2015 IL App (2d) 131288-U
No. 2-13-1288
Order filed June 29, 2015

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL R. LOWER, Trustee of the Mary Jean Lower Trust, Plaintiff-Appellant, v. SUSAN C. APPEL and GORDON A. APPEL, Defendants-Appellees. (Jody Dvorak, Faye Sturtevant, and Michael R. Lower, Intervenors-Appellants).	)	Appeal from the Circuit Court of Carroll County. No. 08–L–17 Honorable Val Gunnarsson, Judge, Presiding

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

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of defendants on the majority of the claims raised by plaintiff and intervenors; following a hearing, the trial court properly granted defendants' motion for a directed finding on the remaining claims. We affirmed the judgments of the trial court.

¶ 2 Plaintiff, Michael R. Lower, trustee of the Mary Jean Lower Trust, and intervenors, Jody Dvorak, Faye Sturtevant, and Michael R. Lower, appeal from 10 of the trial court's 11 judgments

in favor of defendants, Susan C. Appel and Gordon A. Appel. The trial court granted summary judgment on each of the six counts in plaintiff's second amended complaint, as well as counts II, III, and V of intervenors' third amended complaint. After a hearing, the trial court entered directed findings on counts I and IV of intervenors' third amended complaint. Plaintiff filed a timely notice of appeal, challenging the trial court's rulings regarding all but count IV of his second amended complaint. Intervenors filed a timely notice of appeal, challenging the trial court's rulings on each of the five counts in their third amended complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 This case involves a family dispute over the lease of farmland during the 2008 crop year. Rex B. Lower and his wife, Mary Jean Lower, were the longtime owners of the Lanark farm, which consisted of approximately 175 acres in Carroll County. Rex died in August 2003 and Mary Jean died in June 2007. Rex and Mary Jean's beneficiaries were their five children: Michael R. Lower, John Lower, Jody Dvorak, Faye Sturtevant and Susan Appel. Michael is plaintiff, as trustee of the Mary Jean Lower Trust. Michael also joined his sisters, Jody and Faye, as intervenors. Susan and her husband, Gordon, are defendants. John is the only Lower sibling who is not a party to this suit, although his actions are referenced throughout the proceedings.

¶ 5 The pleadings, affidavits, and other evidence presented to the trial court reflected that when Rex died in August 2003, the parties believed Rex and Mary Jean had owned the Lanark farm as joint tenants, meaning that Mary Jean owned the entire farm following Rex's death. In November 2003, Mary Jean created the Mary Jean Lower Trust, named Michael as trustee, and conveyed all of her property to the trust. Mary Jean also assigned all of her interest in the Rex B. Lower Estate to her newly formed trust. Mary Jean had a life interest in the net income from

both the Mary Jean Lower Trust and the Rex B. Lower Estate. Also pertinent to this appeal, Susan and John were named co-executors of the Rex B. Lower Estate.

¶ 6 Michael managed the Lanark farm for the next several years under the belief that the Mary Jean Lower Trust held ownership of the entire farm. Michael had been managing the farm since 2001, when he began acting as Rex and Mary Jean's agent under a power of attorney. That same year, Michael helped Rex negotiate a year-to-year lease with defendants' daughter, Justina Vickery. Justina agreed to lease approximately 17 acres, for grazing and hay harvest, at $205 per acre. Justina moved after Rex died in 2003, at which point Michael, as trustee of the Mary Jean Lower Trust, verbally agreed to carry forth the terms of Justina's lease with defendants (Susan and Gordon). The amount of acreage under defendants' lease grew in the years that followed, but the price and purpose of the lease remained the same: $205 per acre for grazing and hay harvest.

¶ 7 In May 2007, during probate proceedings on Rex's will, the parties discovered that Rex and Mary Jean had actually owned the Lanark farm as tenants in common; therefore, the Rex B. Lower Estate and the Mary Jean Lower Trust each held an undivided one-half interest in the farm. This discovery was made approximately one month prior to Mary Jean's death. By the time of the discovery, Michael had already agreed to lease 118 acres of the farm to defendants during the 2007 crop year. Upon learning of the farm's divided ownership, neither John nor Susan made any requests, on behalf of the Rex B. Lower Estate or otherwise, to change the 2007 lease agreement. In October 2007, as trustee of the Mary Jean Lower Trust, Michael accepted defendants' payment for the second half of the 2007 crop year.

