2012 IL App (2d) 100999-U
No. 2-10-0999
Order filed February 14, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STRATFORD MEDICAL CENTER, LLC,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 07–CH–2404
	)	
TOM J. MILLER, D.D.S., P.C., TOM J. MILLER, STRATFORD PEDIATRIC ASSOCIATES, LTD., VICTOR J. ZUCKERMAN, DR. STUART A. MORGENSTEIN AND ASSOCIATES, LTD, STUART A. MORGENSTEIN, and BRIAN J. KEMKER,	)	
	)	Honorable
Defendants-Appellees, Cross-Appellants.	)	Kenneth J. Popejoy,
	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: The trial court's determination to reform the parties' lease to reflect their agreement pertaining to rent was not against the manifest weight of the evidence and the reformed lease reflected the parties' true intent. The trial court did not err in excluding certain evidence at trial or err by denying defendants' ratification defense. Further, the trial court did not err in denying plaintiff attorneys' fees and costs or prejudgment interest. Finally, because plaintiff failed to adequately develop its

argument, its contention that the trial court erred in denying its breach of contract claim is waived. Thus, we affirmed the trial court's judgment.

¶ 1 In 2006, plaintiff, Stratford Medical Center, LLC, purchased a medical building and entered into separate lease agreements with defendants, Tom J. Miller, D.D.S., P.C., Tom J. Miller, Stratford Pediatric Associates, LTD., Victor J. Zuckerman, Dr. Stuart A. Morgenstein and Associates, LTD, Stuart A. Morgenstein, and Brian J. Kemker (collectively, defendants). The leases provided that defendants would pay rent equal to $16.50 per square foot of their respective leased premises. Plaintiff claimed that the written leases were wrong and that the parties agreed the rental rate would $27.71 per square foot. Thereafter, plaintiff filed the current action seeking to reform the written leases and collect past-due rent. Following a bench trial, the trial court entered judgment in favor of plaintiff, reformed the leases, and awarded damages; but denied plaintiff's request for fees, costs, and prejudgment interest. Plaintiff now appeals, contending that the trial court (1) erred in denying its request for fees and costs; (2) erred by not ordering defendants to pay prejudgment interest; and (3) and erred in not finding in its favor with respect to its breach of contract claim. Defendants also timely appeal, contending: (1) the evidence was insufficient to support reforming the lease agreements; (2) the trial court's reformation of the leases did not keep the parties' true intent; (3) the trial court erred in excluding defendants' trial exhibit 9B and ruling that an email by plaintiff was privileged; and (4) the trial court erred in denying their ratification affirmative defense. We affirm.

¶ 2 I. Background

¶ 3 In 1993, an office complex (the property) used for medical offices was purchased by Professionals North Office Complex, a partnership consisting of Central Du Page Hospital (the hospital) as the general partner and several physicians as limited partners (collectively, the

partnership). After acquiring the property, the partnership entered into lease agreements with several of the limited-partner physicians.

¶ 4 In 2005, the partnership became interested in selling the property. Dr. Catherine Chong, the widow of Dr. Andrew Chong and his successor as a limited partner in the partnership, expressed interest in purchasing the property. On July 25, 2005, Chong made an offer in writing to purchase the property on behalf of AC Investments Inc. The offer stated that Chong would purchase the property for $6 million on the condition that the hospital and other partners renew their leases for 15 years at "24.5 net rent with the same operating expense and real estate tax tops as in the currently existing lease and a three percent annual escalator." On August 8, 2008, the hospital's vice president, Paul M. Teodo, rejected Chong's offer. The letter stated that the specific "issues that would need to be addressed to make the offer more acceptable" including, among others, reducing the length of the renewed leases to between five and seven years and "gross square foot rental in the low $20's, as opposed to $24.50 net." On September 6, 2005, Chong sent the partnership a revised offer to purchase the property for $6.5 million conditioned on the hospital renewing its lease for 15 years at $22 net rent and the other partners renew their leases for 10 years at $22 net rent. The offer also specified that the rental rates would increase if any of the partners requested a lease term that was fewer than 10 years.

¶ 5 On September 12, 2005, Teodo sent a letter on behalf of the hospital to the partnership. The letter advised that the hospital was willing to commit to a 15-year lease provided that all other partners remain in the building for at least 7 years and that the average lease rental rate did not exceed $24 gross square foot price. The letter stated that the entities entering into a renewed lease of 10 years or more receive a reduced gross rental rate, while entities entering into a shorter lease

term would have a higher rental rate. The letter further recommended that the purchase price be increased from $6.5 million to $7 million. The letter advised that it was only a recommendation and not a formal counter offer. On October 3, 2005, Teodo sent an additional letter to the partnership. The letter stated that the hospital supported a graduated "gross per square foot charge" for space leased by tenants, the maximum being $25 per square foot for a 7-year lease, $24 per square foot for a 10-year lease, and $23 per square foot for a 15-year lease.

