2013 IL App (4th) 130268-U

NOS. 4-13-0268, 4-13-0269, cons.

Order filed November 7, 2013

Modified upon denial of rehearing December 17, 2013

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JAMES ROUSONELOS and SANDY ROUSONELOS, Plaintiffs-Appellants, v. MARK LEACH, Defendant-Appellee.	))))))))	Appeal from Circuit Court of Livingston County No. 11LM7 Honorable Robert M. Travers, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Even though, pursuant to a long-term crop-share lease, defendant, the tenant, has exclusive control of farming operations on the rented land, it does not follow that he owes plaintiffs, the landlords, a fiduciary duty, considering that he never influenced them to buy the land that is subject to the lease and he does not farm the ground as their agent.

(2) By answering defendant's small-claims complaint instead of filing a motion to dismiss it pursuant to section 2-615 (735 ILCS 5/2-615 (West 2012)), plaintiffs have forfeited any challenge to the legal sufficiency of the complaint, which, despite any imperfections, sets forth a recognizable cause of action.

(3) Under article VI, section 9, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 9), the trial court had subject-matter jurisdiction to adjudicate defendant's small-claims complaint because the small-claims complaint presented a justiciable matter.

(4) Because the lease provided that the landlord and the tenant were to divide equally any agricultural subsidies from the federal government, the implied covenant of good faith and fair dealing obligated plaintiffs to cooperate with

defendant in obtaining subsidies from the Farm Services Agency (FSA) of the United States Department of Agriculture (USDA) by signing the applications he tendered to them in 2010 and 2011, applications which plaintiffs had no legitimate reason for refusing to sign.

(5) The trial court made a finding that was against the manifest weight of the evidence when it found plaintiffs to have materially breached the lease by refusing to sign the FSA applications that defendant tendered to them in 2010 and 2011; the refusal was a breach but not a material breach.

(6) The trial court did not make a finding that was against the manifest weight of the evidence when it found a termination of the lease to be unwarranted because of defendant's breach of the lease.

(7) The contractual provision that the landowner is entitled to attorney fees incurred in "enforcing *** performance" is inapplicable to this case because the landowner recovered damages from defendant for his nonperformance; the trial court did not compel defendant to perform.

¶ 2 Plaintiffs, James Rousonelos and Sandy Rousonelos, are the landlords, and defendant, Mark Leach, is the tenant under a crop-share lease. Plaintiffs brought an action against defendant for breach of contract and breach of fiduciary duty. Defendant counterclaimed against plaintiffs for breach of contract.

¶ 3 After hearing the evidence in a bench trial, the trial court found plaintiffs to be in material breach of the lease, and the court likewise found defendant to be in material breach of the lease. The court awarded damages to both sides.

¶ 4 Like defendant, plaintiffs were only partly successful in this lawsuit. They had to pay damages to defendant for breaching the implied covenant of good faith and fair dealing. The trial court rejected plaintiffs' theory that defendant owed them a fiduciary duty. The court found that plaintiffs had proved substandard farming work by defendant for the year 2011 but not for the year 2010. And the court declined plaintiffs' request for attorney fees pursuant to the lease as well as their request to terminate the lease. Plaintiffs appeal from all these unfavorable parts of

the judgment. (Defendant does not appeal.)

¶ 5 We find no error in the trial court's interpretation of the lease, a document we interpret *de novo*. Nor do we find the judgment to be against the manifest weight of the evidence. Therefore, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 A. Plaintiffs' Purchase of the Farmland, Which, As They Were Aware, Was Subject to a Long-Term Lease

¶ 8 On November 17, 2009, at an auction, plaintiffs bought 200 acres of farmland adjacent to their residence. The closing was in March 2010.

¶ 9 The previous owner of the land was the Chrystal F. Thompson Trust, and before the trust owned the land, Chrystal F. Thompson herself owned it.

¶ 10 Thompson was an elderly woman, and she had never been a farmer. In 1992, when she still owned the land, she entered into a 33-year crop-share lease with defendant.

¶ 11 At the time plaintiffs bought the land, they knew it was subject to this long-term lease with defendant. James Rousonelos testified he perused the lease before making a bid.

¶ 12 B. Provisions in the Lease

¶ 13 1. *The Tenant's Exclusive Management of the Premises*

¶ 14 The lease, which has an expiration date of February 28, 2025, refers to Thompson as the "Landlord" and to defendant as the "Tenant." The lease provides: "Tenant shall under the terms of this lease and for all purposes be in complete charge of all production and management of the above-described premises and of the farming operation thereon."

¶ 15 The landlord, however, reserves a "right of entry": "The Landowner reserves the right of himself, his employees, assigns, or prospective buyers to enter upon said premises at any

time for any purpose."

¶ 16 2. *Shared Benefits*

¶ 17 The tenant agrees to pay, as rent, "[o]ne-half of all crops raised on the demised premises."

¶ 18 Likewise, the landlord and the tenant agree to share equally any federal farm subsidies: "Payments pursuant to Federal Farm Programs shall be allocated one-half to the landlord and one-half to the tenant unless otherwise agreed to by the parties."

¶ 19 3. *Shared Expenses*

¶ 20 The landlord and the tenant agree to share equally the cost of herbicide, seed, and fertilizer. They also agree to share equally "the cost of shelling and combining the crops."

¶ 21 4. *The Tenant's Duties*

¶ 22 The lease imposes duties upon the tenant, including the following:

> "1. To keep farmstead neat and orderly, and to prevent any unnecessary waste, loss or damage to the property.
>
> 2. Not to allow noxious weeds to go to seed on said premises but to destroy same; to cut all weeds, sprouts and brush in fence rows and on roads adjoining, also to trim all hedge fences on said premises at least once each year without charge to the Landowner for labor."

¶ 23 5. *Attorney Fees*

¶ 24 The lease provides: "If the Tenant shall fail to pay the cash rent and advances, or account for the share rent as herein stipulated or shall fail to keep any of the agreements of this

lease, all costs and attorneys fees of the Landowner in enforcing collection or performance, shall be added to and become a part of the obligations payable by the Tenant hereunder."

¶ 25 C. The First Meeting Between the Parties

¶ 26 In March 2010, soon after the closing, plaintiffs met with defendant for the first time. In this meeting, plaintiffs proposed making changes to the lease. They wanted to change it from a crop-share to a cash-rent lease. They also wanted to substantially reduce, if not eliminate altogether, their contribution toward combining expenses. In an effort to persuade defendant to agree to these proposed changes, plaintiffs suggested they might allow him to farm some additional land they owned.

¶ 27 In this first meeting, the parties did not reach an agreement to modify the lease, and defendant did not waive his contractual right to combining charges. Although the lease requires the equal sharing of combining expenses, it does not specify how much the tenant may charge the landlord for combining expenses. Defendant told plaintiffs he would charge $50 an acre. Plaintiffs were taken aback; in their many years' experience in farming, $50 an acre seemed quite high. Nevertheless, this first meeting was cordial, and James Rousonelos left the meeting in an optimistic frame of mind, or so he testified.

¶ 28 D. The FSA Dispute

¶ 29 1. *Sandy Rousonelos's Testimony*

¶ 30 In the first meeting, defendant presented plaintiffs with an application for subsidies from the FSA. It is undisputed that the application required the landowner's signature, not just the tenant's signature.

¶ 31 At trial, plaintiffs' attorney asked Sandy Rousonelos:

"Q. So, this was a meeting that you had in early 2010, with Mr. Leach. At that meeting was the subject of the FSA government program first approached by Mr. Leach—

A. Yes.

Q. —or broached with you?

A. He wanted to sign up for it and my husband had informed him that, you know, there's plenty of time, you don't have to have it signed up till June 1st.

Q. Okay. Did you understand at that time what the FSA program required you to sign for. In other words, what were you going to be doing with that program?

A. Yes. You would sign up for how much property you're actually farming.

Q. Okay. And did you have an opportunity to review a map prepared by FSA indicating what, in March of 2010, the reported crop acreage was?

A. Yes, I did.

* * *

Q. In your opinion, at that time, did you believe this map was inaccurate?

A. Yes, I did.

Q. Why?

A. Because they had cut out a section that they were claiming was trees so it couldn't be farmed, but it was actually just tree limbs overhanging on the property. So, it was still part of the farm property that could have been farmed.

