violate the doctrine of *res judicata* despite a previous lawsuit between the parties because the lease expressly provided that no reentry by plaintiff will terminate the lease and, although plaintiff could terminate the lease upon default, it was not required to do so. Therefore, future rent did not accelerate upon defendants' default.

¶ 1 Plaintiff, Stillwell Real Estate Limited Partnership, brought this action alleging breach of contract against defendant Downers Grove Auto Sales, Inc., and breach of a guaranty agreement against defendants Joe Barakat a/k/a Jawdat Barakat and Mohammed Shehayber (collectively,

defendants) seeking unpaid rent from June 2009 through January 2010. Plaintiff had previously received a judgment against defendants for rent due pursuant to the same lease from January 2009 through May 2009, and defendants surrendered possession of the premises during the course of that proceeding. Defendant Shehayber filed a motion to dismiss the current action pursuant to section 2—619(a)(4) of the Code of Civil Procedure (the Code) (735 ILCS 5/2—619(a)(4) (West 2010)), claiming the action was barred pursuant to the doctrine of *res judicata*. The trial court granted the motion and plaintiff now appeals that order pursuant to Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb 26, 2010). For the reasons set forth below, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 In February 2007, plaintiff entered into a written lease agreement with defendant Deluxe Auto, Inc. leasing a property on Ogden Avenue in Downers Grove. The lease term was for approximately three years. Defendants Barakat and Shehayber signed a guaranty agreement guaranteeing Deluxe Auto's performance and payment pursuant to the lease terms. With respect to default, section 23.1 of the lease provides:

> "In the event of any breach of this [l]ease by [defendants], [plaintiff], in addition to the other rights or remedies it may have, shall have the immediate right of reentry and may remove all persons and property from the leased premises. *** No reentry or taking possession of the leased premises by [plaintiff] shall be construed as an election on the part of [plaintiff] to terminate this [l]ease unless a written notice of such intention is given to [defendants] or unless the termination of this [l]ease is decreed by a court of competent jurisdiction."

Section 23.2 further provides:

> "In spite of any reletting without termination, [plaintiff] may, at any subsequent time, elect to terminate this [l]ease for the previous breach. Should [plaintiff] at any time terminate this [l]ease for any breach, in addition to any other remedy it may have, [plaintiff] may recover from [defendants] all damages incurred by reason of the breach, including the cost of recovering the leased premises and including the worth at the time of termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this [l]ease for the remainder of the stated term over the then reasonable rental value of the leased premises for the remainder of the stated term, all of which amounts shall be immediately due and payable from [defendants] to [plaintiff]."

¶ 4 Subsequently, plaintiff sent defendants a letter titled "Landlord's Five Day Notice" demanding rent for January 2009 and February 2009. The relevant portion of the letter provided:

> "And you are further notified that the payment of said sum so due has been and is hereby demanded of you, and that unless payment thereof is made before the expiration of five days after service of this notice your right of possession to said premises will be terminated.
>
> FULL PAYMENT of the rent and additional reimbursement payments demanded in this notice will waive the landlord's right to terminate the lease under this notice, unless the landlord agrees in writing to continue the lease in exchange for receiving partial payment."

¶ 5 On February 21, 2009, plaintiff filed a complaint against defendants alleging that they failed to pay rent for the months of January 2009 and February 2009. The complaint sought forcible entry and detainer and to enforce the guaranty agreement for the lease. Defendants surrendered the premises on March 10, 2009, and after a trial on damages, the trial court entered a judgment on May

4, 2009, in favor of plaintiff. As modified, the judgment only provided that defendants were joint and severally liable for $23,479.41, $420 in costs, and $3,379.25 in attorney fees, in addition to $2,205 in supplemental attorney fees.

¶ 6 On November 13, 2009, plaintiff filed the current lawsuit against defendants. Count I of the complaint alleged breach of contract against defendant Downers Grove Auto Sales. Plaintiffs alleged that the lease between the parties did not terminate and sought $40,000 in damages, the amount of rent owed for June 2009 through January 2010. Count II alleged that defendants Barakat and Shehayber were jointly and severally liable for the unpaid rent pursuant to the guaranty agreement and requested the trial court enter a judgment against them for $40,000.