¶ 6 On October 12, 2005, Teodo sent a letter to Chong that "represent[ed] the wishes of the entire physician ownership entity (except for yourself) and [the hospital]." The letter offered to sell the property for $7 million. The letter further proposed a "graduated fashion" for the gross per square foot rental rate for space leased by tenants. Specifically, the letter proposed rental rates of $25 per square foot for a 7-year lease, $24 per square foot for a 10-year lease, and $23 per square foot for a 15-year lease. The letter advised that all physician tenants intended to sign a minimum 7-year lease extension and the hospital intended to sign a 15-year lease extension. On October 17, 2005, the partnership held a meeting regarding the sale of the building. During the meeting, Chong, who was accompanied by her real estate advisor, Ed Van Der Molen, distributed a "purchase proposal" for the building. The proposal offered a net purchase price of $6.65 million. The proposal was contingent on new leases being signed. The proposal provided that the new leases would have annual rent escalators of 3 % and the new gross lease rates would be $27.71 per square foot for 7-year leases and $26.21 per square foot for leases greater than 10 years. Paragraph II of the recorded minutes of the meeting reflected the terms outlined in Chong's purchase proposal.

¶ 7 On October 28, 2005, the partnership conducted a board meeting that Chong also attended. An attorney for the partnership attended the meeting by conference call. The minutes reflect that the

attorney outlined the parameters of Chong's proposal and noted that the lease terms would be consistent with the parameters of paragraph II from the recorded minutes of the October 17, 2005, board meeting.

¶ 8 On December 21, 2005, the partnership and Chong entered into a commercial sales contract for the property. Paragraph 8(i) of the contract stated that Chong shall obtain leases with tenants listed in exhibit C to that contract and contained the "general terms and conditions" contained in those leases. Paragraphs 8(i)(i)(1) and (2) provided that rent shall be $27.71 per square foot for a lease term of less than 10 years and $26.21 per square foot for a lease term of more than 10 years. Paragraph 8(i)(ii) provided that a tenant shall pay additional rent covering operating costs and real estate taxes increased beginning in the second year of the lease term. Paragraph 8(i)(iii) further clarified that:

> "The annual rent rate includes a base amount of $16.50 or $15.00 (depending on the annual rental rate) per rental rate square foot which will be used to calculate the annual rent escalations beginning in year two of the lease terms. A three percent (3%) annual escalator will be applied to this amount and the subsequent compounding amount every year throughout the lease term. For example, in year two the comparative rental rate shall be calculated using the following formula: ($15.00 psf * 103) + 11.21 psf + increase in year two that is over the $11.21 psf amount) = year two rental rate (example using $26.21 rental rate)."

Exhibit C listed the hospital Morgenstein as a tenant. Exhibit C further provided that rental "per square foot" would be either $26.21 or $27.21 per square foot depending on the lease term.

¶ 9 Thereafter, Chong retained counsel to draft the leases for the lease extensions. Morgenstein's leases provided that base rent would be $16.50 per square foot for a 7-year lease, in addition to the rent adjustments for taxes and operating expenses. Paragraph 3 provided:

> "In addition to Base Rent (and not as a portion thereof), and as additional rent thereunder, [t]enant shall pay to [plaintiff] *** an amount equal to [t]enant's [p]roportionate [s]hare of the amount by which (i) [t]axes paid in any calender year by [plaintiff] plus (ii) [o]perating [e]xpenses for any [c]alender [y]ear combined exceed [$11.21] per rentable square foot of the [property] (the 'Taxes and Operating Expense Stop')."

Paragraph 35 of the leases further provided that:

> "B. All payments becoming due under this [l]ease or under any work order or other agreement relating to the [leased premises] shall be considered as rent, and if unpaid when due shall bear interest from such date at the rate of ten (10) percent per annum until paid *** ."

In addition, with respect to attorney fees, paragraph 35(L) of the leases provided that if either party, without fault on its part, is made a party to any litigation, it should be entitled to reasonable attorney fees and costs from the other party. Defendants Morgenstein and Kemker signed the lease on behalf of Dr. Stuart A. Morgenstein and Associates, LTD. Defendants Morgenstein and Kemker also signed an individual lease guaranty. Plaintiff then became the new owner of the property, and the property was managed by Van Der Molen Construction.

¶ 10 In July 2006, after realizing that the rent submitted by defendants for the first month under the new lease term was less than anticipated, plaintiff sent defendants a corrected invoice for July rent and an August 2006 rent invoice. In August 2006, defendants sent plaintiff a letter stating that

the rent they submitted was in accordance with the terms of the lease. Defendants sent an additional letter in September 2006 reiterating that their rent payments were consistent with the lease terms.