Q. Okay. And then so, at that time, did you believe the map was inaccurate?

A. Yes, I did.

Q. Okay. Did you convey that point, did you personally or did your husband convey that point to Mr. Leach at any time?

A. It was sometime before we signed up for it.

Q. You conveyed that to him.

A. Yeah."

¶ 32 2. *Defendant's Testimony*

¶ 33 Defendant's attorney asked defendant:

"Q. Now, FSA, with the FSA maps, did you receive government program payments in prior years before Mr. Rousonelos owned the ground?

A. Yes.

Q. Okay. And did you believe that you were going to—Did you in fact sign up for 2010 and 2011?

A. Yes.

Q. Did you receive any income from government program

payments?

A. No.

Q. Why did you not receive payments?

A. Because he refused to sign up.

Q. Okay. And he made mention that the map was in error?

A. Yes.

Q. And was anything done with the map?

A. Yes. The map was corrected. I believe it was changed in February of 2010, at the FSA office; and it was corrected approximately two weeks later.

Q. And when was the deadline for signing up?

A. June 1st.

Q. And was, at the time the map was corrected and sign-up time was still available, he could have signed up?

A. Yes.

Q. He didn't sign up for 2010. Did you sign up for 2011?

A. Yes.

Q. Did he sign up?

A. No.

Q. You received no income in 2010 and no income in 2011. Is that correct?

A. Correct.

* * *

Q. What, if anything, did Mr. Rousonelos indicate to you about receiving government payments?

A. He just said he considered it welfare and didn't want to be a part of it."

¶ 34 Defendant further testified that he and plaintiffs had a second meeting, which also was in "early March after the property closed," or "[p]robably pretty close" to that time. Plaintiffs' attorney asked defendant:

"Q. *** Were you, at that second meeting, told by the Rousoneloses that they did not want to apply for the FSA program at that time and weren't going to do so?

A. Okay.

Q. Yes?

A. I think he told me that at the first meeting also; so, yes, I'm sure he did at the second meeting again.

Q. Okay. And was it your understanding that the problem for them with respect to the FSA program in March of 2010 was that you had and were operating off of an incorrect FSA map?

A. No, that's not—

Q. So, there was never a discussion with you or information given to you by the Rousoneloses telling you that they disagreed with the map, that you were off by a half an acre or more?

A. They might have mentioned it, but that wasn't the reason they give me for not signing up."

¶ 35 3. *James Rousonelos's Testimony*

¶ 36 Defendant's attorney asked James Rousonelos:

"Q. Okay. And there was an issue, your wife testified and you were here and heard it, there was an issue as to a map with about a half acre; that's where the map was wrong. Is that right?

A. Yes, sir.

Q. And that was, you saw the map in March and either you or your wife brought it to FSA attention or somebody's attention; and the map was subsequently changed. Is that not correct?

A. Yes, we did that immediately on possession.

Q. So, you could have signed up and received a government program payment in 2010, 2011?

A. No, sir.

Q. Why?

A. We were illegal, and we have to wait a year; we were illegal.

Q. Okay. So, 2011 you didn't sign up either. Is that right?

A. Mr. Leach wouldn't do what he was supposed to do in that lease; so—

Q. So, he didn't do what you wanted to do; so, you weren't

going to give him the money?

A. No. No. No, that's not it.

Q. What is it?

A. I don't want to go to jail. You read that again real close, and half a dozen different governmental departments after you then.

Q. You want—

A. And I'm afraid of that right now."

¶ 37 4. *The FSA Application Form*

¶ 38 In 2010 and 2011, the Secretary of the USDA paid "direct payments" and "counter-cyclical payments" to farmers of corn, soybeans, and other crops. 7 C.F.R. § 1412.1 (2013). These are subsidies. A direct payment is independent of market fluctuations and is calculated on the bases of the type of crop, payment yields, and base acres. 7 C.F.R. § 1412.52 (2013); *Kinder Canal Co., Inc. v. Johanns*, 493 F.3d 543, 546 n.2 (5th Cir. 2007). "Counter-cyclical payments, in contrast, are based on a farm's historical acreage and crop yields and are triggered if market prices for covered commodities fall below [certain] levels ***." *Kinder*, 493 F.3d at 546 n.2.

¶ 39 "Base acres are calculated based on one of the following at the election of the farmer: a 4-year average of acreage planted in crop years 1998-2001, acreage not planted during crop years 1998-2001 due to natural disaster or other circumstance beyond the control of the farmer, or the sum of the contract acreage used to calculate the farm's fiscal 2002 year payment and the 4-year average (years 1998-2001) of eligible oilseed acreage." *In re Stevens*, 307 B.R.

124, 130 (E.D. Ark. 2004); see also 7 C.F.R. § 1412.21(a) (2013); 7 C.F.R. § 1412.3 (2013) (definition of "base acres"); 7 U.S.C. § 7911(a)(1) (2013).

¶ 40 The record contains an example of a "Direct and Counter-Cyclical Program Contract," plaintiffs' trial exhibit No. 7. This contract form is for the year 2008, and it is blank. The form includes a page entitled "Report of Acreage." On this page, for each field, the "operator" is to indicate the number of acres devoted to the growing of crops and the number of acres devoted to other uses of the land. Above the operator's signature line is the statement "I certify to the best of my knowledge and belief that the acreage of crops and land uses listed herein are true and correct."

¶ 41 On the final page of the form is a large box reserved for "Remarks/Sketches."

¶ 42 Plaintiffs' trial exhibit No. 8 is an aerial photograph, which, Sandy Rousonelos testified, shows the farm ground that she and her husband bought in March 2010. The photograph is dated March 24, 2010, and purports to have been prepared by the FSA. It shows two fields side by side, each field outlined with a white border and each field containing a number: 39.36 in the top field and 78.96 in the bottom field. The bottom field, where it abuts a tree line, contains an additional, extremely narrow rectangle, also drawn in white and apparently enclosing an area where trees overhang the field.

¶ 43 E. The Letter of March 22, 2010

¶ 44 The parties' relationship went sour quite soon, the same month as the closing. On March 22, 2010, James Rousonelos wrote defendant a stern letter, which began by complaining of the "uncompetitive and unfair contents of this 50/50 crop share lease," which defendant had declined to modify.

¶ 45 The letter declared that, for his part, James Rousonelos would not sign up for FSA subsidies until defendant met the demands set forth in the letter. James Rousonelos wrote: "FSA government program: at this time the 200 acres will not be signed up. We have till June 1 and the outcome will be determined by your decisions of my demands."

¶ 46 The first demand was to trim the hedge fence. James Rousonelos wrote:

> "With your last land lord you have breached number two of page four. To trim all hedge fences, as the FSA imaging took out 1/2 acre because you didn't do your job. Which now delays me one year to put it back in because of the one year ownership rule. So if I decide to give you the FSA program we lose 1/2 acre. This area as you know is on the south east piece of the 120 acres or east field. I have owned that tree line for six years and I was never asked permission to trim. You have mismanaged FSA ground benefits for your landlord and preventing that 1/2 acre to me if I decide to sign up. You also stayed fifteen feet from the boarder [*sic*] because your tractor couldn't get in any closer thus costing more money to your landlord. Under number two of page three I expect those trees trimmed so your equipment can pass and farm as close to the tree line as you can without permanently damaging the trees. I expect you to trim and maintain yearly."

¶ 47 The letter makes four additional demands. First, defendant shall "deliver the grain to a storage facility designated by the landlord," as the lease requires. James Rousonelos

writes: "I would suggest lining up trucking for getting the job done, as my choice of designation will be determined by price advantage to make up some of the unfairness you have instilled upon me." As it transpired, James Rousonelos demanded that defendant deliver the grain to a storage facility over 45 miles away, in Ottawa, Illinois. (Defendant did not take the grain to Ottawa.)

¶ 48 Second, defendant shall waive his contractual right to combining charges. James Rousonelos writes:

> "On the combining charges, they should be zero. I know of no one that charged for combining when crop sharing, its unheard of. You are basing your $50.00 an acre decision from the state of Iowa's custom combining charges. Do we live in Iowa? This area charges $25.00 to $30.00 an acre for custom combining and I pay $30.00 to have my own crop custom combined which includes a grain cart and one extra man and is adjoining the 120 acres in question. I'm still in shock that you would even consider charging me."

¶ 49 Third, defendant shall allow plaintiffs to use half the pole barn on the rented land and shall, within the week, provide them a key to the pole barn.