¶ 7 On May 11, 2010, defendant Shehayber moved to dismiss the complaint pursuant to section 2—619(a)(4) of the Code. Shehayber argued that the doctrine of *res judicata* barred plaintiff's current lawsuit because a previous judgment was entered regarding the same lease, the same parties, and the same facts. Specifically, Shehayber argued that plaintiff's previous forcible entry and detainer lawsuit terminated the lease and his obligations thereunder. According to Shehayber, plaintiff previously had the opportunity to litigate "any and all" issues pursuant to the lease agreement, including damages through the end of the lease term.

¶ 8 After a hearing, the trial court granted defendant Shehayber's motion. In reaching its determination, the trial court concluded that plaintiff's acceptance of the property during the first lawsuit terminated the lease. The trial court noted that a trial regarding damages was held and that "plaintiff had a full and fair opportunity to raise all issues." The trial court further concluded that, pursuant to paragraph 23.2 of the lease, the parties agreed that when the premises were returned to plaintiff, all amounts would be immediately due and payable, and therefore, the issue in the current

lawsuit could have been raised in the previous lawsuit. Plaintiff timely appealed the trial court's order pursuant to Supreme Court Rule 304(a).

¶ 9 II. DISCUSSION

¶ 10 On appeal, plaintiff contends that the trial court erred when it granted defendant Shehayber's motion to dismiss pursuant to section 2—619(a)(4) of the Code and the doctrine of *res judicata*. Plaintiff argues that the trial court erred in concluding that the lease contained a clause providing for the acceleration of all future rent. Specifically, plaintiff maintains that section 23.2 of the lease provides that, if plaintiff elects to terminate the lease, it can immediately recover the premium rental value, if any, of the lease over the balance of its term, or excess rent, but does not provide for the acceleration of all future rent. Therefore, according to plaintiff, all future rent was not immediately due and owing and plaintiff had the option of suing for rent installments as they become due without violating the doctrine of *res judicata*.

¶ 11 Section 2—619(a)(4) of the Code provides that a party may seek an involuntary dismissal if the cause of action is barred by a prior judgment. 735 ILCS 5/2—619(a)(4) (West 2008). Section 2—619(a)(4) incorporates the doctrine of *res judicata*. *Illinois Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 719 (2008). *Res judicata* bars a subsequent suit by the same parties if a court of competent jurisdiction previously rendered a final judgment involving the same cause of action, including matters that could have been raised and decided in the previous lawsuit. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The underlying purpose of *res judicata* is to promote judicial economy and to protect litigants from the burdens of repetitive litigation. *Bagnola v. SmithKline Beecham Clinical Laboratories*, 333 Ill. App. 3d 711, 717 (2002). Three elements must be satisfied for *res judicata*

to be applicable: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the parties or their privies; and (3) an identity of cause of action. *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 3 (2009). Our standard of review from a dismissal pursuant to section 2—619(a)(4) of the Code and the doctrine of *res judicata* is *de novo* (*Kiefer v. Rust-Oleum*, 394 Ill. App. 3d 485, 489 (2009)), and in ruling on such a motion, we must interpret the pleadings and supporting documents in the light most favorable to the nonmoving party (*Sage Information Services v. King*, 391 Ill. App. 3d 1023, 1028 (2009)).

¶ 12 Plaintiff does not dispute that the first and second elements of *res judicata* are satisfied here. Focusing on the third element, plaintiff argues that the current action lacks an identity of cause of action with the previous lawsuit and cites *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405 (2003). In *Miner*, the plaintiff leased retail space to the defendants. *Miner*, 342 Ill. App. 3d at 409. Paragraph 13 of the lease provided that if defendants vacated the premises for a period of 10 days, their right to possession would terminate. Paragraph 14 provided that if the defendants' right to possession terminated, the plaintiff was not obligated to mitigate damages by accepting a new tenant and that the defendants would satisfy any rent deficiency. A rider to the lease provided that rent would be paid on the first of each month and other provisions relating to real estate taxes, assignment, and permitted activity on the premises. *Id.* at 410. On September 3, 1996, the plaintiff filed an action seeking unpaid rent accruing through that date and a default judgment was entered. *Id.* at 410. The plaintiff then filed a second lawsuit against the defendants seeking, in part, rent that had accrued after September 3, 1996. *Id.* at 412-13. The trial court dismissed the delinquent rent-related counts pursuant to the doctrine of *res judicata*, concluding that because the plaintiff did not have a duty to mitigate damages after the defendants abandoned the premises, the remaining rent

accelerated and the plaintiff could have used the first lawsuit to recover the entire amount of rent due under the lease; therefore, its failure to seek all rent implicated the doctrine of *res judicata*. *Id.* at 413-16.