¶ 8 Defendants purchased the Lanark farm in fall 2008, following nearly a year of negotiations with other the Lower siblings (the beneficiaries of the Rex B. Lower Estate and the

Mary Jean Lower Trust). During this time, defendants carried over the terms of their 2007 lease into the 2008 crop year, maintaining that they were entitled to do so because they were never given written notice to quit. This was the apparent catalyst for approximately five years of litigation in the trial court, as plaintiff (Michael) filed his first complaint against defendants in December 2008.

¶ 9 Plaintiff ultimately proceeded on his second amended complaint, which consisted of six unmarked counts. Although plaintiff failed to list any specific causes of action, he alleged that defendants unlawfully occupied the 118 acres during the 2008 crop year, and that the Mary Jean Lower Trust was damaged because the land could have yielded higher profits if it had been utilized for harvesting corn, rather than for hay and grazing. Intervenors ultimately proceeded on their third amended complaint, which included five counts. Although these counts were labeled with various causes of action for breach of fiduciary duty and unjust enrichment, the allegations in intervenors' third amended complaint largely mirrored those set forth in plaintiff's second amended complaint.

¶ 10 Plaintiff, intervenors, and defendants each eventually moved for summary judgment. The trial court ruled in favor of defendants on all counts but those involving intervenors' claims that Susan breached her fiduciary duty to the Rex B. Lower Estate. Intervenors and defendants proceeded to a hearing in April 2013. Following intervenors' case in chief, the trial court granted defendants' motion for a directed finding on the remaining counts. As noted, plaintiff appeals the trial court's rulings on all but count IV of his second amended complaint; intervenors appeal the trial court's rulings on each of the five counts in their third amended complaint.

¶ 11 II. ANALYSIS

¶ 12 We begin by affirming the trial court's finding that Michael was the unquestioned manager of the Lanark farm. The record reflects that each of the Lower siblings consistently acquiesced to Michael's management of the farm, even after learning the true nature of the farm's ownership. Each of the siblings also acquiesced to defendants' year-to-year lease through the end of the 2007 crop year. With that in mind, we first address the trial court's grants of summary judgment in favor of defendants. These rulings were made with respect to plaintiff's and intervenors' (referred to collectively as "plaintiffs") various contentions that defendants illegally occupied 118 acres of the Lanark farm during the 2008 crop year.

¶ 13 Summary judgment is proper only where 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 2008). "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In appeals from summary judgment rulings, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). We may affirm a trial court's grant of summary judgment on any basis supported by the record, regardless of whether the trial court relied on that basis or whether the court's reasoning was correct. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

¶ 14 Count I of plaintiff's second amended complaint and count II of intervenors' third amended complaint were based on the premise that defendants' lease automatically terminated at the end of 2007, the year in which Mary Jean died, and that no written notice to quit was required.

¶ 15 Section 9-206 of the Code of Civil Procedure (735 ILCS 5/9-206 (West 2012)), provides that written notice to quit is required for the termination of year-to-year tenancies of farmlands. Specifically, section 9-206 states, "the notice to quit shall be given in writing not less than 4 months prior to the end of the year of letting. Such notice may not be waived in a verbal lease." However, section 9-206.1(a) provides an exception for circumstances where a lessor dies having held only a life interest in the subject farmland; in such instances, the year-to-year lease expires automatically at the end of the year in which the lessor's life interest terminates. This exception is consistent with the doctrine of emblements, which allows for a tenant farmer to "cultivate and harvest such annual crops as were planted prior to the event which ended the estate for life." *Leigh v. Lynch*, 112 Ill. 2d 411, 419 (1986) (citing section 121 of the Restatement of Property (1936)). Section 9-206.1(a) specifically states:

> "Tenancies from year to year of farmland occupied on a crop share, livestock share, cash rent, or other rental basis in which the lessor is the life tenant or the representative of the life tenant shall continue until the end of the current lease year in which the life tenant's interest terminates unless otherwise provided in writing by the lessor and the lessee." 735 ILCS 5/9-206.1(a) (West 2012).

¶ 16 The trial court found that Mary Jean "was not the lessor because she conveyed all of her right, title and interest to the trust." It then found that Michael was the lessor, as trustee of the Mary Jean Lower Trust, focusing on the authority and control that he exercised over the farm. The trial court concluded that Michael did not agree to the terms of defendants' lease as the representative of a life tenant; rather, he did so as representative of the Mary Jean Lower Trust and its beneficiaries: the five Lower siblings. The trial court ruled, therefore, that section 9-206.1 did not apply and that written notice to quit was required.