¶ 50 Fourth, defendant shall remove from the pole barn any items unrelated to the farming of the land, including "fence stakes and posts."

¶ 51 The letter concludes:

> "7. Everything listed in this letter has strong to exact legal argument. This lease is unfair to the landlord to justify a profit on

> the two hundred acres. I have no desire not to follow the lease for the next fifteen years I just want to be treated fair. I expect you to do your parts in the lease and I expect everything listed to go into effect.
>
> 8. Have your lawyer call me if you disagree with what I expect of you and I will give him the names of the two law firms that are working on this lease with me. They are aware of everything in this letter and I am also conferring with my lawyers on the April 1st accounting and what information I should be given by you. I will be expecting to see your accounting paperwork and you can give me a call when you are coming by and I will meet you in my shop office on April 1st if not sooner."

¶ 52 F. The Reduced Crop Yields in 2010 and 2011

¶ 53 Plaintiffs presented evidence that in 2010 and 2011, the crop yields on the leased land were considerably lower than in surrounding fields, even though the leased land had Class A soil and good drainage.

¶ 54 Plaintiffs called an agricultural expert, Mark Bols, who testified that in 2011 he measured the distance between cornstalks on the leased land and found overpopulation, that is, too many seeds planted per acre—a factor that could reduce yield.

¶ 55 G. Plaintiffs' Amended Complaint

¶ 56 Plaintiffs' amended complaint against defendant had two counts: one alleging breach of contract and the other alleging breach of fiduciary duty. Defendant allegedly breached

the contract, and also breached his fiduciary duty, in the following ways:

"a. Mr. Leach's failure to trim surrounding hedge and tree lines bordering the Property that resulted in his failure to plant crops on the Property's total available acreage;

b. Mr. Leach's failure to trim invasive growth or apply weed-control treatments to drainage ditches surrounding the Property;

c. Performing farming methods that have resulted in crop yields substantially below the expected average for the Property;

d. Performing farming methods that have resulted in crop yields substantially below the yields of farm properties surrounding and, in some cases immediately adjacent to Plaintiffs' Property.

e. Failure to comply with the Crop Share Lease's requirement to provide storage for Plaintiffs' one-half share of the crop yield 'at the Landowners' option' and 'to deliver such share in such manner as directed by and without cost to the Landowner to the elevator or its storage facility designated by the Landlord.'

f. Mr. Leach's keeping of unauthorized equipment within the Property's barn structures;

g. Refusing to provide Plaintiffs with a key to the Property's barn structures;

h. Keeping an unauthorized fuel storage tank and a bath tub on the Property;

i. Removing an access road he agreed to allow Plaintiffs to put in, at Plaintiffs' expense, without notice or warning to Plaintiffs.

j. Failing to provide an accurate accounting of the costs expended to maintain the property.

k. Failing to relinquish control of the property upon receiving a valid three-day notice from Plaintiffs pursuant to the Landlord's Lien provision of the Crop Share Lease."

¶ 57 H. Defendant's Small-Claims Complaint Against Plaintiffs

¶ 58 Defendant in turn filed a small-claims complaint against plaintiffs. The amended small-claims complaint alleges as follows: "[T]he Defendants, James Rousonelos and Sandy Rousonelos are indebted to the Plaintiff in the sum of $7,459.98 plus costs for crop expenses not paid by Defendants, as well as Defendants' failure to execute documents so that funds could be received from the United States Department of Agriculture."

¶ 59 I. The Trial Court's Decision

¶ 60 After hearing the evidence in a bench trial, the trial court rejected plaintiffs' theory of a fiduciary relationship and found only two material breaches of contract. One material breach of contract was by plaintiffs: their refusal to sign the FSA applications in 2010 and 2011. The other material breach of contract was by defendant: his unworkmanlike farming in 2011, resulting in a substantially reduced crop yield compared to adjacent fields farmed by others. The

court found that plaintiffs had failed to carry their burden of proving unworkmanlike farming by defendant in 2010.

¶ 61 For these material breaches of contract, the trial court awarded plaintiffs $7,920 in damages against defendant, and the court awarded defendant $4,521 in damages against plaintiffs.

¶ 62 The trial court denied plaintiffs' request to terminate the lease and also denied their request for attorney fees pursuant to the lease.

¶ 63 This appeal followed.

¶ 64 II. ANALYSIS

¶ 65 A. Whether Defendant Owed Plaintiffs a Fiduciary Duty

¶ 66 1. *Our Standard of Review*

¶ 67 Plaintiffs argue it is purely a question of law whether defendant owed them a fiduciary duty and that our standard of review therefore is *de novo*. In support of that argument, they cite a case saying we should decide *de novo* whether a legal duty exists (*Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 Ill. App. 3d 640, 644 (1980)), and they also cite a case saying we should interpret the law *de novo* (*In re Marriage of Daebel*, 404 Ill. App. 3d 473, 492 (2010)).

¶ 68 In this appeal, however, the real question is not what the law says. Nor is there really any question as to what circumstances give rise to a fiduciary duty. We can state, *de novo*, the obvious: a fiduciary duty arises if A puts special trust and confidence in B and B consequently dominates and influences A. *Carey Electric Contracting, Inc. v. First National Bank of Elgin*, 74 Ill. App. 3d 233, 237 (1979). Or we can state, *de novo*, another truism: a fiduciary duty arises in certain relationships, *e.g.*, attorney and client, guardian and ward, and

principal and agent. *Id.* at 237-38. In this appeal, the question is not what kinds of facts create a fiduciary duty. If that were the question, it would indeed be a question of law, to which we would undeferentially give the obvious answers.

¶ 69 The real question in this appeal is whether plaintiffs actually put special trust and confidence in defendant and whether he consequently dominated and influenced them. See *id.* at 237. In other words, the question is whether plaintiffs proved, by clear and convincing evidence, the *factual basis* of a fiduciary duty. See *A.T. Kearney, Inc. v. INCA International, Inc.*, 132 Ill. App. 3d 655, 661 (1985). "Ordinarily, the existence of a duty is a question of law to be determined by the court. [Citation.] However, where the duty depends on the existence of facts that are in dispute, the existence of the relevant facts presents a question for the [trier of fact] to resolve." *Jones v. O'Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 933 (2007). When reviewing a bench trial, we defer to the trial court's factual findings insomuch as they are not against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010).

¶ 70 After hearing the evidence in a bench trial, the trial court found that plaintiffs had failed to prove, by clear and convincing evidence, that they put special trust and confidence in defendant and that he consequently dominated and influenced them. See *Carey*, 74 Ill. App. 3d at 237. We will overturn that finding only if it is "clearly apparent" that plaintiffs did indeed prove, by clear and convincing evidence, that they put special trust and confidence in defendant and that he consequently dominated and influenced them. (Internal quotation marks omitted.) *In re Estate of Koester*, 2012 IL App (4th) 110879, ¶ 46.

¶ 71 2. *Special Trust and Confidence on the One Hand, With Resulting Dominance and Influence on the Other Hand*

¶ 72 A fiduciary relationship exists "where confidence is reposed on one side and resulting superiority and influence is found on the other." (Internal quotation marks omitted.) *Herbolsheimer v. Herbolsheimer*, 60 Ill. 2d 574, 577 (1975). Evidently, plaintiffs put some amount of trust and confidence in defendant, or else they surely would not have bought the 200 acres of farmland with the knowledge that, until 2025, the land was subject to a crop-share lease agreement with him, an agreement that gave him exclusive control of farming operations on the land. But trust and confidence and exclusive control of the work are not enough to create a fiduciary duty. "Normal trust between contracting parties does not turn a contractual relationship into a fiduciary one." See *Tully v. McLean*, 409 Ill. App. 3d 659, 683 (2011). Rather, the subservient party in a fiduciary relationship "reposes *special* trust and confidence" in the dominant party, to the point that the dominant party is able to influence the will and conduct of the subservient party. (Internal quotation marks omitted.) (Emphasis added.) *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 585 (2011), *aff'd sub nom. Khan v. Deutsche Bank AG*, 2012 IL 112219.

¶ 73 Most contractual agreements imply a certain amount of trust, even though they have a judicial backstop in that a breaching party can be sued. Parties do not enter into contracts with the expectation that they will have to sue each other for breach of contract. They want performance, not a lawsuit. They have some confidence in each other, or else they would not have chosen to do business with each other.