¶ 11 On September 17, 2007, plaintiff filed its complaint. Count I sought reformation of defendants' leases; count II sought damages resulting from breach of contract; count III sought, in the alternative, rescission of the leases. On October 7, 2008, defendants filed an answer and asserted various affirmative defenses. The trial court granted plaintiff's motion to dismiss some of defendants' affirmative defenses, but permitted defendants' statute of frauds, waiver, ratification, and unclean hands affirmative defenses to proceed to trial. Prior to trial, the trial court excluded as privileged an email communication between Chong and Van Der Molen. The trial court refused to admit defendants' trial exhibit 9B, which defendants claimed demonstrated that the commercial sales contract and lease contingency expired when defendants signed the lease.

¶ 12 A bench trial commenced on March 8, 2010. The trial court heard testimony from Teodo; Joe Daniel, the hospital's director of real estate; and John Yep, the hospital's corporate controller. The three witnesses all testified that Morgenstein was present at the October 2005 partnership meetings when the sale of the property was discussed. Those witnesses testified that the rental rates for the new leases were discussed and those discussions did not involve rental rates in the teens. The witnesses testified that, at the October 17, 2005 partnership meeting, Chong explained that tenants would pay either $27.71 or $26.21 per square foot in rent, depending on the duration of the extended-lease term, and that those rates included a $11.21 payment for operating expenses and real estate taxes. The witnesses testified that they observed Morgenstein commit to entering the lease extension without expressing confusion over the rental rates and that Morgenstein voted to approve the sale of the property to Chong based on the parameters outlined in the October 17, 2005, meeting. Finally,

Teodo and Yep testified that the commercial sales contract accurately reflected the agreement by Chong and the partnership.

¶ 13 Chong testified that, upon her husband's passing, she became a limited partner in the partnership. She testified that she presented a purchase proposal at the October 17, 2005, partnership meeting and that she and Van Der Molen explained that the contract required tenants to pay $27.21 per square foot in rent for a 7-year lease, and that $11.21 of that amount would be applied toward operating expenses and real estate taxes. Chong testified that no one expressed confusion over that rate. Chong testified that the partnership agreed to sell the property pursuant to the terms of the purchase proposal and that the partners, including Morgenstein, shook her hand. Chong testified that Teodo and Morgenstein asked to use the 1993 leases as a template for the new leases.

¶ 14 Chong further testified that after the October 28, 2005, partnership meeting, she believed she had an agreement with the limited partners to enter into new leases with rental rates of $27.71 per square foot or $26.21 per square foot based on the duration of the lease term. Chong testified that Morgenstein later approached her and requested a rental rate of $25 per square foot, which she rejected. Chong testified that she supplied some of the information in the new leases, including rental rates on the first page of the leases, but she did not realize the leases required payment of only $16.50 per square foot in rent, and not the additional $11.21 in rent to be applied toward operating expenses and real estate taxes. Chong conceded that the $16.50 rental rate appeared in the first and subsequent drafts of the leases.

¶ 15 Van Der Molen testified that he assisted Chong with purchasing the property. He testified that he helped explain the rental rates outlined in the purchase proposal at the partnership's October 17, 2005, meeting. Van Der Molen testified that the limited partners verbally accepted Chong's

proposal and shook hands with Chong. Van Der Molen testified that Chong filled in the rental rates in the new leases, but those rates did not accurately reflect the agreement reached between Chong and the partnership regarding rental rates. Van Der Molen testified that he noticed the mistake after he sent out the first set of rental invoices in July 2006 and he sent out corrected invoices reflecting the $27.21 per square foot rental rate.

¶ 16 Russel Adkins, an attorney retained by Chong to assist her with purchasing the property and drafting the new leases, testified that in drafting the new leases, he used old leases for the property from 1993 as templates. He was not aware that the new leases specified a rental rate of $16.50 per square foot until July 2006. He testified that the leases were incorrect and did not reflect the agreement reached by the parties. He testified that from the time the new leases were prepared in February 2006 through their execution in June 2006, there were no discussion with the hospital or defendants regarding the rental rate.

¶ 17 Morgenstein testified that he participated in the partnership meetings and negotiations regarding rental rates for the extended leases and the purchase price of the property. Morgenstein testified that the rental rates discussed were around $26 or $27 per square foot. Morgenstein testified that the minutes of the October 17, 2005, board meeting accurately reflected his agreement to Chong's purchase offer. Morgenstein testified that he believed the agreed rental rate at the time he signed the lease was $27.71 per square foot and that $11.21 of that amount would be applied toward common area maintenance costs.

