2017 IL App (2d) 160203-U
Nos. 2-16-0203
Order filed April 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROC/SUBURBAN NAPERVILLE, LLC,	)	Appeal from the Circuit Court of Du Page
	)	County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-LM-1506
	)	
ROC, INC., MICHAEL S. SIUREK, MARK GRUNZE and DOUGLAS RICCOLO,	)	
	)	
	)	
Defendants	)	Honorable
	)	Bonnie M. Wheaton,
(ROC, Inc., Defendant-Appellant).	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's motion to dismiss and finding for plaintiff after trial on the basis that plaintiff failed to provide proper statutory notice since the court held that the lease was invalid and no notice is required where there is no landlord-tenant relationship; the trial court did not err in denying defendant's motion to dismiss or stay; the trial court did not err in barring evidence of prior practice; and the trial court's determination of damages was not unreasonable or manifestly erroneous. Affirm.

¶ 2 Plaintiff, ROC/Suburban Naperville, LLC, filed a three-count amended complaint against defendants, ROC, Inc., Michael S. Siurek, Mark Grunze, and Douglas Riccolo, arising out of the

use and possession of an office suite by defendants in a building owned by plaintiff. Count I sought to have the lease declared invalid. Count II, which was pled in the alternative, sought damages and possession assuming a valid lease existed. The parties agreed that plaintiff did not proceed to trial on Count III, which was therefore abandoned. The trial court declared the lease invalid, and it awarded plaintiff possession of the premises and damages for use and occupancy of the suite.[1] Only ROC, Inc. (hereinafter referred to as defendant) appeals. We affirm.

¶ 3 I. Facts

¶ 4 Plaintiff was a single use entity, which owned a commercial office building located at 1804 N. Naper Boulevard in Naperville, Illinois (1804 N. Naper). Plaintiff was managed by Bryan E. Barus and defendant, Michael S. Siurek. The Class A members of plaintiff are the respective trusts of Barus and Siurek. Barus also owns Suburban Real Estate Services, Inc. Defendant is an Illinois corporation whose sole shareholder is Siurek. Barus and Siurek are also Class A members and managers of other limited liability companies that own other commercial real estate they jointly manage. Siurek, through defendant, maintains the records and accounts of plaintiff, collects rents from 1804 N. Naper, and is responsible for the finances and the physical condition of 1804 N. Naper, reporting to Barus.

¶ 5 In October 2011, Siurek was obligated to move out of an office suite he occupied in another building owned by another limited liability company owned and managed by Barus and Siurek. Siurek relocated his office and defendant to Suite 460 at 1804 N. Naper and allegedly gave notice to Barus of his intention to do so in October 2011. At that time, Suite 460 was

[1] Pursuant to plaintiff's motion, the trial court amended the judgment to clarify that the judgment was only against ROC, Inc., not Michael Siurek, Mark Grunze, or Douglas Riccolo, and they are not parties to this appeal.

vacant and not generating rent for plaintiff and 1804 N. Naper had a 35% vacancy rate. Defendant took possession of Suite 460 on November 11, 2011.

¶ 6 On October 27, 2011, prior to defendant taking possession of Suite 460, Barus, as trustee of the Barus Living Trust, and Siurek, as the trustee of the Siurek Living Trust, were involved in separate litigation before Judge Terence M. Sheen regarding the appointment of a receiver and to dissociate Siurek's trust as a member of plaintiff (*Barus v. Siurek*, No. 2011-CH-5137) (the 2011 suit). In that case, Judge Sheen authorized plaintiff to file the present action against defendant for possession of Suite 460. Judge Sheen subsequently denied a motion to consolidate the two actions. As of the filing of the present suit, the 2011 suit remained pending.