¶ 74 When a homeowner hires an electrician, for example, the homeowner has trust and confidence in the electrician, or else the homeowner would not have hired him in the first place. Also, the electrician has exclusive control of the electrical work. Let us say the

homeowner hires the electrician to wire a junction box. How to go about doing that is entirely up to the electrician. The wiring in the junction box is exclusively the electrician's domain.

¶ 75 Similarly, defendant was, in a manner of speaking, "hired" to farm the 200 acres, and he has exclusive control of that work. It does not follow that he owes plaintiffs a fiduciary duty any more than the electrician owes the homeowner a fiduciary duty. Even though the homeowner places his trust and confidence in the electrician and even though the electrician alone decides how to wire the junction box, the electrician does not, as a result, dominate and influence the homeowner. See *id.*; *Koltz v. Fordtran*, 412 Ill. 461, 468 (1952); *Koester*, 2012 IL App (4th) 110879, ¶ 46. Likewise, even though plaintiffs placed their trust and confidence in defendant by buying the 200 acres that were subject to the long-term crop-share lease with him as the tenant farmer, he has not, as a result, dominated and influenced them.

¶ 76 Trust and confidence are special, and create a fiduciary relationship, only if they enable the dominant party to influence or control the subservient party's decisions or behavior. (In this context, we are not talking about certain relationships, such as principal and agent, that give rise to a fiduciary relationship as a matter of law. See *Carey*, 74 Ill. App. 3d at 237-38.) "Normally, proof of a confidential or fiduciary relationship requires a showing that one person has reposed trust and confidence in another who *thereby* gains a resulting influence or superiority over the other." (Emphasis added.) *Ray v. Winter*, 67 Ill. 2d 296, 304 (1977). By buying the 200 acres, plaintiffs did not make themselves subservient to defendant or vulnerable to his powers of persuasion. They did not entrust him with "the handling of [their] business and financial affairs." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 927 (1992). They merely allowed him to farm the 200 acres, as he had a right to do under the crop-share lease agreement.

But they subjected his work to critical scrutiny, and when the work did not meet their standards, they complained to him and sued him.

¶ 77 3. *Acting On Behalf of Another*

¶ 78 By entering into the crop-share lease agreement, defendant did not agree to act solely for the landlord's benefit. See *County of Cook v. Barrett*, 36 Ill. App. 3d 623, 628 (1975) ("[A] fiduciary is bound to act solely for the benefit of his principal ***."). It just happens that, because of the 50/50 allocation of the harvest, what is beneficial to defendant is equally beneficial to the landlord, namely, growing a good crop. Defendant is a tenant farmer, not a cropper. See In re *Smith v. Drennan Joint Venture*, 302 B.R. 870, 871-72 (C.D. Ill. 2003) (explaining the distinction between a cropper and a tenant). If he were a cropper, he would be plaintiffs' employee (see *id.* at 871) and, as such, would owe them a fiduciary duty (see *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill. App. 3d 671, 683 (1978)). But he is a tenant rather than a cropper, as the lease says. When farming the land, he does not act on the landlord's behalf; he acts on his own behalf. See *Graham v. Mimms*, 111 Ill. App. 3d 751, 760 (1982).

¶ 79 4. *The Cases of Tully and Long*

¶ 80 In claiming the existence of a fiduciary relationship between them and their tenant, plaintiffs compare their case to *Tully* and *In re Estate of Long*, 311 Ill. App. 3d 959 (2000). *Tully* and *Long* are distinguishable, as we will explain.

¶ 81 a. *Tully*

¶ 82 In *Tully*, the plaintiffs were members of a manager-managed limited liability company, Old Town Development Associates, LLC (OTD). *Tully*, 409 Ill. App. 3d at 660.

(Statutory law provides for member-managed limited liability companies and manager-managed limited liability companies. 805 ILCS 180/15-1 (West 2012).)

¶ 83 To run OTD, one had to be both a member of OTD and also a manager: a manager-member. "The manager-member of OTD had exclusive responsibility for conducting OTD's business and the other members were to take no part in the management, conduct or control of the company." *Id.*

¶ 84 The plaintiffs in *Tully* sued the manager-members of OTD for breach of fiduciary duty, and they sued other defendants for conspiring with the manager-members. *Id.* The defendants included the current manager-member, Piper's Alley Management, Inc. (PAM), as well as the former manager-member, MCL Companies of Chicago, Inc. (MCL). Also, the plaintiffs sued MCL Management Corporation (MCL Management), which functionally was the same entity as PAM and MCL and which had acted in concert with them in breaching their fiduciary duties. *Id.* at 683. Finally, the plaintiffs sued Daniel E. McLean, the person at the top, who controlled PAM, MCL, and MCL Management. *Id.*

¶ 85 On appeal, "[i]t [was] undisputed that McLean, MCL and PAM had a fiduciary duty to OTD." *Id.* at 682. By statutory law, managers of a member-managed limited liability company owed the company and its members a fiduciary duty. 805 ILCS 180/15-3(g)(2) (West 1998). It also was undisputed that McLean, MCL, and PAM had breached that fiduciary duty by transferring some of OTD's assets to other business entities as "interest-free 'loans.' " *Id.*

¶ 86 MCL Management argued, however, that because it was not a manager-member of OTD, but instead was merely a clerical concern that helped the actual manager-member (MCL or PAM) with OTD's bookkeeping and day-to-day handling of bills, it owed OTD no fiduciary

duty and hence could not be held liable for breach of fiduciary duty. *Id.* at 681.

¶ 87 The First District responded:

> "Pursuant to the management agreement between OTD and MCL Management, MCL Management was the manager for the Piper's Alley complex, OTD's sole asset. *It was OTD's exclusive agent for the day-to-day operations of Piper's Alley*, responsible for maintaining the complex, renting the space, dealing with tenants, collecting rent, and maintaining the appropriate records. Normal trust between contracting parties does not turn a contractual relationship into a fiduciary one. *In re Estate of Long*, 311 Ill. App. 3d 959, 966 (2000). But the trust here was more than normal trust. The essence of a fiduciary relationship is that one party is dominated by another; the presence of a significant degree of dominance and superiority. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (1995). That degree of dominance and superiority exists here. OTD and plaintiffs were completely dependent on OTD's manager to run the company. The OTD members gave up all control over the company to the manager on the basis of promised high returns. The manager of OTD was also the manager of MCL Management.
>
> As the court found and the testimony of McLean and his accountant shows, all defendants, MCL Management included,

> were controlled by McLean and acted in concert with him with regard to the breaches of fiduciary duty. MCL, PAM and MCL Management were basically the same entity." (Emphasis added.) *Id.* at 682-83.

¶ 88 In the present case, plaintiffs reason that just as in *Tully* OTD and its members were completely dependent on the manager-member to run the company, so they, plaintiffs, are completely dependent on defendant to run the farm and he therefore owes them a fiduciary duty just as the manager-member owed OTD and its members a fiduciary duty.

¶ 89 Notwithstanding the emphasis the First District placed on exclusive control, *Tully* is distinguishable. Although the manager-member in *Tully* had exclusive control over the operation of OTD, just as defendant has exclusive control over the operation of the farm, the manager-member purported to exercise that control *on behalf of OTD*. Likewise, MCL Management, though it was not a manager-member, acted as "OTD's exclusive agent." *Id.* Defendant, by contrast, is not plaintiffs' agent; nor has he ever purported to act as their agent. This distinction is important because "[e]very person who accepts the responsibility of acting on behalf of another is a fiduciary." *Graham*, 111 Ill. App. 3d at 760. As a matter of law, an agent is a fiduciary of the principal. *Carey*, 74 Ill. App. 3d at 237. Defendant does not purport to farm the 200 acres on behalf of the landlord. Rather, he farms this land on his own behalf and in his own right, as a tenant. "[A] tenant is not *ipso facto* an agent of his landlord ***." *Johnston v. Suckow*, 55 Ill. App. 3d 277, 279 (1977). The lease does not say the tenant is the landlord's agent. No statute provides that a crop-share tenant is the fiduciary of the landlord, although, as we have observed, a statute provides that the manager-member of a limited liability company is a

fiduciary of the company and its members (805 ILCS 180/15-3(g)(2) (West 1998)). For all those reasons, *Tully* is distinguishable.