¶ 17 Plaintiffs concede that Mary Jean was not the lessor of the Lanark farm, but argue that she was nonetheless a "life tenant." As noted, following Rex's death, Mary Jean assigned her interest from the Rex B. Lower Estate to the Mary Jean Lower Trust; she was to receive the net income from both entities during her lifetime. Plaintiffs argue that Mary Jean's life interest in the net income from the farm must be considered a life tenancy, and that section 9-206.1 must apply because Michael was representing a "life tenant" in his capacities as the lessor of the farm and the trustee of the Mary Jean Lower Trust.

¶ 18 However, section 9-206.1 applies to "[t]enancies from year to year *of farmland* *** in which the lessor is the life tenant or the representative of the life tenant *** ." (Emphasis added) 735 ILCS 5/9-206.1 (West 2006). This clearly contemplates the termination of a life tenancy in the subject property, that being farmland; the statute is not implicated merely upon the termination of a life interest in the net income from farmland. See *Olmstead v. Nodland*, 356 Ill. App. 3d 1092, 1094 (2005) (applying section 9-206.1 where the lessor "held the subject property as a life tenant").

¶ 19 Because the Lanark farm was owned by the Rex B. Lower Estate and the Mary Jean Lower Trust, Mary Jean's death had no impact on defendants' year-to-year lease, regardless of whether she was a "life tenant" of the net income from the farm. Plaintiffs argue that the lease was broken upon Mary Jean's death, despite her lack of any ownership interests, asserting that Michael's authority to control Rex's half of the farm derived from Mary Jean's assignment of the net income from the Rex B. Lower Estate. However, as will be discussed further below, Rex's will gave Susan and John the authority, as co-executors of his estate, to deal with themselves, individually. Hence, the authority that was needed from the Rex B. Lower Estate derived from Susan and John, not from Mary Jean's assignment of her interests in the Rex B. Lower Estate.

For these reasons, we affirm the trial court's grant of summary judgment on count I of plaintiff's second amended complaint and count II of intervenors' third amended complaint, as there are no genuine issues of material fact to be decided pertaining to these claims.

¶ 20 Count II of plaintiff's second amended complaint and count III of intervenors' third amended complaint were each based on the contention that defendants surrendered their right to lease the disputed 118 acres during the 2008 crop year. As noted, where a lessor seeks to terminate a year-to-year tenancy of farmland, "the notice to quit shall be given in writing not less than 4 months prior to the end of the year of letting. Such notice may not be waived in a verbal lease." 735 ILCS 5/9-206 (West 2006). The trial court granted summary judgment in defendants' favor, finding that section 9-206 "provides no exception as was stated" in plaintiffs' respective amended complaints.

¶ 21 *People v. Miller*, 81 Ill. App. 3d 292 (1980), concerned the "doctrine of surrender and acceptance" as it applied to section 5.1 of the Landlord & Tenant Act, which included a provision with identical language to section 9-206. See Ill. Rev. Stat. 1977, ch. 80, par. 5.1. The plaintiff in *Miller* had leased farmland to the defendant on a year-to-year basis, pursuant to an oral agreement. Prior to the 1979 crop year, the plaintiff presented the defendant with a written lease that contained different provisions from the verbal agreement. *Miller*, 81 Ill. App. 3d at 293. Although the parties and witnesses presented conflicting testimony, the *Miller* court affirmed the trial court's finding that the defendant informed the plaintiff he would not be farming the land for the 1979 crop year. *Id.* at 295. The *Miller* court invoked the doctrine of surrender and acceptance, holding, "in a case where the tenant explicitly informs the landlord that he will not be reletting the property, there no longer is a need to provide statutory notice to quit, and the landlord is relieved of his duty to so do." *Id.* at 295-96.

¶ 22 Plaintiffs argue that defendants' lease was similarly surrendered here, based on the assertion that defendants led them to believe they would not be leasing the farmland during the 2008 crop year. They alleged that, following Mary Jean's death in June 2007, Susan agreed the farm should be sold before the 2008 crop year, indicated an interest in buying the farm, agreed to support a sale to a third party if she did not buy the farm, and did not communicate her intent to continue the terms of the lease until March 2008.

