2012 IL App (2d) 110647-U
No. 2-11-0647
Order filed April 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES W. WALSH and LAURIE B. WALSH, as beneficiaries under U.S. Bank, Successor Trustee of Firstar Bank of Illinois Trust No. 7-2229,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	
v.	)	No. 10-LM-3541
SANTO BARBAROTTA,	)	
Defendant-Appellant	)	Honorable Robert G. Gibson,
(Loris Murariu, defendant).	)	Judge, Presiding.

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

ORDER

Held: By failing to raise the issue in his motion to reconsider, defendant forfeits review of whether the trial court erred in awarding damages in excess of the prayer for relief; even if forfeiture were excused, when defendant received exhibits relating to damages minutes before the prove-up hearing, defendant failed to establish that he was prejudiced by reason of surprise or that the trial court abused its discretion by denying his request for a continuance of the hearing; affirmed.

¶ 1 Plaintiffs, James W. Walsh and Laurie B. Walsh, as beneficiaries under U.S. Bank, Successor

Trustee of Firstar Bank of Illinois Trust No. 7-2229 (Trust), brought a forcible entry and detainer action against defendants, Loris Murariu and Santo Barbarotta, to evict them from the commercial property leased by defendants. The complaint alleged defendants unlawfully withheld possession of the premises and were indebted to plaintiffs "in the sum of $1,700 for failure to pay Sept. 2010 rent in full, and failure to maintain insurance pursuant to the terms and provisions of the lease." Following a bench trial, the trial court entered judgment in favor of plaintiffs and against defendant Barbarotta (hereafter referred to as defendant) in the amount of $39,263.[1] Defendant asserts the trial court erred in assessing damages. For the following reasons, we affirm.

¶ 2 FACTS

¶ 3 On or about November 30, 2009, the Trust entered into a three-year lease agreement with Impressioni-Euro Clothing Culture, as lessee, to rent commercial property, located at 125 South Washington, Naperville, Illinois. Plaintiffs signed the lease agreement as agents and defendants signed the lease agreement individually as lessees. Pursuant to the terms of the lease, defendants were required to pay rent in monthly installments of $3,300 on or before the first of each month for the first year. Starting in February 2011, the second year of the lease, the monthly rent increased to $3,432. Defendants were required to maintain general liability insurance in minimum amounts of "$1,000,000/2,000,000 at all times." In the event of a breach of the lease by either party to the lease, "the prevailing party in a legal action shall be entitled to recover costs, expenses and legal fees from the other party for enforcing any obligation or terms of the Lease or Rider to Lease."

¶ 4 On September 22, 2010, plaintiffs' attorney sent a letter to defendants advising them that they

[1]The court dismissed Murariu, without prejudice, based on his discharge in bankruptcy. Accordingly, he is not a party to this appeal.

were in breach of the lease for failing to (1) pay the rent in full, and (2) provide proof of insurance. The letter stated that, unless rent was paid in full ($2,300 remaining) and proof of insurance was provided, defendants' possession of the premises would be terminated, and they would be subject to personal liability for all damages.

¶ 5 Plaintiffs filed the present forcible entry and detainer action on October 5, 2010. As stated, plaintiffs sought possession of the premises and prayed for $1,700 in damages. The bench trial commenced on November 10, 2010, and following argument, the trial court entered judgment in favor of plaintiffs, as beneficiaries under the Trust, and against defendants, and continued the matter for a prove-up hearing on damages. Defendant Murariu was subsequently dismissed as a defendant based on his discharge in bankruptcy.

¶ 6 At the prove-up hearing, plaintiff, Laurie Walsh, testified regarding the damages incurred as a result of the breach, including costs, expenses, and legal fees for enforcing the lease agreement. Specifically, plaintiffs requested damages for: (1) back rent, which included the increase of monthly rent, beginning February 2011; (2) failing to pay rent on a timely basis; (3) a realtor's commission based on the old lease; (4) utilities; (5) additional expenses to rekey the locks and repair damages to the premises; and (6) attorney fees. Plaintiffs relet the property to new tenants, who began paying rent in June 2011, and plaintiffs credited defendant $6,269. All toll, the damages amounted to $39,263. We note the record shows that receipts were tendered to the court at the hearing, but the receipts are not in the record on appeal. Following argument, the trial court entered a judgment for damages in the amount of $39,263 against defendant.

¶ 7 Thereafter, defendant filed a motion to reconsider. Defendant argued that he executed the lease as a member of an entity and should not have been held personally liable for damages. In the

alternative, defendant claimed that the amount of damages should be reduced by $5,988 because any repairs plaintiffs allegedly made were not the result of his actions. On June 2, 2011, the court rejected defendant's arguments, and denied the motion to reconsider. Defendant timely appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues on appeal that the trial court erroneously awarded damages in excess of the $1,700 amount requested by plaintiffs in their prayer for relief. As set forth above, the court awarded plaintiffs, as beneficiaries under the Trust, $39,263 following the prove-up hearing. Section 2-604 of the Code of Civil Procedure (Code) (745 ILCS 5/2-604 (West 2010)) specifically states that "the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise." Defendant acknowledges that the relief plaintiffs sought is not limited to the relief obtainable. Rather, he contends that the trial court failed to protect him from prejudice by reason of surprise.

¶ 10 We find defendant has forfeited this issue, as he failed to raise this argument in his motion to reconsider. Issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996).

¶ 11 Nevertheless, even if we were to excuse forfeiture (*Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 64) (forfeiture is a limitation on the parties and not on this court), defendant's argument would fail on the merits. Defendant maintains that he suffered prejudice by reason of surprise when he received plaintiffs' exhibits relating to damages 10 minutes prior to the prove-up hearing, and he "could not prepare documents in response to the prove-up exhibits." Defendant could not have established prejudice, however, because he failed to state which

documents he was precluded from preparing that would have challenged plaintiffs' claim for damages.

¶ 12 Moreover, even though defendant did seek a continuance of the prove-up hearing based on his "late" receipt of plaintiffs' exhibits, the trial court could not have abused its discretion in denying the request. Litigants do not have an absolute right to a continuance, and the grant or denial of a motion for a continuance lies in the sound discretion of the trial court. *Somers v. Quinn*, 373 Ill. App. 3d 87, 96 (2007). The decisive factor in assessing the merits of a motion for a continuance is whether the moving party has exercised due diligence in proceeding with the case. *Somers*, 373 Ill. App. 3d at 96. Due diligence in this case required defendant's counsel to stay abreast of the status of the case. Counsel knew that the case was scheduled for a prove-up hearing for "future damages," yet he never utilized any discovery procedures available. Furthermore, we cannot perceive how defendant could have been prejudiced by surprise where the damages awarded were not extraordinary for a forcible detainer action and could have been approximated by the terms of the lease agreement.

¶ 13 Defendant cites *Rauscher v. Albert*, 145 Ill. App. 3d 40, 45 (1986), in support of his position that the award of damages in excess of the prayer for relief constitutes reversible error. In *Rauscher*, the appellate court held that the trial court erred in entering judgment for damages in excess of the *ad damnum* clause of the plaintiffs' complaint, since the defendant was in default at the damages hearing and received no notice that additional relief had been sought in violation of section 2-604. *Rauscher*, 145 Ill. App. 3d at 46-47. Here, unlike in *Rauscher*, defendant appeared at and participated in the damages hearing and was represented by counsel.

¶ 14 CONCLUSION

¶ 15 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 16 Affirmed.