¶ 90 b. *Long*

¶ 91 In *Long*, the plaintiff, Maria Knobloch, was the executor of Edwin Long's will. *Long*, 311 Ill. App. 3d at 960. Long was deceased, and she wanted to sell some farmland that was in his estate. *Id.* The farmland, however, was subject to a 15-year crop-share lease, which would not expire for several years. *Id.* at 962. The tenants in the lease agreement were Bruce, Jerry, and Tia Lyon, and the plaintiff filed a petition against them to sell the farmland clear of the lease, alleging that Bruce Lyon had obtained the lease by exerting undue influence on Long, who had been an elderly and illiterate man. *Id.* at 960.

¶ 92 The association between Long and Bruce Lyon dated from 1986, when Long began leasing the land to him year by year. *Id*. at 961. The leases were 50-50 crop-share leases. *Id.*

¶ 93 In 1993, Long executed a codicil to his will, naming Bruce Lyon as a coexecutor. *Id.* (Two months after Long's death, Bruce Lyon resigned his position as coexecutor. *Id.* at 962.)

¶ 94 In 1994, Bruce Lyon presented to Long a proposed eight-page lease, drafted by Bruce Lyon's attorney. *Id.* at 961-62. The lease provided for a 15-year term, an unusually long term for a crop-share lease (*id.* at 962). Long and Bruce Lyon signed this lease in Long's home. *Id.* Bruce Lyon never told Long's children about the lease. *Id.*

¶ 95 In 1995, Long executed a health-care power of attorney appointing Bruce Lyon as his agent. *Id.* Bruce Lyon thereafter made health-care decisions for Long while he was in the

hospital being treated for cancer. *Id.*

¶ 96 The trial court denied the plaintiff's petition to set aside the 15-year lease (*id.* at 960), finding no evidence that Long had reposed trust and confidence in Bruce Lyon or that Bruce Lyon had influenced Long in the management of his affairs (*id.* at 963).

¶ 97 On appeal, we deemed that finding to be against the manifest weight of the evidence. *Id.* at 964. The record afforded no adequate explanation for Long's entering into a 15-year lease with Bruce Lyon. *Id.* at 965. Customarily, farm leases were annual. *Id.* at 962. A 15-year lease not only tied the landlord to a particular tenant but also reduced the sales value of the farm by eliminating active farmers from the pool of potential buyers. *Id.* Also, we observed, a landlord did not typically make a tenant his executor or give a tenant the power to make health-care decisions for him. *Id.* at 966. Thus, we held that a fiduciary relationship existed between Bruce Lyon and Long, that Bruce Lyon had profited from the fiduciary relationship by obtaining the 15-year lease, and that he had failed to meet his burden of showing he had exercised good faith in the transaction (*id.* at 967), such as by reading and explaining the lease to Long (*id.* at 966). (As the trial court ruled, the Dead Man's Act (735 ILCS 5/8-201 (West 1996)) barred Bruce Lyon's testimony that he had read and explained the lease to Long. *Long*, 311 Ill. App. 3d at 962.)

¶ 98 The sole similarity between the present case and *Long* is that both involve a crop-share lease with a long term. The resemblance ends there. The record appears to contain no evidence that plaintiffs are elderly and illiterate. The record appears to contain no evidence that defendant had a preexisting friendship with plaintiffs and that he exploited this friendship by persuading them to buy the land that was subject to his crop-share lease. The record appears to

contain no evidence that plaintiffs even knew defendant when they bought the land, although they knew that the land was subject to the lease and they reviewed the lease before making a bid. For all that appears, plaintiffs bought the land without being unduly influenced by anyone. Therefore, *Long* is irrelevant.

¶ 99 5. *Subservient Status By Assignment*

¶ 100 Plaintiffs suggest that Thompson put special trust and confidence in defendant and that he consequently dominated and influenced her and that, with the assignment of the lease to them, they stepped into her shoes as a subservient party in a fiduciary relationship. We are aware of no case holding that subservient status in a fiduciary relationship—the personal circumstance of reposing special trust and consequently being dominated—is assignable.

¶ 101 B. The Legal Sufficiency of Defendant's Small-Claims Complaint

¶ 102 According to plaintiffs, the trial court "erred in finding that [defendant] properly pleaded a cause of action for breach of the covenant of good faith and fair dealing." In other words, they contend that defendant's complaint—a small-claims complaint—was legally insufficient.

¶ 103 There are two steps to challenging the legal sufficiency of a complaint. The first step is to file a motion for dismissal pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). The second step is to schedule a hearing on that motion, with notice to the other parties. It does not appear that plaintiffs did either of those two things. Instead, they filed an answer to defendant's complaint and an "Affirmative Defense of failure to state a cause of action" (we quote from plaintiffs' brief). This so-called affirmative defense was self-negating because an affirmative defense, by its very nature, "*admits the legal sufficiency of*

the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." (Emphasis added.) *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). (There are exceptions in section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2012)), which, for example, lists "want *** of consideration" as an affirmative defense. *Cf.* Illinois Pattern Jury Instructions, Civil, No. 700.03 (2003) ("There is a contract if [plaintiff] proves there was an offer by one party, acceptance by the other party[,] and consideration between the parties.") Also, "where a defendant files an answer to a complaint, any defect in the pleading is waived." *Fox v. Heimann*, 375 Ill. App. 3d 35, 41 (2007). Because plaintiffs did not file a motion for dismissal pursuant to section 2-615 and set the motion for hearing but instead filed an answer to the complaint, they have forfeited any contention that defendant's small-claims complaint is legally insufficient. See 735 ILCS 5/2-612(c) (West 2012).

¶ 104 There is an exception to this rule of forfeiture: a defendant may at any time raise the contention that a complaint totally fails to state a cause of action. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 61 (1994). This exception is applicable, however, only if it is impossible to descry a cause of action in the complaint. *Id.* "The exception does not apply where the complaint states a recognized cause of action, but contains an incomplete or otherwise insufficient statement of that cause of action." *Id.* at 61-62.

¶ 105 The cause of action in defendant's complaint is recognizable: he complains of plaintiffs' "failure to execute documents so that funds could be received from the United States Department of Agriculture." This statement of defendant's cause of action might be incomplete or imperfect, but the cause of action is nevertheless recognizable. He believes that part of the benefit of his contract with plaintiffs is to receive subsidies from the USDA and that plaintiffs

have failed to do their part—namely, adding their signatures to the applications—to enable him to receive that contractual benefit. "If a complaint states a cause of action, *no matter how defectively or imperfectly alleged*, and is not challenged in the trial court, then such defectively stated cause of action is cured by judgment or verdict and cannot be attacked on appeal." (Emphasis added.) *Fox*, 375 Ill. App. 3d at 41. The judgment cured the defects in defendant's complaint—assuming, for the sake of argument, that his complaint was defective, given the liberal pleading standards for small-claims complaints (see Ill. S. Ct. R. 282(a) (eff. July 1, 1997)).

¶ 106 C. The Trial Court's Subject-Matter Jurisdiction To Adjudicate Defendant's Small-Claims Complaint

¶ 107 Plaintiffs argue that defendant's small-claims complaint presents no "justiciable matter" and that the trial court therefore lacked "jurisdiction" to adjudicate, "*sua sponte*," the issue of whether plaintiffs breached the covenant of good faith and fair dealing by refusing to sign the documentation from the USDA. Plaintiffs make this argument without an adequate discussion of (1) where a trial court's subject-matter jurisdiction comes from or (2) what a "justiciable matter" is—even though the supreme court has discussed these topics repeatedly. See, *e.g.*, *In re Luis R.*, 239 Ill. 2d 295, 300-01 (2010); *In re M.W.*, 232 Ill. 2d 408, 424 (2009); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334-35 (2002).

¶ 108 Article VI, section 9, of the Illinois Constitution provides:

> "Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume

> office. Circuit Courts shall have such power to review administrative action as provided by law." Ill. Const. 1970, art. VI, § 9.

Thus, circuit courts receive their subject-matter jurisdiction entirely from the Illinois Constitution, except in cases of administrative review. *Luis R.*, 239 Ill. 2d at 301. The Illinois Constitution gives them jurisdiction over "all justiciable matters." Ill. Const. 1970, art. VI, § 9. A "justiciable matter" is merely this: "a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." (Internal quotation marks omitted.) *Luis R.*, 239 Ill. 2d at 301.