¶ 18 Greg Miecyznski testified that he is an attorney retained to assist in preparing the leases. He testified that the new leases were supposed to have reflected rental rates of either $27.21 or $26.21 per square foot depending on the length of the lease term. Miecyznski testified that he was unaware

that the written leases only required $16.50 per square foot in rent. Miecyznski testified that Chong or one of her representatives filled in the rental rates on the first page of the leases.

¶ 19 Timothy Wagener testified on behalf of defendants as their expert witness. Wagener testified that the market rental rate for the property in June 2006 was between $18 and $20 per square foot and that $16.50 per square foot for rent was slightly under market. Wagener testified that he relied on his knowledge of the industry, a database for commercial real estate listings, and the $18.34 per square foot rental rate for the building adjacent to the property as a basis for his conclusions.

¶ 20 On June 8, 2010, the trial court issued a letter opinion. The trial court found that the negotiations between Chong and the partnership regarding the sale of the property involved both written and verbal presentations regarding rent and that, while the terminology was not always consistent, "the three basic numbers of $27.71, $16.50 and $11.21 stayed constant." The trial court further found that "Clearly $16.50 and $11.21 add up to $27.71 and those three numbers as well as that algebraic calculation were consistently used through the negotiation process." The trial court noted, however, that the phrases "gross versus net," "base rent," and "landlord stop" were not used consistently during the negotiations.

¶ 21 With respect to reformation of the leases, the trial court found that plaintiffs proved by clear and convincing evidence that Morgenstein agreed to pay $27.71 in rent for a 7-year lease, but the written lease did not reflect that agreement. The trial court further found that the inaccurate rental rate in the lease resulted from a mutual mistake, and therefore, plaintiff satisfied the elements necessary for reforming the lease. However, the trial court found that plaintiff failed to prove the elements of reformation. The trial court denied plaintiff's breach of contract allegations, concluding

that because it entered an order reforming the leases, defendants were not in breach of the lease. Finally, the trial court rejected plaintiff's claim for rescission.

¶ 22 The trial court also rejected plaintiff's request for attorney fees and costs. The trial court concluded that the lease only permitted an award of attorney fees and costs when a party to the lease has been made a party to a litigation without fault, and here, plaintiffs were not made a party to this case because it pursued the cause of action, not defendants. Similarly, the trial court rejected plaintiff's request for prejudgment interest with respect to unpaid rent defendants owed plaintiff resulting from the lease being reformed. The trial court concluded that such an award would be inequitable because plaintiff's lost rental income resulted from a mutual mistake. Finally, the trial court rejected defendants' affirmative defenses of statute of frauds, waiver, ratification, and unclean hands.

¶ 23 On August 27, 2010, the trial court modified its previous order by specifying the language that was reformed in the lease and clarified the amount of damages awarded to plaintiff. This timely appeal followed. However, during the pendency of this appeal, plaintiff reached an agreement with defendants Miller, Tom Miller D.D.S., P.C., Zu1ckerman, and Stratford Pediatric Associates, Ltd. and are not parties to this appeal. Therefore, we will address the issues raised only with respect to defendants Morgenstein, Dr. Stuart A. Morgenstein & Associates, Ltd., and Kemker.

¶ 24 II. Discussion

¶ 25 For the purposes of this appeal, we will address the issues defendants raise in their cross-appeal first and then turn to the issues plaintiff raises on direct appeal**.**

¶ 26 Before turning to the merits, however, we take this opportunity to remind defendants that Illinois Supreme Court Rule 341(h)(6) (eff. Sept. 1, 2006) provides that briefs before this court must

contain a statement of facts "stated accurately and fairly without argument or comment." When a party violates this rule, a court may, in its discretion, strike or disregard those portions of a brief not in compliance with supreme court rules. *Hubert v. Consolidated Medical Laboratories*, 306 Ill. App. 3d 1118, 1120 (1999) (citing R. 341(e)(6)). Here, defendants' statement of facts was replete with argumentative and conclusory statements, such as Chong's "driving frugality" combined with help from non-attorneys led "to a cascade of unilateral mistakes." Nonetheless, while we find this statement and others inappropriate, defendants' statement of facts is not so misleading as to hinder our analysis. Therefore, we will not strike defendants' statement of facts in its entirety, but we will disregard those portions that violate supreme court rules. See *Hubert*, 306 Ill. App. 3d at 1120.

¶ 27 A. Defendants' Cross-Appeal

¶ 28 *1. Sufficiency of the Evidence*

¶ 29 The first issue defendants raise is whether the evidence was sufficient to support the trial court's judgment reforming defendants' lease. Defendants raise several arguments in support of this contention, including that plaintiff failed to prove a typographical error, Chong's insertion of the inaccurate rental amounts in the new lease was a unilateral mistake, there was not a sufficient antecedent agreement, and that the trial court erred in reforming the leases because "Chong's aggravated negligence" amounted to recklessness.