¶ 23 These alleged acts fall short of the conduct considered in *Miller*, which turned on the trial court's finding that the tenant explicitly informed the landlord he would not be reletting the property. *Miller*, 81 Ill. App. 3d at 295-96. Here, plaintiffs merely assert that defendants' conduct led them to believe they would not continue their lease during the 2008 crop year; they allege no set of circumstances under which the trial court could have concluded that the parties actually agreed to the termination of defendants' lease. See *Solomon v. Geller*, 48 Ill. App. 2d 15, 21-22 (1964) (explaining that the doctrine of surrender and acceptance is applicable where the trial court concludes "that an agreement had been reached whereby the lessee surrendered the premises and the lessor accepted the premises back, both intending thereby to terminate the lease and cancel all the covenants and obligations thereunder"). Therefore, we affirm the trial court's grant of summary judgment on count II of plaintiff's second amended complaint and count III of intervenors' third amended complaint, as there is no genuine issue of material fact to be decided pertaining to these claims.

¶ 24 Plaintiff contends that the trial court erred in granting summary judgment in defendant's favor on count III of his second amended complaint, arguing that defendants waived their right to carry over the terms of their lease to the 2008 crop year. Again, section 9-206 specifically provides that the written notice needed to terminate a year-to-year tenancy of farmland "may not

be waived in a verbal lease." 735 ILCS 5/9-206 (West 2006). We reject plaintiff's argument that the equitable doctrine of waiver must apply, despite the statutory language to the contrary, due to Susan's position as the co-executor of the Rex B. Lower Estate. Plaintiff asserts that application of the statutory bar against waiver is inapplicable here because compliance with section 9-206 would necessarily have required Susan to provide herself with written notice to terminate her own lease. We disagree; it mattered not that Susan was a co-executor of the Rex. B. Lower Estate. Because Michael was the lessor, it was his duty to provide defendants with written notice to quit. Plaintiffs concede that Michael failed to provide any such notice, and we therefore affirm the trial court's ruling.

¶ 25 Whereas plaintiffs earlier acknowledged the validity of defendants' lease, but argued that the lease terminated at the end of the year in which Mary Jean died, the fifth count of their respective amended complaints took a contrary position. Plaintiffs contend here that defendants' lease was void because they never obtained permission from the Rex B. Lower Estate to use and occupy the disputed 118 acres. Hence, Michael now seeks to invalidate the very lease which he unquestionably negotiated and managed from 2004 through 2007, on grounds that he never received proper authorization from the Rex B. Lower Estate. Michael also puts forth this same argument as an intervenor, with Jody and Faye, claiming they are entitled to damages as beneficiaries of the Rex B. Lower Estate.

¶ 26 The trial court granted summary judgment in defendants' favor, finding, "as has been litigated in the probate case, Susan as co-executor with her brother John, had authority under the will and trust documents to deal with herself, despite the potential conflict of interest." Plaintiffs acknowledge Susan's authority to self-deal, but argue that Susan and John could not have granted the consent necessary for defendants' year-to-year lease because they each denied having

any knowledge of the Rex B. Lower Estate's interest in the Lanark farm until May 2007. See *Daugherty v. Burns*, 331 Ill. App. 3d 562, 568 (2002) (noting that "consent of all joint owners is necessary to create a lease").

¶ 27 We first note that the Rex B. Lower Estate was not made a party to this suit. "Illinois law provides that a necessary party is one who has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court." *Bill Marek's The Competitive Edge, Inc. v. Mickelson Group, Inc.*, 346 Ill. App. 3d 996, 1010-11 (2004). A finding that defendants' lease was void in this case would undoubtedly affect the Rex B. Lower Estate, as rents from the Lanark farm were paid to the Mary Jean Lower Trust each year since Rex's death in 2003. Thus, the issue of whether the Rex B. Lower Estate properly consented to defendants' lease is beyond the scope of this appeal.

¶ 28 To the extent that plaintiffs argue Susan and John never consented in their individual capacities, we note that Susan and John learned of the Lanark farm's divided ownership in May 2007, yet neither of them made any request to change the 2007 lease agreements. Michael then accepted defendants' payment for the second half of the 2007 crop year in October 2007, as trustee of the Mary Jean Lower Trust. This was consistent with the management policy set forth in a probate inventory that John filed in March 2004, as co-executor of the Rex B. Lower Estate. Although the inventory did not properly include Rex's half of the farm, it stated that the Rex B. Lower Estate was utilizing the "management services" of the Mary Jean Lower Trust to "collect and maintain rental assets." The record reflects that this management structure remained in effect even after the Lower siblings learned that the Rex B. Lower Estate owned half of the farm. Thus, Susan and John clearly acquiesced to Michael's continued management of the farm, and we affirm the trial court's grant of summary judgment in favor of defendants as to these counts.