¶ 109 Defendant claims that plaintiffs are obliged to sign the documentation from the USDA, that plaintiffs have failed to do so, and that consequently he has suffered a loss, for which he seeks compensation from plaintiffs. This is a definite controversy, not a hypothetical one, and it touches upon the legal relations of parties having adverse interests. Therefore, it is a "justiciable matter," over which article VI, section 9, of the Illinois Constitution gave the trial court subject-matter jurisdiction. "[E]ven a defectively stated claim is sufficient to invoke the court's subject matter jurisdiction, as [s]ubject matter jurisdiction does not depend upon the legal sufficiency of the [complaint]"; rather, it depends solely upon whether the complaint "alleg[es] the existence of a justiciable matter." (Internal quotation marks omitted.) *Louis R.*, 239 Ill. 2d at 301.

¶ 110 D. The Implied Covenant of Good Faith and Fair Dealing

¶ 111 1. *Our Standards of Review*

¶ 112 The trial court found that plaintiffs had breached the implied covenant of good faith and fair dealing by refusing, in 2010 and 2011, to sign the applications necessary for them and defendant to receive subsidies from the FSA. Plaintiffs dispute that the lease required them to sign these applications, and they further dispute that they acted in bad faith by refusing to sign them.

¶ 113 The interpretation and legal effect of a contract are questions of law. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007); *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). Therefore, we decide *de novo* whether the lease obligated plaintiffs to sign the FSA applications in 2010 and 2011. See *id.*

¶ 114 By contrast, it is a question of fact whether plaintiffs acted in good faith by refusing to sign the applications. See *Case v. Forloine*, 266 Ill. App. 3d 120, 125 (1993); *Central National Bank in Chicago v. Fleetwood Realty Corp.*, 110 Ill. App. 3d 169, 179 (1982). The trial court found they had not. We defer to that finding unless it is against the manifest weight of the evidence. See *Case*, 266 Ill. App. 3d at 125; *Louis v. Lexington Development Corp.*, 253 Ill. App. 3d 73, 78 (1993). The court's finding is against the manifest weight of the evidence only if it is "clearly evident" that defendant failed to prove bad faith or unfair dealing on plaintiffs' part in their refusal to sign the FSA applications. *Case*, 266 Ill. App. 3d at 125.

¶ 115 2. *The Nature of the Implied Covenant*

¶ 116 Whenever parties enter into a contract, they impliedly promise one another that, in the performance of the contract, they will deal with one another fairly and in good faith. *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 286 (1958). If a contract is susceptible to two different interpretations, one of which allows a party to act in bad faith and the other of

which requires the party to act in good faith, we should choose the interpretation requiring the party to act in good faith. *Id.*

¶ 117 One of the functions of this implied covenant of good faith and fair dealing is to put a fair and reasonable limit on the use of contractual discretion, a limit the parties presumably intended but did not express in their contract. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 671-72 (2007). "This covenant prohibits the parties from exercising their contractual discretion arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." (Internal quotation marks omitted.) *Id.*

¶ 118 "The duty of cooperation *** is closely related to that of good faith ***. [W]hile the two are often used interchangeably, the implied duty to cooperate comes more from the fact that one party cannot fully perform or receive its compensation if the other does not work with it." 6 Peter Linzer, Corbin on Contracts § 26.15, at 526 (Joseph M. Perillo, ed., 2010). Whenever "a party's non-cooperation *** is a deliberate attempt to prevent the other from receiving the fruits of the bargain," that party is guilty of bad faith in its "classic definition." *Id.*; see also *Hentze v. Unverfehrt*, 237 Ill. App. 3d 606, 611 (1992) (describing "bad faith" as including "lack of cooperation depriving the other contracting party of his reasonable expectations").

¶ 119 "[T]he duty [of good faith and fair dealing] may not only proscribe undesirable conduct, but may require affirmative action as well." E. Allan Farnsworth, Contracts § 7.17, at 551 (2d ed. 1990); see also *Kipnis v. Mandel Metals, Inc.*, 318 Ill. App. 3d 498, 506 (2000); *Spircoff v. Spircoff*, 74 Ill. App. 3d 119, 128 (1979).

¶ 120 3. *Plaintiffs' Breach of the Implied Covenant*

¶ 121 a. Plaintiffs' Contention That the Lease Agreement Does Not Require Them To Sign Up for FSA Subsidies

¶ 122 According to plaintiffs, the lease does not require them to sign up for the FSA program or any other program. All the lease says is that "[p]ayments pursuant to the Federal Farm Programs shall be allocated one-half to the landlord and one-half to the tenant unless otherwise agreed to between the parties." Plaintiffs argue: "The plain language of the Agreement speaks for itself. It does not require [them] to sign up for any government program and thus they could not be found in breach for failing to do so."

¶ 123 In support of this argument, plaintiffs cite *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301 (2006), *aff'd*, 226 Ill. 2d 208 (2007), in which the appellate court said: "[A] court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, write into the contract something which the parties have omitted or take away something which the parties have included." Also, plaintiffs place particular emphasis on *Oliva v. Amtech Reliable Elevator Co.*, 366 Ill. App. 3d 148 (2006), in which the appellate court declined to recognize a contractual condition that had no basis in the explicit text of the lease.

¶ 124 In *Oliva*, the two landlords of an office building brought an action against a tenant for breach of contract. *Id.* at 149. According to the landlords, the tenant had exercised its option to extend the lease for an additional term of three years, but then the tenant had reneged on the extension, taking the position that the lease had expired. *Id.*

¶ 125 The circuit court dismissed the landlords' complaint for failure to state a cause of action. *Id.* In the circuit court's view, the complaint was legally insufficient because it nowhere alleged that the tenant had exercised the option *in writing*. *Id.*

¶ 126 The landlords appealed because, as they read the lease, it did not say the tenant had to exercise the option in writing. *Id.* According to the landlords, the tenant had exercised the option, and had extended the lease, merely by making a payment of increased rent corresponding to the extended term. *Id.*

¶ 127 The appellate court agreed with the landlords. *Id.* at 152. By its provisions, the lease did not require the tenant to give any notice whatsoever, oral or written, of an exercise of the option to extend the lease. *Id.* The lease simply provided that, *whenever a notice was required*, it had to be in writing—which was not the same as requiring written notice of an extension of the lease. *Id.* Under the common law, if the tenant had an option to extend the lease, the tenant could exercise that option simply by remaining in possession of the premises. *Id.* at 152-53. Holding over had the legal effect of extending the lease pursuant to the option. *Id.* at 153. The tenant in *Oliva* had held over and had paid the increased rent. *Id.* The tenant thereby had exercised its option to extend the lease. *Id.*

¶ 128 Plaintiffs argue that just as the circuit court in *Oliva* should not have read into the lease an unexpressed condition that the option had to be exercised in writing, so, in this case, we should not read into the lease an unexpressed promise to sign up for the FSA program. *Oliva* is distinguishable, however, because putting the notice of extension in writing was unnecessary to realizing a contractual benefit that the parties to that lease reasonably expected. Merely holding over resulted in an extension; a written notice would have been superfluous. In the present case, by contrast, the parties reasonably expect "[p]ayments pursuant to the Federal Farm Programs," and signing up for such payments is essential to receiving them. The contractual provision allocating such payments half to the landlord and half to the tenant is, as a practical matter,

ineffective unless the landlord adds his or her signature to the FSA application tendered by the tenant.

¶ 129 A contractual provision can contemplate, without explicitly saying so, that the parties will work together to realize a benefit for one or both of the parties. In *Spircoff*, for example, a brother and a sister had a contract—a settlement agreement—in which the sister, the beneficial owner of an apartment building, agreed that her brother would receive $50,000 of the sales proceeds if, within four years, he succeeded in selling the apartment building for at least $504,000. *Spircoff*, 74 Ill. App. 3d at 121. The brother found a prospective buyer who was willing to pay $504,000, but the sale could not go forward until the brother provided him an income and expense statement for the apartment building. *Id.* at 122. This information was in the sister's control, and the brother requested it from her, but she delayed sending it to him until she herself found a prospective buyer. *Id.* at 126-27.

¶ 130 As the brother admitted, "nothing in the [Settlement] Agreement state[d] [the sister] was to furnish to [him] an income and expense statement." *Id.* at 125. Nevertheless, the First District agreed with the trial court that the implied promise of good faith and fair dealing obligated her to cooperate with him by providing him an income and expense statement. *Id.* at 127-28. The First District reasoned:

> "Even though the express words are absent, the court will compel performance in accordance with what it believes to be required by good faith and fair dealing. [Citation.] In the case at bar the Agreement clearly states that [the brother] had a right to sell the property for a period of four years. The evidence established that a

> statement of income and expenses would be necessary in order to secure a purchaser for the type of property in question. *** We conclude that the trial court's finding that there was an implied condition of cooperation which [the sister] breached is supported by the evidence." (Internal quotation marks omitted.) *Id.* at 128.