¶ 7 On May 15, 2014, plaintiff filed the initial action against defendant under the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq*. (West 2012)) to obtain possession of Suite 460, alleging the following. At the time defendant seized possession of Suite 460, plaintiff was engaged in lease negotiations with a prospective tenant, Sunny Direct, LLC. Sunny Direct signed a letter of intent to enter into a lease with plaintiff for Suite 460. The prior tenant of Suite 460, Colco Services, Inc., had paid a base monthly rent of $3,561. After Sunny Direct signed the letter of intent, Siurek sent an email to the real estate broker for plaintiff informing the broker that "[o]wnership has decided to occupy Suite 460." Thus, defendant unilaterally terminated the prospective tenancy of Sunny Direct and halted the preparation and execution of a lease. Immediately thereafter, defendant, through Siurek, moved into Suite 460 without a lease. Defendant paid nothing for the occupancy of Suite 460 from November 2011 through June 1, 2012.

¶ 8 Hinsdale Bank & Trust (the Bank), was the mortgage holder of 1804 N. Naper, and it was in the process of a second extension on the loan. The Bank required all occupants to have a

written lease. Seven months after defendant moved into Suite 460, Siurek unilaterally prepared and executed a written lease between plaintiff and defendant, effective June 1, 2012. Plaintiff never authorized defendant to enter into the lease. The lease was never shown to Barus, who co-managed plaintiff, and it was not approved by Barus. Additionally, no corporate resolution authorized defendant to enter into the lease.

¶ 9 Plaintiff's Operating Agreement does not allow for a manager to make unilateral decisions. Pursuant to Article 13 of the agreement, both managers are responsible for the management of plaintiff, the execution of contracts, and the major decisions of plaintiff. As stated, Barus and Siurek are plaintiff's co-managers.

¶ 10 Under the unilateral lease attached to the complaint, defendant was to pay $2,838 per month. Neither a security deposit nor a personal guaranty was due under the lease. Defendant did not pay the full rent as set forth in the purported lease from June 1, 2012, to May 13, 2013. Defendant sought to apply a construction management fee of $17,517 toward its rent obligations beginning around July 2013 through June 2014, but it again failed to pay plaintiff rent under the purported lease.

¶ 11 Defendant filed a motion to dismiss, arguing that plaintiff failed to allege a cause of action under the Forcible Entry and Detainer Act and failed to allege a demand for possession. Plaintiff responded that notice was not required in this matter as defendant was not a tenant since the purported lease was not authorized. Defendant claimed that it was a tenant because it had a lease, and because it had a lease, it was entitled to a five-day notice. The trial court granted the motion to dismiss without prejudice and also allowed plaintiff leave to file an amended complaint.

¶ 12 On August 27, 2014, plaintiff filed its first amended complaint for declaratory judgment and forcible entry and detainer. Count I sought declaratory relief to obtain a declaration that the lease between plaintiff and defendant for Suite 460 was invalid and unenforceable. Alternatively, if a valid lease for the premises existed between plaintiff and defendant, Count II sought damages and possession. Although plaintiff filed a third count, plaintiff did not proceed to trial on this count, and it was therefore abandoned. Plaintiff served a Landlord's five-day notice on defendant on August 18, 2014, which stated plaintiff's demand for rent and the termination of defendant's "right of possession."

¶ 13 Thereafter, defendant filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). Defendant sought to dismiss the suit on the basis that plaintiff failed to comply with the jurisdictional requirement that a written notice of rent due and/or demand for possession be served prior to filing a suit for possession. The trial court denied the motion.

¶ 14 On December 8, 2014, defendant filed before Judge Sheen a motion to consolidate the 2011 suit and the present action. Defendant contended that consolidation was proper because some of the issues and the "primary" parties were the same. Judge Sheen denied the motion.

¶ 15 Defendant subsequently filed its answer and affirmative defenses. In its answer, defendant admitted jurisdiction. As to its affirmative defenses, defendant alleged consolidation, unclean hands, and estoppel. However, defendant failed to allege facts to establish any of the alleged affirmative defenses.

¶ 16 A bench trial proceeded on November 23, 2015. Siurek testified that defendant took possession of Suite 460 without a lease, paid no rent between November 2011 through June 2012, and that Siurek unilaterally prepared and executed a lease on behalf of plaintiff and

defendant without approval of plaintiff's managers. Siurek further testified that defendant executed the unilateral lease setting rent at $2,838 per month, even though the prior tenant paid $3,561 per month.