See *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004) (stating that a reviewing court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower court relied upon that ground).

¶ 29 In count VI of his second amended complaint, plaintiff alleged that, if he did not recover under the first five counts, he was entitled to recover half of the payments from the 2008 crop year. The trial court granted summary judgment in favor of defendants, finding that the issue of rent payments had been resolved through the probate case. Plaintiff argues that the issue was not resolved during the probate case, but he has not attached any of the relevant transcripts or orders from the probate case. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (stating that the appellant bears the burden of presenting the complete record, and the reviewing court will resolve any doubts arising from an incomplete record against the appellant).

¶ 30 Under these circumstances, we decline to second guess the trial court's findings as they relate to a different law suit. We also take this opportunity to comment on a recurring theme in this litigation. The trial court noted that this case was an "offshoot" of the probate proceedings surrounding Rex's will, adding that the probate case was opened in 2003, and that it remained open through at least 2012. The trial court also remarked, on a related note, that it had "never seen a file like this," explaining that the parties had filed numerous pleadings, responses, motions, and affidavits which made "little or no procedural sense." We bring this up only to comment that the parties have ignored the trial court's admonitions in this appeal. The briefs have largely been copied and pasted from the various pleadings below, and we echo the trial court's sentiment regarding the arguments contained therein.

¶ 31 Having resolved the issues pertaining to the trial court's various grants of summary judgment, we move on to the trial court's directed findings in favor of defendants. Intervenors

were allowed to proceed to a hearing on counts I and IV of their third amended complaint, which included claims that Susan breached her fiduciary duty to the Rex B. Lower Estate and that Gordon induced Susan's breach of fiduciary duty. Intervenors first alleged that Susan knew the Rex B. Lower Estate held an undivided half interest in the Lanark farm, but concealed this knowledge so that she could continue leasing 118 acres during the 2008 crop year. Intervenors also alleged that Susan "dragged out" the sale of the Lanark farm in an attempt to diminish its market value. As discussed, defendants ultimately purchased the farm after prolonged negotiations with the beneficiaries of the Rex. B. Lower Estate and the Mary Jean Lower Trust. Following the presentation of intervenors' evidence, the trial court granted defendants' motion for directed finding.

¶ 32 In bench trials, a defendant may, at the close of the plaintiff's case, move for a finding or judgment in his or her favor. 735 ILCS 5/2-1110 (West 2012); *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). When ruling on a section 2-1110 motion, the trial court must first determine as a matter of law whether the plaintiff has presented a *prima facie* case. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). If the plaintiff has presented a *prima facie* case, the court must consider and weigh all the evidence offered by plaintiff, including evidence favorable to defendant, to determine whether the *prima facie* case survives. *Id.*

¶ 33 If the trial court grants the defendants' motion for directed finding in the first phase of its analysis, finding a total lack of evidence on one or more of the elements of the *prima facie* case, our standard of review is *de novo*. *Barnes v. Michalski*, 399 Ill. App. 3d 254, 264-65 (2010). If, however, the trial court grants the motion after weighing the evidence and assessing the credibility of witnesses, we determine whether the ruling is against the manifest weight of the evidence. *Id.* A ruling is against the manifest weight of the evidence only if it is unreasonable,

arbitrary, or not based on any evidence or only if the opposite conclusion is clearly evident from the evidence in the record. *In re Estate of Savio*, 388 Ill. App. 3d 242, 247 (2009). Here, the trial court granted defendants' motion for directed finding after considering intervenors' evidence; therefore, we must determine whether the trial court's ruling was against the manifest weight of the evidence. See *Minch*, 395 Ill. App. 3d at 398.

¶ 34 "To state a claim for breach of fiduciary duty, a plaintiff must establish (1) a fiduciary duty on the part of the defendant, (2) the defendant's breach of that duty, and (3) damages that were proximately caused by the defendant's breach." *1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). In the present case, the trial court first found that Susan did not withhold any information from the Rex B. Lower Estate, but that even if she had, the estate would not likely be able to prove any damages. The trial court next found that Susan did not "drag out" the sale of the Lanark farm, noting that Michael rejected defendants' first offer and that defendants ultimately bought the farm at a higher price than its appraised value. Intervenors presented nothing in the record to contradict these findings, and we affirm the trial court's ruling.

¶ 35 III. CONCLUSION

¶ 36 For these reasons, we affirm the judgments of the circuit court of Carroll County.

¶ 37 Affirmed.