¶ 131 For another example, in *Kipnis* the employee had a written employment contract with his employer. This employment contract gave the employee the right, within 12 months after the termination of his employment, to make an offer to buy a portion of the employer's business, the "Service Center Division," provided that the employer had not fired him for cause. *Kipnis*, 318 Ill. App. 3d at 501. The employer would then have the option either to accept the employee's offer or to reject the offer and pay the employee an amount equal to 25% of the gain the employer would have realized had it accepted the offer. *Id.*

¶ 132 The employer fired the employee, and the parties agreed there had been no cause. *Id.* at 502. Over the next several months, the employee requested the employer to provide him financial information regarding the Service Center Division, and to allow his lenders and investors to tour the premises, so that he could "formulate his offer and *** obtain financing." *Id.* After an initial trickle of financial documents, the employer told the employee it would provide no further information until he made a *bona fide* offer. *Id.*

¶ 133 The 12-month period expired without the employee's making a *bona fide* offer, that is, one not hedged with qualifications because of the incomplete financial information. *Id.* at 504. The employee then filed an action against the employer, alleging the employer had "breached the employment agreement by refusing to provide [him] with appropriate financial

information." *Id.* at 503.

¶ 134 "The [trial] court *** found that no implied duty of good faith and fair dealing required [the employer] to provide [the employee] with financial information or access to the plant. To impose such a duty, the trial court concluded, would be tantamount to rewriting the employment agreement." *Id.* at 503.

¶ 135 Basically, the trial court required the implied covenant of good faith and fair dealing to be explicit. The First District perceived the contradiction. *Id.* at 506. "[A] covenant of good faith and fair dealing is implied in *every contract absent a provision that specifically states otherwise*." (Emphasis in original.) *Id.* "Whenever the cooperation of one party is necessary for the other party's performance, there is an implied condition that such cooperation will be given." *Id.* at 505. The employee could not render his performance of submitting a *bona fide* offer unless the employer cooperated by disclosing the financial information necessary to formulate such an offer. *Id.* at 506. Therefore, in its judgment of reversal, the First District instructed the trial court to enter an order "directing [the employer] to act in a manner consistent with its obligations of good faith and fair dealing," such as by producing "all documents reasonably necessary [for the employee] to formulate a *bona fide* offer." *Id.* at 506-07. The employee was to receive a reasonable amount of additional time to formulate such a *bona fide* offer. *Id.* at 507.

¶ 136 Note that the employee in *Kipnis* won this relief even though the employment agreement said nothing about the production of any financial information. Likewise, the brother in *Spircoff* won relief against his sister even though the settlement agreement between them said nothing about her providing an income and expense statement. Thus, when a party to a contract

is accused of breaching the implied covenant of good faith and fair dealing by failing to cooperate, that party will get nowhere by responding that the duty to render the specific act of cooperation is not stated in the contract. Of course the duty is not explicitly stated. The duty is implied unless it is expressly excluded. *Id.* at 506. That is why it is called "the implied duty of good faith and fair dealing" instead of "the explicit duty of good faith and fair dealing."

¶ 137 Granted, cases can be found that say "a court cannot *** write into the contract something which the parties have omitted" (*Gallagher*, 367 Ill. App. 3d at 301)) and "a presumption exists against provisions that easily could have been included in the contract but were not" (internal quotation marks omitted) (*Lee v. Allstate Life Insurance Co.*, 361 Ill. App. 3d 970, 979 (2005)). Those pronouncements, however, are too broad because contract law abounds in implied terms. See, *e.g.*, 810 ILCS 5/2-314(1) (West 2012) (implied warranty of merchantability); *In re Estate of Callahan*, 144 Ill. 2d 32, 38 (1991) (client's implied contractual right to discharge attorney); *Martindell*, 15 Ill. 2d at 286 (implied promise of good faith and fair dealing); *Fox*, 375 Ill. App. 3d at 45 (relevant laws are implied into the contract as though written therein); *American National Bank v. Powell*, 293 Ill. App. 3d 1033, 1045 (1997) (implied warranty of habitability); *Victory Memorial Hospital v. Rice*, 143 Ill. App. 3d 621, 623 (1986) ("[W]here there is a contract, express or implied, under which one party supplies articles or services to another and there is no provision setting out the amount the supplier is to be compensated, the law implies that there is an agreement to pay a reasonable price for the goods and services."); *Playskool, Inc. v. Elsa Benson, Inc.*, 147 Ill. App. 3d 292, 299 (1986) (Internal quotation marks omitted.) ("Presumably, if the architect or engineer fails to use reasonable care to produce a satisfactory structure, he may be sued *** for a breach of an implied term of his

contract ***.").

¶ 138 b. Plaintiffs' Claim That They Declined To Sign the FSA Applications To Avoid Committing Fraud

¶ 139 The trial court found that plaintiffs had breached the implied covenant of good faith and fair dealing by refusing to sign the FSA applications for the years 2010 and 2011. Plaintiffs challenge that finding. They argue the FSA map attached to the applications was inaccurate. They say in their brief: "James Rousonelos testified that he did not sign the documents presented by Leach to sign up for a USDA Farm Service Agency ('FSA') inventive program because the application included a map of the Property showing that an area of the property was being farmed that in fact was not being farmed [citation to record]." We do not see where James Rousonelos says that in his testimony. He merely testified that the map was "wrong" with respect to the half-acre and that consequently "[w]e were illegal." His letter of March 22, 2006, to defendant appears to presuppose that the FSA map shows the half-acre to be unfarmed, as in fact it was ("So if I decide to give you the FSA program we lose 1/2 acre.").

¶ 140 Sandy Rousonelos never testified that the FSA map showed a half-acre to be farmed that actually was unfarmed. Rather, according to her testimony, the inaccuracy in the map consisted in representing that the half-acre "couldn't be farmed."

¶ 141 Although Sandy Rousonelos's testimony is slightly more intelligible than James Rousonelos's testimony when it comes to identifying the supposed problem with the map, her testimony nevertheless leaves a couple of unanswered questions. First, how could this map, prepared by FSA, be considered a representation by plaintiffs? In the application, the "operator" has his or her own page for reporting the uses of the acreage, above the operator's own signature. It is unclear where, in the application, the operator attests to the accuracy of FSA's map.

¶ 142 Second, the narrow rectangle in the FSA map, drawn around the half-acre, encloses some tree foliage extending over the field from the hedge line. The map does not explicitly say this half-acre is incapable of being farmed. It is unclear how the map is a representation to that effect. Obviously, overhanging foliage can be trimmed, and trees in the field can be removed. Farmers do these sorts of things.

¶ 143 We do not mean to dismiss the possibility of an explanation. It is just that plaintiffs have not provided one in their brief. The defense of an "illegal" map makes no sense. Plaintiffs are the appellants, and it is their responsibility to make a coherent argument. The defense of an "illegal" map could be regarded as a pretext if the defense does not logically hold together.

¶ 144 In sum, the trial court did not make a finding that was against the manifest weight of the evidence when it found that a supposed inaccuracy in the map had nothing to do with plaintiffs' refusal to sign the FSA applications in 2010 and 2011. We defer to the court's evaluations of credibility. *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 501 (2010). The court reasonably found that plaintiffs' refusal to sign the FSA applications actually was a bad-faith effort to deprive defendant of some of the fruits of the contract and to thereby coerce him into acceding to their demands. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 286 (2007) ("[The purpose of the implied covenant of good faith and fair dealing] is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party's right to receive the benefit of the contract.").

¶ 145 In one circumstance, "coercion" is acceptable. If a party to a contract materially

breaches the contract, the other party may, in response, suspend its own performance until the breaching party cures its breach. E. Allan Farnsworth, Contracts §§ 8.16, 8.17 (2d ed. 1990). But in this case the only material breaches the trial court found were plaintiffs' refusal to sign the FSA applications in 2010 and 2011 and defendant's unworkmanlike farming in 2011. Plaintiffs' breach was first in time.