¶ 17 Barus testified and opined that the reasonable base rental rate for Suite 460 was the amount paid by the prior tenant, Colco Services, and that the rate set forth in the purported lease was not the fair market rate. Barus stated that, in his opinion, the fair market value for Suite 460 was between $18 and $19.50 per square foot. Defendant did not provide any opinion testimony as to the reasonable rental value for the use and occupancy of Suite 460.

¶ 18 The trial court admitted into evidence the Operating Agreement and the Landlord's five-day notice, without objection. The court also admitted the rent rolls kept by defendant.

¶ 19 Following argument by counsel, the court entered judgment in favor of plaintiff and against defendant on Counts I and II of the amended complaint. The court found the lease was invalid given that Siurek did not have the authority to enter into the lease under the Operating Agreement, and that plaintiff was entitled to possession of Suite 460. The court awarded damages to plaintiff in the amount of $85,777, based on the prior tenant's monthly base rent.

¶ 20 The trial court denied plaintiff's posttrial motion but amended the damage amount to $85,767. Thereafter, the court denied defendant's posttrial motion. Defendant timely appeals.

¶ 21 II. ANALYSIS

¶ 22 A. Notice

¶ 23 Defendant first claims that plaintiff failed to provide proper statutory notice, and on that basis, the trial court erred in denying defendant's motion to dismiss and finding for plaintiff after trial. This issue can be resolved quite simply.

¶ 24 Section 9-102 of the Forcible Entry and Detainer Act requires notice only when a lessee of land holds possession without right after the termination of the lease or where notice is specifically required. 735 ILCS 5/9-102 (West 2014). Here, defendant agrees that this case falls under section 9-102(a)(2) of the Forcible Entry and Detainer Act. 735 ILCS 5/9-102(a)(2) (West 2014). No notice is required under that section where there is no landlord-tenant relationship. *North American Old Roman Catholic Church by Rematt v. Bernadette*, 253 Ill. App. 3d 278, 294-95 (1990). The trial court held that the lease was invalid and granted judgment for plaintiff on that basis in Count I. Defendant does not appeal that portion of the judgment in which the trial court held that no lease existed between plaintiff and defendant. Since the lease was invalid, there was no landlord-tenant relationship between plaintiff and defendant. Therefore, defendant's notice argument necessarily fails.

¶ 25 Defendant argues that the trial court erred in entering judgment for plaintiff on Count II of the complaint. Again, defendant bases this contention on the faulty notice requirement because Count II presumes the existence of a valid lease. Where the trial court held that there was never a valid lease and at the same time entered judgment in favor of plaintiff on Count II, its orders are inconsistent. Defendant has forfeited this potential argument by failing to raise it on appeal. Regardless, it would not make a difference as the prayer for relief in Count I covered the trial court's damages determination in Count II.

¶ 26 B. Section 2-619(a)(3) Motion to Dismiss or Stay

¶ 27 Defendant next contends that the trial court erred in denying its motion to dismiss or stay. On August 26, 2015, just prior to setting the trial date, defendant filed a motion to dismiss or stay pursuant to section 2-619(a)(3) of the Code (735 ILCS 5/2-619(a)(3) (West 2014)), claiming that the 2011 suit was the same cause of action and involved the same parties as the present suit.

Section 2-619(a)(3) allows for the dismissal of an action if there is another action pending between the same parties for the same cause. The standard of review for motions under section 2-619(a)(3) is abuse of discretion. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48 (1986). An abuse of discretion occurs only if the ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 28 In *Kellerman*, the court stated that "even when the 'same cause' and 'same parties' requirements are met, section 2-619(a)(3) does not mandate automatic dismissal." *Kellerman*, 112 Ill. 2d at 447. Factors that a court may consider in ruling on a section 2-619(a)(3) motion include comity, prevention of multiplicity, vexation, harassment, the likelihood for obtaining complete relief in a foreign jurisdiction, and the *res judicata* effect. *Id*. at 447-48. We note that defendant fails to address the factors identified in *Kellerman*.

¶ 29 Plaintiff responds that the trial court properly denied the motion because neither the causes of action nor the parties are the same. We agree. Plaintiff is a named party in both cases, but defendant in the present case is not named in the 2011 case. Arguably, this is a distinction without a difference as Siurek is the named defendant in the 2011 case and he owns defendant in the present case.