¶ 13 The reviewing court reversed. The reviewing court noted that payment of future rent was not a present obligation and the failure to pay rent when it accrues did not accelerate future unpaid rent absent a lease provision providing for the acceleration of rent. *Id.* at 416-17. The reviewing court also noted that a lessor had the option of suing for rent as it became due, suing for several accrued installments, or suing for the entire amount when the lease ended. *Id.* The reviewing court further noted that the rights of the parties were limited to the contract and that the lease indicated that the defendants' obligation to pay monthly rent would survive its premature relinquishment. *Id.* at 417-18. Therefore, the trial court erred when it added an acceleration provision that was not provided in the parties' contract. *Id.* at 418. The reviewing court concluded that a new set of operative facts arose each month for unpaid rent and, therefore, "there is no 'identity of cause of action' between the [first lawsuit] and the portion of the new action which seeks subsequently accruing rent." *Id.* at 417.

¶ 14 We find *Miner* persuasive to the matter currently before us and conclude that the trial court erred when it dismissed plaintiff's complaint pursuant to the doctrine of *res judicata*. As the court in *Miner* explained, the failure to pay rent accrues when the rent is due and is not a present obligation. *Miner*, 342 Ill. App. 3d at 416. Therefore, despite the final judgment in the previous lawsuit between the parties here, the doctrine of *res judicata* is not implicated because there is not an identity of cause of action between the previous lawsuit resulting in a judgment for delinquent

rent through May 2009 and the current lawsuit seeking delinquent rent for June 2009 through January 2010. See *id.* at 416-17.

¶ 15 Moreover, Shehayber's argument that *Miner* is distinguishable from the current matter is unavailing. Shehayber maintains that, unlike *Miner*, the lease between the parties contained an acceleration clause permitting plaintiff to accelerate the rent due for the entire lease term, and therefore, *res judicata* should bar the current lawsuit because plaintiff could have sought future rent in the previous lawsuit. We do not read *Miner* as broadly as Shehayber suggests. Illinois law is well settled that a lease is a contract between two parties and is subject to the law of contracts. *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1039 (2009). Leases should be construed to ascertain the parties' intent, and where the lease terms are unambiguous, " 'they must be enforced as written, and no court can rewrite a [lease] to provide a better bargain to suit one of the parties.' " *Id.* (quoting *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 349 (2000)).

¶ 16 Here, section 23.2 provides that, should plaintiff elect to terminate the lease, it could recover "all damages incurred by reason of the breach *** all of which shall be immediately due and payable from [defendants] to [plaintiff] ." The plain language of section 23.2 reflects that the parties intended for plaintiff to have the option of terminating the lease, at which time all damages resulting from the breach would become immediately due, but plaintiff was not required to terminate the lease. In other words, this section is implicated only if plaintiff elected to terminate the lease, and absent plaintiff's election to do so, all damages were not accelerated or immediately due. If the parties intended for all damages to be immediately due or accelerate upon defendants' default or defendants' surrendering possession, without first requiring plaintiff to terminate the lease, the parties could have expressed that intent in the lease. See *Miner*, 342 Ill. App. 3d at 417 (quoting *Wright v. Chicago*

Title Insurance Co., 196 Ill. App. 3d 920, 925 (1990) ("There is a strong presumption against provisions that easily could have been included in the contract but were not."). Thus, holding that the lease obligated plaintiff to accelerate rent upon default, as opposed to giving plaintiff the option to elect to terminate the lease and then immediately recover all resulting damages, would require us to disregard the express provisions of the lease and place defendants in a better position by adding a provision to the lease that the parties did not include, which, as the court *Miner* noted, we are not permitted to do. See *Miner*, 342 Ill. App. 3d 417-18. Therefore, because a lease is subject to the law of contracts and because we are required to give effect to the parties' intent, we read *Miner* as holding that, unless the parties intended to obligate plaintiff to accelerate rent upon default through an express acceleration clause, plaintiff had the option of bringing successive lawsuits for rent as it became due. See *Miner*, 342 Ill. App. 3d at 416-17.