¶ 30 The standard of review we apply when a challenge is made to a trial court's ruling following a bench trial is whether the trial court's judgment is against the manifest weight of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 598 (2000). A trial court's judgment will be found against the manifest weight of the evidence when its findings appear to be unreasonable, arbitrary, or not based on evidence.

Wildman, Harrold, 317 Ill. App. 3d at 599. This court must resolve questions of testimonial credibility in favor of the prevailing party and draw from the evidence all reasonable inferences in support of the trial court's judgment. *Wildman, Harrold*, 317 Ill. App. 3d at 599 (citing *H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994)). We will not reverse a trial court's decision if differing conclusions can be drawn from conflicting testimony unless an opposite conclusion is clearly apparent. *Wildman, Harrold*, 317 Ill. App. 3d at 599 (citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999)).

¶ 31 This court gives great deference to the trial court's findings because the trial court, as the trier of fact, is in an optimum position to observe the demeanor of witnesses while testifying, to judge their credibility, and to determine the weight their testimony and other evidence should receive. *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 440-41 (1998). We may affirm the trial court's decision on any basis supported by the record. *Reedy Industries, Inc. v. Hartford Insurance Co. of Illinois*, 306 Ill. App. 3d 989, 997 (1999).

¶ 32 A written agreement may be reformed to reflect the intention of the parties and the agreement reached between them. *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill. 2d 51, 58 (1994). Reforming a written agreement is premised on the theory that the parties came to an understanding, but in the course of reducing that agreement to writing, through a mutual mistake or through mistake on one side and fraud on the other side, an agreed-upon provision was omitted. *Id.* (citing *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 28 (1941)). A party wising to reform a written must show a mutual mistake by clear and convincing evidence, and the trial court's decision on that matter will not be disturbed unless it was against the manifest weight of the evidence. *Schivarelli v. Chicago Transit Authority*, 355 Ill. App. 3d 93, 100 (2005). Therefore, to maintain a cause of action for

reformation of a contract, a party must establish (1) the existence and substance of an agreement; (2) the parties agreed to reduce their agreement to writing; (3) the substance of a written agreement; (4) a variance exists between the original agreement and the written agreement; and (5) mutual mistake or some other basis for reformation. *Id.*

¶ 33 In the current matter, the trial court's decision to reform defendants' lease was not against the manifest weight of the evidence. The trial court could have found that plaintiff established each of the elements necessary to maintain a reformation action. Specifically, there is no dispute that the parties entered into a written lease, and that the lease specified a rental rate for the leased premises. At issue is whether the parties previously reached an agreement regarding rent for the extended lease and whether that amount was at variance with the rental rate reflected in the lease. Morgenstein testified at trial that he attended the October 2005 partnership meetings when the sale of the property to Chong was discussed, and that the minutes from those meetings accurately reflected Chong's offer to purchase the property. Morgenstein further admitted that, when he entered into the lease extension, he believed rental rate for his new lease term was $27.21, and of that amount, $11.21 would be used to pay the first $11.21 in operating expenses. Chong also testified that she believed the rental rate for the new lease terms was $27.71 per square foot for 7-year lease terms, which included $11.21 per square foot in operating expenses. In addition to the trial testimony, the commercial sales contract signed by Teodo and Chong specified that the rental rate per square foot for a 7-year lease was $27.71. The terms of that sales contract and the purchase proposal were discussed at the partnership meetings that Morgenstein attended. Therefore, the trial court's finding that there was an agreement between Morgenstein and Chong that defendants would renew their

lease for 7 years at a rental rate of $27.71, and that the written lease did not accurately reflect that agreement, was not arbitrary, unreasonable, or not based on the evidence.

¶ 34 Moreover, the trial court could have found that the discrepancy between the rental rate the parties agreed to and the amount specified in the lease resulted from a mutual mistake. Defendant argues that the insertion of the incorrect rental rate constitute a unilateral mistake rendering reformation unavailable. However, Illinois law is well settled that "[a] mutual mistake is one that is common to the parties such that each labors under the same misconception. In such a case, the parties are in actual agreement, but the instrument to be reformed, in its present form, does not express the parties' real intent." *Wheeler-Deeler, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008) (citing *Bank of Naperville v. Holz*, 86 Ill. App. 3d 533, 538 (1980)). Therefore, the court's definition of "mutual mistake" is not necessarily contingent on determining who is responsible for the written instrument not accurately reflecting the parties' actual agreement. Instead, our inquiry is whether each party labored under the same misconception. See *Wheeler-Deeler, Ltd. v. Christ*, 379 Ill. App. 3d at 869. Given Morgenstein's and Chong's trial testimony, the trial court's determination that the parties agreed that Morgenstein's rental rate for the new lease term would be $27.71 per square foot and that, as a result of a mutual mistake, the written lease did not reflect that amount was not against the manifest weight of the evidence.