¶ 30 However, it is clear that the causes of action are different. The 2011 case seeks an order dissociating Siurek from plaintiff and for appointment of a receiver for plaintiff. In the case at bar, plaintiff seeks a declaration that the lease was invalid, possession of the office suite, and money damages. While the facts of both cases certainly overlap, the legal issues that need to be resolved do not. Based on this factor alone, it is difficult to see how the trial court's denial of the motion was an abuse of discretion. Additionally, two judges ruled consistently on this issue. In

the 2011 suit, Judge Sheen denied a motion to consolidate and, in the present suit, Judge Wheaton denied this motion.

¶ 31 C. Evidentiary Rulings

¶ 32 Defendant next contends that the trial court erred in barring evidence of prior unilateral actions of the co-managers, which would show that defendant's possession of the office suite, with or without a lease, was consistent with prior practice. Defendant points out that the court wrongfully rebuffed its attempt to admit evidence from Siurek of the co-managers' practices of locating their office in a building they own and manage and using part of it as an office of the building to show that occupying Suite 460 was consistent with prior practice and to demonstrate that defendant and plaintiff had a superior right to possession of Suite 460 arising from the co-managers' prior conduct. Defendant maintains that the importance of this rejected evidence is that it reveals that both managers acted unilaterally when it was in the best interest of plaintiff.

¶ 33 The decision to admit evidence rests within the sound discretion of the trial court. *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003). Evidentiary rulings will not be disturbed absent a clear abuse of discretion. *Simmons v. Garces*, 198 Ill. 2d 541, 567-68 (2002). Abuse of discretion occurs only when no other reasonable person would take the view adopted by the court and the ruling is arbitrary, fanciful, and unreasonable. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 34 The trial court held that the lease was invalid and it relied on the Operating Agreement, which clearly did not allow Siurek to act unilaterally regarding the property. Accordingly, defendant's evidence regarding past practices was irrelevant, as extrinsic evidence may not be used to interpret an otherwise unambiguous contract. See *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 24. Evidence of prior conduct to affect the terms of the unambiguous

Operating Agreement would be improper, especially when the agreement contained an integration clause, as in this case. See *Gomez*, 2013 IL App (1st) 130568, ¶ 26 ("[a] court may not use extrinsic evidence to interpret a facially unambiguous contract if the contract contains an integration clause.") (citing *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 466 (1999)).

¶ 35 D. Damages

¶ 36 Defendant last contends that the trial court erred in determining damages. The standard of review for determining the propriety of an award of damages is whether the award is manifestly erroneous. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543 (1996).

¶ 37 The trial court rejected Suirek's testimony regarding the monthly amount he set in the lease and instead relied on Barus's opinion that the court should use the prior tenant's monthly base rent of $3,561 as the fair market value of rent for Suite460 for a total of $85,767. Because the court heard the testimony of the parties and assessed their credibility, we should not disturb the trial court's use of the prior tenant's rent for determining the fair market value for the use and occupancy of Suite 460.

¶ 38 Defendant contends the trial court erred in rejecting the set-off of its $17,587 construction management fee against its use and occupancy and in rejecting the $44,247 credit for the use of Suite 460 as the office of the building. We will not reach the merits of this argument because it has not been properly presented on appeal. Defendant fails to develop this argument, cite to the record to support this argument,[2] or cite to authority to support this argument in violation of Illinois Supreme Court Rule 341 (h)(7) (eff. Jan. 1, 2016). This court is entitled to clearly

[2] Defendant continuously cites to an appendix rather than the record in violation of Supreme Court Rule 341(h)(6) (eff. Jan.1, 2016).

defined issues, cohesive legal arguments, and citations to relevant authority. See *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (3d) 130768, ¶ 17. Accordingly, this argument is forfeited. See *id*. Forfeiture aside, in its oral ruling, the trial court held that the Operating Agreement, which delineates the rights of the co-managers, did not give Siurek the right to enter into the lease, give a rent credit, or take an off-set for the construction management payment. This determination was not manifestly erroneous.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the Circuit Court of Du Page County.

¶ 41 Affirmed.