¶ 17 We further reject Shehayber's argument that plaintiff's demand letter to defendants terminated the lease. Shehayber argues that, pursuant to section 23.1 of the lease, the parties intended that the lease would not be terminated unless plaintiff gave defendants written notice. Shehayber maintains that the lease terminated because plaintiff's demand letter expressed an intent to terminate the lease if delinquent rent was not paid.

¶ 18 Shehayber's argument misconstrues section 23.1 and the nature of the demand letter. Because we are reviewing the trial court's dismissal pursuant to section 2—619 of the Code, we are required to interpret the pleadings and supporting documents in the light most favorable to plaintiff as the nonmoving party. See *Sage Information Services*, 391 Ill. App. 3d at 1028. As noted above, section 23.1 expressly provided that "[n]o reentry or taking possession of the leased premises by [plaintiff] shall be construed as an election on the part of [plaintiff] to terminate this [l]ease unless

a written notice of such intention is given to [defendants] or unless the termination of this [l]ease is decreed by a court of competent jurisdiction." This provision clearly permits plaintiff to take possession of the premises without terminating the lease unless defendants are informed of such an intent in writing or if the lease is deemed terminated by a court of competent jurisdiction. The demand letter merely warned defendants that their right to possession of the premises would terminate if the default was not cured, but did not expressly state that the lease would also terminate. The demand letter further notified defendants that "full payment of the rent and additional reimbursement payments demanded in this notice will waive the landlord's right to terminate the lease under this notice *** ." This provision, however, merely notified defendants that plaintiff would no longer have the right to terminate the lease upon satisfaction of outstanding rent. The provision did not expressly inform defendants that the lease would automatically terminate if they failed to pay the outstanding rent. Thus, interpreting plaintiff's demand letter in a light most favorable to plaintiff as the nonmoving party, the letter did not terminate the lease for the purposes of this appeal because it did not express plaintiff's intent to terminate the lease upon defendants' failure to pay rent or their relinquishment of possession of the premises.

¶ 19 Further, plaintiff's prior forcible entry and detainer action also did not terminate the lease. A forcible entry and detainer action is a limited proceeding to determine the issue of the party entitled to immediate possession, and matters not germane to the issue of possession may not be litigated in such an action. *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 861 (2004). Generally, claims germane to the issue of possession include claims asserting a paramount right of possession, claims denying the breach of the agreement vesting possession in the plaintiff, claims challenging the validity or enforceability of the agreement that a plaintiff's right to possession is based, and claims

questioning a plaintiff's motivation for bringing the action. *Id.* at 862. Here, because plaintiff's first lawsuit against defendants was a forcible entry and detainer action and also involved whether defendants were delinquent paying rent through May 2009, it did not address or resolve the issue of whether the lease between the parties had terminated and, as discussed below, the order from that proceeding did not specify whether the lease terminated.

¶ 20 We find support for our conclusion that the previous forcible entry and detainer action did not terminate the lease in *Elliot v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724 (1992), and *Broniewicz v. Wysocki*, 306 Ill. App. 187 (1940). In *Elliot*, the lease expressly provided that the lessee's obligation to pay rent will not be waived by the service of a five-day notice, demand for possession, or by a forcible detainer action. *Id.* at 726. The court held that the mere surrender of possession of the leased premises did not terminate the contract all together *(id.* at 730), and that the forcible entry and detainer action did not terminate the lease because the order resulting from that proceeding "noticeably lack[ed] any language concerning rent payments for the balance of the leasehold" (*id.* at 731).

¶ 21 The facts present here are sufficiently analogous to *Elliot*. We recognize that the lease provision in *Elliot* expressly provided that a forcible entry and detainer action would not terminate the lease, and therefore, the lease provision in that case was more detailed. Nonetheless, the lease here provided "No reentry or taking possession of the leased premises by [plaintiff] shall be construed as an election on the part of [plaintiff] to terminate this lease *** ." The phrase "no reentry or taking possession" is broad and would logically include retaking possession by a forcible entry and detainer action. Accordingly, the parties intended for the lease to remain in effect after a forcible entry and detainer proceeding, and the lease remained in effect unless the order from the

previous lawsuit expressed otherwise. The order in the previous forcible entry and detainer action here did not contain any specific language regarding either the termination of the lease or future rent, and therefore, the order did not terminate the lease because it "noticeably lack[ed]" language concerning rent payments for the remainder of the lease term. See *id.* Thus, the last section of section 23.1, which provided that the lease would be terminated if decreed by a court of competent jurisdiction, is not applicable because there is no previous court order expressly terminating the lease.