¶ 35 *2. Reformed Lease Provisions*

¶ 36 Defendants' second contention on appeal is that the evidence did not support the trial court's construction of the reformed leases. Specifically, defendant argues that there was never an agreement that tenants would pay "every cent" of common-area-maintenance expenses, *i.e.*, $11.21 of such expenses as base rent plus common-area-maintenance expenses that exceed $11.21 per

square foot. As noted above, the legal effect of an instrument raises a question of law, and a reviewing court may consider these conclusions under a *de novo* standard of review. *Haran*, 273 Ill. App. 3d at 871.

¶ 37 Here, the trial court's reformation of the lease between plaintiff and Morgenstein accurately reflected the agreement reached by the parties. The trial court's August 27, 2010, order reformed Morgenstein's lease to provide as follows:

> "Base Rent shall be comprised of: (i) an adjustable component of *** ($16.50) per square foot of rentable area in the Premises ('Adjustable Base Rent'), plus (ii) a fixed component of *** ($11.21) per square foot of rentable area of the Premises ('Fixed Base Rent')."

This provision is consistent with article 8(i)(iii) of the addendum to the commercial sales contract that provided an algebraic equation to determine rent. That equation specified that, for a 10-year lease, the rental rate would be calculated by the formula "(($15.000 psf *1.03) + $11.21 psf + increase in year two that is over the 11.21 psf amount) = year two rental rate (using the $26.21 rental rate)." In addition, article 8(i)(ii) of the commercial sales contract provided "Tenant shall pay for increase in operating cost and real estate taxes over the amount of $11.21 per rentable square foot, based on the proportionate share of the premises to the size of the building." Accordingly, the trial court's common-area-maintenance provision accurately reflected the agreement reached by the parties, as evidenced by the commercial sales contract.

¶ 38 *3. Trial Court's Exclusion of Commercial Sales Contract Expiration and Email*

¶ 39 Defendants' next argument on appeal is that the trial court erred in excluding its exhibit 9B, which demonstrated that the sales contingency contract expired on May 31, 2006, a month before

the leases were executed. Defendants maintain that this evidence was relevant to their "knowledge and intent" with respect to the new leases' rental rate.

¶ 40 The admissibility of evidence rests within the sound discretion of the trial court, and its decision will not be reversed unless it amounts to an abuse of discretion. *Napcor v. JPMorgan Chase Bank, NA*, 406 Ill. App. 3d 146, 155 (2010). A trial court abuses its discretion when no reasonable person would agree with the position taken by the trial court. *Matthews v. Avalon Petrolum Co.*, 375 Ill. App. 3d 1, 10 (2007). However, in a nonjury case, the entire record is before the reviewing court and any error committed in ruling in the admissibility of evidence is unimportant if there is competent evidence to sustain the trial court's decision. *Eychaner v. Gross*, 202 Ill. 2d 228, 262 (2002) (citing *Newman v. Youngblood*, 394 Ill. 617 (1946)).

¶ 41 In the current matter, even if the trial court abused its discretion in refusing to admit defendants' exhibit 9B, that error was harmless because there was sufficient evidence before the trial court to sustain its decision. As noted above, Morgenstein admitted at trial that he believed that the rental rate was $27.71 per square foot when he signed the lease. He further testified that in the meetings leading up to the execution of the leases, the discussion of the rental rate was $27.71 per square foot for a 7-year lease. The trial court's June 8, 2010, opinion letter expressly noted that it found Morgenstein's testimony credible. See *Nokomis Quarry Co. v. Dieti*, 333 Ill. App. 3d 480, 486 (2002) (noting that, in a bench trial, it is for the trial court to assess the credibility of witnesses). Thus, there was competent evidence before the trial court to sustain its determination that Morgenstein agreed to a rental rate of $27.71 per square foot regardless of whether the trial court erred in excluding defendants' exhibit 9B. See *Eychaner*, 202 Ill. 2d at 262.

¶ 42 Similarly, we reject defendants' argument that the trial court erred in excluding an email communication between Chong and Van Der Molen on the basis that the communication was privileged. Defendants argue that the communication was not privileged, and in the alternative, plaintiff waived the privilege. Defendants argue that the email would demonstrate that the mistake in the lease was the result of a unilateral mistake, and therefore, reformation was not available.