¶ 146 c. The Materiality of Plaintiffs' Breach

¶ 147 Plaintiffs challenge the trial court's finding that their breach of the implied covenant of good faith and fair dealing was a material breach of contract. The materiality of a breach is a question of fact, and we uphold the trial court's findings of fact unless they are against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006). "[T]he test for materiality is whether a breach is of such nature and importance [that], if anticipated in advance, the agreement would not have been made." *CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc.*, 406 Ill. App. 3d 783, 790 (2010); see also *Dragon Construction, Inc. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 33 (1997). To our knowledge, defendant has never claimed he would have refrained from entering into the 33-year lease with Thompson had he known in advance that the landlord would refuse to sign up for FSA subsidies in 2010 and 2011. In any event, such a claim would be implausible, considering how small the subsidies were compared to the total value of this long-term lease. Therefore, by finding that plaintiffs' refusal to sign the FSA applications in 2010 and 2011 was a *material* breach of the lease, the trial court made a finding that was against the manifest weight of the evidence.

¶ 148 E. Plaintiffs' Claim That Defendant Failed To Farm the Land in a Workmanlike Manner in 2010

¶ 149 Plaintiffs alleged that during the 2010 crop year, defendant breached the lease by

failing to farm the land in a workmanlike manner. The trial court found that plaintiffs had failed to carry their burden of proving that allegation (although the court found they had carried their burden regarding the 2011 crop year). Plaintiffs argue that finding is against the manifest weight of the evidence.

¶ 150 Essentially, the only evidence plaintiffs presented regarding the 2010 crop year was that the corn yield on the rented land was lower than the corn yields on adjacent lands. The corn yield on the rented land was 168 bushels per acre, whereas the corn yield on adjacent lands was in the 180s. It does not appear that plaintiffs presented evidence of any particular unworkmanlike thing that defendant did or failed to do in 2010 as a farmer (although they presented evidence that in 2011 he planted the corn seeds too close together, resulting in "overpopulating"). We are unaware of any authority that the doctrine of *res ipsa loquitur* applies to these circumstances. The trial court wrote: "Yields in crop year 2010, although low, were not so low as to be without a plausible explanation. Rousonelos did not help his argument in relation to yields in 2010 and 2011 by repeatedly referring to the low yields as 'mysterious' (Plaintiffs' memorandum page 15, 17, 18). If it is truly a mystery to the Plaintiff at the close of the evidence then his burden has not been satisfied." We do not find it to be "clearly evident" that plaintiffs carried their burden of proof regarding the 2010 crop year. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998).

¶ 151 F. The Trial Court's Refusal To Declare a Forfeiture of the Lease

¶ 152 Plaintiffs argue the trial court erred by declining to terminate the lease by reason of defendant's material breach in 2011. They say that, for purposes of this argument, our standard of review is *de novo*, and in support of the proposition that our standard of review is *de*

novo, they cite three cases (without pinpoint citations) that have nothing to do with the forfeiture of a contract. See Ill. S. Ct. R. 341(g) (eff. July 1, 2008); Ill. S. Ct. R. 6 (eff. Jan. 20, 1993).

¶ 153 We conclude it is a question of fact whether the substandard farming work in 2011 was "so material and important as to justify the injured party in regarding the whole transaction as at an end." *First National Bank of Evergreen Park v. Chrysler Realty Corp.*, 168 Ill. App. 3d 784, 793 (1988); *cf.* E. Allan Farnsworth, Contracts § 8.18, at 643 (2d ed. 1990) ("Whether a material breach has remained uncured for long enough to justify termination is a question of fact, much like the question whether the breach is material in the first place."). According to the Restatement (Second) of Contracts § 242 (1981), a material breach does not automatically justify terminating the contract, or discharging the other party's remaining duties to render performance. See also *Mohanty*, 225 Ill. 2d at 70 ("Under general contract principles, a material breach of a contract provision by one party *may* be grounds for releasing the other party from his contractual obligations." (Emphasis added.)). Rather, in deciding whether the nonbreaching party is discharged, a court should take into consideration several circumstances, including those in section 241. Restatement (Second) of Contracts § 242(a) (1981). The circumstances in section 241 are as follows:

> "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to

offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." Restatement (Second) of Contracts § 241 (1981).

Applying these factors from section 241, we observe that defendant has rendered materially substandard performance in only 1 year of a 33-year lease. Plaintiffs can be adequately compensated for this single year of substandard performance, and in fact the trial court has awarded them damages. Terminating the lease would cause defendant to forfeit the 12 years remaining on the lease, a considerable forfeiture. The court believed he would do better work in succeeding years. There was no evidence that his deficient performance in 2011 was willful or malicious. The factors in section 241 suggest the court did not make a finding against the manifest weight of the evidence when it found that termination of the lease was unwarranted.

¶ 154 G. The Trial Court's Refusal To Award Attorney Fees to Plaintiffs

¶ 155 Again, the lease provides:

"If the Tenant shall fail to pay the cash rent and advances, or account for the share rent as herein stipulated or shall fail to keep any of the agreements of this lease, all costs and attorneys fees of the Landowner in enforcing collection or performance,

shall be added to and become a part of the obligations payable by the Tenant hereunder."

Plaintiffs argue the trial court erred by refusing to award them attorney fees pursuant to this provision.

¶ 156 We give this attorney fee provision a strict construction. *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 516 (2001). By the terms of this provision, plaintiffs are entitled to attorney fees only if, in their lawsuit against defendant, they either (1) collected rent or advances from him or (2) enforced his performance of obligations under the lease. To "enforce" his performance means to "constrain" or "compel" him to perform. Merriam-Webster's Collegiate Dictionary 382 (10th ed. 2000). The appellate court has held that if parties in a lease agree to pay attorney fees " 'incurred or made by the other in enforcing the covenants and agreements of this lease,' " the prevailing party "is entitled to an award of attorney fees under this provision only when she or he can demonstrate that the other party was compelled by the trial court to obey a condition of the lease." *Powers*, 326 Ill. App. 3d at 516.

¶ 157 In this case, the trial court did not compel defendant to obey a condition of the lease or constrain him to perform any of his promises in the lease. Nor did the court award rent or an advance to plaintiffs. Instead, the court made plaintiffs whole by awarding them damages for defendant's nonperformance in 2011. Consequently, in our *de novo* interpretation of the attorney fee provision (*Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005)), we find it to be strictly inapplicable.

¶ 158 In their petition for rehearing, plaintiffs argue that, by this interpretation, we fail to give effect to the plain and ordinary meaning of the attorney fee provision. They say: "[T]he

plain language of the Attorney Fee Provision provides [that the] Landowner is also entitled to attorneys fees for 'enforcing collection' for [the] tenant's failure 'to keep any of the agreements of this lease.' " The trial court awarded plaintiffs $7,920 in damages. This amount, the court found, was the difference between what the corn yield should have been in 2011 and what it actually was (44 bushels x $6 per bushel x 30 acres). Thus, plaintiffs reason, "it is plainly evident that the trial court ordered the collection of funds by [the] Landowner from [the] tenant due to [the] tenant['s] failing to keep 'any of the agreements of this lease'—an outcome that, according to plaintiffs, "clearly" triggers the attorney fee provision.

¶ 159 Plaintiffs' interpretation is unpersuasive for two reasons. First, the attorney fee provision—which, again, we construe strictly (see *id.*)—nowhere mentions "damages," whereas it does mention "cash rent," "advances," and "share rent." "Damages" is a common word. Presumably, if Thompson and defendant meant "damages," they would have said "damages" in their lease agreement.

¶ 160 Second, interpreting "collection" to include the winning of damages would be an unnatural, if not incorrect, use of the word "collection." To "collect" means to "receive (money that is due)," as in "they called to collect a debt." (Emphasis omitted.) The New Oxford American Dictionary 335 (2001). Money is "due" if it is "required at a certain time" or "owed." *Id.* at 526. Thus, a "collection agency" tries to "collect" overdue debts, a government "collects" overdue taxes, and a successful litigant "collect[s] a judgment" (Ill. S. Ct. R. 289 (eff. April 1, 2007)). In this sense, "collection" is an apt word if it is applied to "cash rent," "advances," and "share rent," because those items are "due." Damages, by contrast, really are not "due" until the tribunal finds the defendant to be liable and awards the damages. In this case, plaintiffs won or

recovered damages; they did not, properly speaking, "collect" them.

¶ 161 III. CONCLUSION

¶ 162 For the foregoing reasons, we affirm the trial court's judgment.

¶ 163 Affirmed.