¶ 22 Similarly, *Broniewicz* clearly stands for the proposition that a tenant's obligation to pay rent will cease when he is dispossessed, but the obligation to continue paying rent will remain when there is an express provision in the lease providing that the obligation to pay rent will continue despite a landlord's reentry before the expiration of the lease term. *Broniewicz*, 306 Ill. App. at 187. As we previously discussed, section 23.1 of the lease constitutes an express provision that the obligation to pay rent will continue after defendants surrendered possession because that section provided that no reentry or taking possession by plaintiff shall be construed as an election to terminate the lease. Thus, consistent with the holding in *Broniewicz*, the lease provided that it will continue to remain in effect despite plaintiff's repossession of the premises unless plaintiff gives written notice expressing its intent to terminate the lease, which did not occur in this case.

¶ 23 We also reject Shehayber's reliance on *Munroe v. Brower Realty & Management Co.*, 206 Ill. App. 3d 699 (1990), to support his contention that the previous forcible entry and detainer action terminated the lease. In *Munroe*, the trial court expressly found that "although a lessee may remain liable for all future rents due under the terms of the lease, notwithstanding the lessor's reentry, where a lease expressly so provides, the lease in the instant action did not contain such a provision." *Id.*

at 702. The reviewing Court noted that the lease was not provided in the record on appeal. *Id.* More important, the reviewing Court noted that the trial court's findings regarding the lease provision provided that, in the event of default, the lessor may, at his election, declare the lease ended and "re-enter without prejudice to any remedies which otherwise might be used for arrears of rent." *Id.* at 702-03. The court concluded that the provision only discussed past rent upon termination of the lease, not future rent, and there were no other provisions providing that the lessee's obligation to pay rent would survive his eviction pursuant to a forcible entry and detainer proceeding. *Id.* at 702-04.

¶ 24 Conversely, here, the lease provisions regarding default and possession were not limited to past rent. Section 23.1 expressly provided that no reentry on the part of plaintiff shall be construed as an election to terminate the lease unless plaintiff gave defendants express notice of its intent to terminate the lease. As discussed above, because plaintiff did not elect to terminate the lease, defendants' obligations under the lease—including the obligation to pay rent as it becomes due—remained in effect.

¶ 25 In sum, consistent with *Miner*, our primary objective is to ascertain the parties' intent and enforce the lease provisions accordingly. The clear intent of the parties, as expressed in section 23.1 of lease, was that plaintiff's reentry and taking possession of the premises would not terminate the lease unless plaintiff gave defendants written notice of its intent to terminate the lease or the lease was decreed terminated by a court of competent jurisdiction. No such intent was given because plaintiff's notice letter only expressed an intent to terminate defendants' right to possession of the premises, not terminate the lease. The forcible entry and detainer action also did not terminate the lease because the lease expressly provided repossession by plaintiff would not terminate the lease

and the orders in the previous action did not specifically address whether the lease terminated. Morever, the clear intent of the parties, as reflected in the express lease terms, was for plaintiff to have the option to terminate the lease, and upon electing to do so, all damages resulting from the breach would be immediately due. However, the lease did not require plaintiff to terminate the lease upon default, and because plaintiff did not elect to terminate the lease prior to the current lawsuit, section 23.2 was not implicated. Therefore, defendants had an obligation to continue paying rent and plaintiff could bring multiple suits to collect delinquent rent without running afoul of *res judicata*.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand the case for further proceedings consistent with this order.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE BIRKETT, dissenting:

¶ 30 I respectfully dissent. As the majority correctly points out, the plain language of section 23.2 of the lease reflects that the parties intended for plaintiff to have the option of terminating the lease, at which time all damages resulting from the breach would become immediately due. The majority does not dispute the fact that if the lease was terminated, plaintiff's current action is barred on *res judicata* grounds because it could have sought the unpaid rent from June 2009 to January 2010 when it brought its original action for unpaid rent pursuant to the same lease, but it did not do so. However, the majority incorrectly holds that no termination of the lease occurred here.