¶ 43 We disagree. Even if the exclusion of this evidence was an error, it was not a reversible error. See *Newton v. Meissner*, 76 Ill. App. 3d 479, 499 (1979) (holding that even though the trial court erred in excluding evidence on the basis that the evidence was privilged, the error did not constitute reversible error). As we discussed above, the record contains sufficient competent evidence for the trial court to conclude that plaintiff satisfied the elements necessary to successfully maintain a reformation action. As noted, the dispute centered on whether Chong and Morgenstein reached an agreement and whether the lease accurately reflected that agreement. Morgenstein's testimony that he understood the rent to be $27.71 per square when he entered into the lease combined with Chong's testimony and the other documentation submitted at trial enabled the trial court to conclude plaintiff and defendants agreed that base rent would equal $27.71 per square foot. In addition, and despite defendants repeated assertions to the contrary, a mutual mistake exists when the "parties are in actual agreement, but the instrument to be reformed, in its present form, does not express the parties' real intent (*Wheeler-Deeler, Ltd.*, 379 Ill. App. 3d at 869), and therefore, our analysis does not hinge on whether plaintiff was more culpable for the inaccurate rent provision in the lease.

¶ 44 *4. Defendants' Ratification Affirmative Defense*

¶ 45 Defendants' next contention on appeal is that plaintiff ratified and affirmed the lease, despite the inaccurate rental amount, by accepting defendants' rent for the lower amount. In support of this contention, defendants rely primarily on *Zirp-Burnham, LLC v. E. Terrell Associates, Inc.*, 356 Ill. App. 3d 590 (2005). In *Zirp-Burnham*, the defendants argued that they were not liable for breach of contract because, according to them, they did not accept a promise from the plaintiff with respect to a lease. The reviewing court disagreed, noting that the evidence demonstrated that the jury could have inferred that the defendants ratified the lease with the plaintiff by, among others, sending a letter thanking the plaintiff for returning a copy of the lease and asking for a rent credit. *Id.* at 600-01. According to the court, this evidence allowed the jury to accept the plaintiff's argument that, even if the plaintiff's name did not appear on the most-recent amended version of the lease, the defendants subsequently ratified the lease by acknowledging the plaintiff as the landlord. See *id.*

¶ 46 Defendants' argument is misplaced because we find *Zirp-Burnham* distinguishable. Initially, that case involved the defendants arguing that a contract was never reached with the plaintiff, and therefore, the defendants could not be liable for breach of contract. Conversely, here, defendants are arguing that an agreement existed between them and plaintiff as reflected in the lease but they never agreed to pay rent at $27.71 per square foot pursuant to a previous agreement. More important, the uncontroverted evidence before the trial court demonstrated that, shortly after plaintiff discovered the erroneous rent amount provided in the lease, it sought to collect rent in the amount $27.71 by sending a letter to defendants demanding rent be paid at that amount. Therefore, even if we accept defendants' argument that a ratification defense is available against a reformation claim in addition to a breach of contract claim—for which defendants have provided no authority—the evidence

before the trial court clearly demonstrates that plaintiff did not ratify the lease providing for total base rent at the amount of $16.50 per square foot.

¶ 47 B. Plaintiff's Appeal

¶ 48 Having determined the merits of defendants' appeal, we now turn to the issues raised in plaintiff's appeal.

¶ 49 *1. Attorney Fees and Costs*

¶ 50 The first issue plaintiff raises on appeal is whether the trial court erred in not awarding its request for attorney fees and costs incurred in this litigation. Plaintiff maintains that the lease expressly provided for an award of fees and costs and that its action was merely an action to enforce the agreement reached between the parties. We disagree.

¶ 51 A lease is a contract between a landlord and a tenant, and as a result, the rules of contract construction apply to the construction of leases. *Williams v. Nagel*, 162 Ill. 2d 542, 555 (2006). The construction of a contract is a question of law subject to *de novo* review. *Fuller Family Holdings v. Northern Trust Co.*, 371 Ill. App. 3d 605, 620 (2007). When the contract language is clear and unambiguous, that language must be given effect. *Id.* When interpreting contractual provisions, words are given their plain and ordinary meanings. *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151, 157-58 (2004).

¶ 52 In current matter, the lease between plaintiff and Morgenstein does not entitle plaintiff to attorney fees and costs. Paragraph 35(L) provides that, if a party to the lease is made a party to a lawsuit *without fault on its part*, it is entitled to reasonable attorney fees and costs from the other party. The commonly understood meaning of "fault" is:

> "Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty, or rectitude; any shortcoming, or neglect of care or performance resulting from intention, incapacity, or perversity; a wrong tendency, course, or act; bad faith or mismanagement; neglect of duty." *Black's Law Dictionary* 608 (6th ed. 1990).

Here, plaintiff is partially at fault for this litigation. Specifically, as plaintiff conceded at trial and in its briefs before us, when drafting the new lease agreements, Chong's attorney did not accurately and correctly reflect the agreement between the parties that defendants would pay rent of $27.71 per square foot. This is true regardless of whether plaintiff was ultimately successful in reforming the lease provision. Therefore, because plaintiff's deviation from prudence is a clear cause of this lawsuit, plaintiff is not without fault for this litigation. Accordingly, we affirm the trial court's determination denying plaintiff's request for attorney fees and costs.

¶ 53 *2. Prejudgment Interest*

¶ 54 Plaintiff's next contention is that the trial court erred in refusing its request for prejudgment interest on the unpaid rent. According to plaintiffs, paragraph 35(B) entitles it to prejudgment interest because the full rental amount, *i.e.*, $27.71 per square foot, was not paid when due. As with the previous issue, this question involves the construction of a lease provision and is subject to *de novo* review. *Fuller Family Holdings*, 371 Ill. App. 3d at 620. Moreover, we note that Illinois law is well settled that "[p]rejudgment interest is recoverable only where authorized by agreement of the parties or by statute. In chancery proceedings, however, equitable considerations permit a court to allow interest as the equities of the case may demand." *Tri-G, Inc. v. Burke, Bossel, Man & Weaver*, 218 Ill. 2d 218, 255 (2006).

¶ 55 Plaintiff's argument is unavailing. Plaintiff's request for prejudgment interest is not based on statute or in equity, but rather, is based on the express terms of the lease. As previously discussed, because a lease is subject to the law of contracts (*Williams*, 162 Ill. 2d at 555), when the language of a lease is clear and unambiguous, that language must be given effect (*Fuller Family Holdings*, 371 Ill. App. 3d at 620). When interpreting contractual provisions, words are given their plain and ordinary meaning. *Young*, 351 Ill. App. 3d at 157-58.

¶ 56 With respect to the agreement between the parties, paragraph 35(B) of the lease provides:

> "All payments becoming due under this [l]ease or under any work order or other agreement relating to the [p]remises shall be considered rent, and *if unpaid when due* when due shall bear interest from such a date at the rate of ten (10) percent per annum until paid ***." (Emphasis added.)

Pursuant to the plain and unambiguous language of this provision, the parties clearly intended that any payment by way of agreement relating to the premises not paid when due would accrue interest at 10% per annum until that amount was paid. However, here, although the parties previously agreed that defendants would pay rent at the rate of $27.71 per square foot, those agreements did not specify when that rental amount would be due. Instead, the record clearly reflects that the only agreement between the parties specifying when rent would be due was the lease. Prior to being reformed, the lease provided that defendants would pay rent at the rate of $16.50 per square foot. Simply put, the record is devoid of indication that, prior to the lease being reformed, defendants failed to pay rent when due as specified by the lease, or that after the lease was reformed, defendants failed to pay rent pursuant to the reformed lease. Therefore, because defendants paid the specified rent *when due* pursuant to the lease—the only agreement between the parties specifying a rental amount and when

that amount would be due—the plain language of paragraph 35(B) of the lease does not entitle plaintiffs to prejudgment interest.

¶ 57 *3. Plaintiff's Breach of Contract Claim*

¶ 58 Plaintiff's final contention on appeal is that the trial court erred in rejecting its breach of contract claim against defendants. Plaintiff notes the trial court found that defendants had an agreement with plaintiff to pay $27.71 per square in rent and defendants failed to honor that agreement by only paying rent in the amount of $16.50 per square foot. According to plaintiff, "Stripped to its barest essentials, that is a breach of contract."

¶ 59 We find plaintiff's contention waived pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006). In plaintiff's brief, its argument supporting this contention totaled one page. Plaintiff cited only two cases, one addressing our standard of review and one addressing reformation of a contract. Plaintiff cited no case law identifying the elements necessary to sustain a breach of contract cause of action or provide any analysis applying those elements to the facts present in this case. In lieu of substantive analysis and citation, plaintiff provided mere conclusory statements and left us to search for matters in the record. For example, instead of citing to relevant case law or providing meaningful analysis discussing breach-of-contract causes of action in relation to a reformation cause of action, plaintiff merely concluded that "[s]imply put, the fact that the rental provisions in the written agreements were erroneous does not somehow change the terms of the parties' actual agreement. Nor does it transform [d]efendants non-payment of rent into a 'non-breach.' " A conclusory assertion without supporting analysis is insufficient to overcome a finding of waiver. *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348 (2006). Plaintiff's reply brief with respect to this contention is similarly deficient. It, too, provided no developed analysis or relevant authority.

¶ 60 This is unacceptable. The appellate court is not a depository in which the appealing party may dump the burden of argument and research. *Id.* As a result of plaintiff's violation of Rule 341(h)(7), we find plaintiff's contention waived. See *id.* at 349. Further, we admonish plaintiff's attorneys and urge them to use caution in the future by ensuring that reviewing courts are provided with meaningful analysis and citation to relevant authority.

¶ 61 III. Conclusion

¶ 62 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 63 Affirmed.