¶ 31 I must initially point out that I disagree with the majority's conclusion that *Miner* is persuasive to the matter currently before this court. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405 (2003). As the majority notes, *Miner* held that payment of future rent was not a present

obligation and the failure to pay rent when it accrues did not accelerate future unpaid rent *absent a lease provision providing for the acceleration of rent*. *Miner*, 342 Ill. App. 3d at 416-17. Here, the majority acknowledges that section 23.2 of the lease provides that if plaintiff elects to terminate the lease, all damages resulting from the breach would become immediately due. Therefore, *Miner* does not aid our analysis of whether plaintiff terminated the lease, which under the terms of the lease would trigger the acceleration clause to apply, and bar plaintiff's lawsuit on *res judicata* grounds.

¶32 Section 23.1 of the lease is clear regarding what type of event would terminate the lease. That section provides that no re-entry or taking possession of the leased premises by plaintiff would be construed as an election to terminate the lease *unless*: (1) a written notice *of such intention* is given to defendants; or (2) the termination of the lease is decreed by a court of competent jurisdiction. The majority holds that the Landlord's Five Day Notice merely warned the defendants that their right of *possession* of the premises would terminate if the default was not cured, but did not expressly state that the *lease* would also terminate. With regard to the second paragraph of the notice, which discusses plaintiff's right to terminate the lease, the majority holds that that provision merely notified defendants that plaintiff would no longer have the right to terminate the lease upon satisfaction of outstanding rent.

¶33 A review of the Landlord's Five Day Notice, however, demonstrates that the second paragraph of the notice did not merely notify defendant that plaintiff would no longer have the right to terminate the lease. Instead, the second paragraph of the notice constituted a written notice of plaintiff's intent to terminate the lease. Again, the Landlord's Five Day Notice provided, in pertinent part:

> "And you are further notified that the payment of said sum so due has been and is hereby demanded of you, and that unless payment thereof is made before the expiration of five days notice after service of this notice your right of possession to said premises will be terminated.
>
> *FULL payment of the rent and additional reimbursement payments demanded on this notice will waive the landlord's right to terminate the lease under this notice*, unless the landlord agrees in writing to continue the lease in exchange for receiving partial payment." (Emphasis added).

¶34 A plain reading of the second paragraph of the Landlord's Five Day Notice makes it clear that full payment of the rent would waive the landlord's right to terminate the lease *under that notice*. The only logical interpretation of this clause, then, is that if defendants did *not* pay in full within five days, the plaintiff was going to terminate the lease *under that notice*. Therefore, plaintiff provided defendants written notice of its *intention to terminate the lease* as required in section 23.2 of the lease.

¶35 In rejecting Shehayber's argument that the Landlord's Five Day Notice to defendants terminated the lease, the majority also holds that the second paragraph of the notice "did not expressly inform defendants that the lease would automatically terminate if they failed to pay the outstanding rent." Therefore, interpreting the notice in a light most favorable to plaintiff as the nonmoving party, the majority holds that the notice did not terminate the lease. See *Sage Information Services v. King*, 391 Ill. App. 3d 1023, 1028 (2009). Even when interpreting the pleadings and supporting documents in the light most favorable to the plaintiff, however, a plain reading of section 23.2 of the lease does *not* require plaintiff to expressly inform defendants that the

lease would automatically terminate if they failed to pay the outstanding rent. Instead, section 23.2 specifically states that the lease is not terminated unless: (1) a written notice *of such intention* is given to defendants; or (2) the termination of the lease is decreed by a court of competent jurisdiction. The Landlord's Five Day Notice provided such written notice of plaintiff's intention to terminate the lease.

¶36 When defendants did not pay the unpaid rent in full within five days of the receiving the Landlord's Five Day Notice, the lease was terminated. At that time, pursuant to section 23.3 of the lease, all damages incurred by the lease became immediately due and payable. Since plaintiff did not bring a cause of action for unpaid rent from June 2009 through January 2010 in its initial action, it is barred from doing so now on *res judicata* grounds because the three elements necessary to establish *res judicata* are present in this case: (1) a final judgment on the merits; (2) an identity of the parties; and (3) an identity of a cause of action. *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 3 (2009). For these reasons, I dissent.