2016 IL App (4th) 150258-U

NO. 4-15-0258

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOSEPH MAZURKIEWICZ, a/k/a JOSEPH MAZURK, on Behalf of Himself and All Others Similarly Situated, Plaintiff-Appellant, v. PLATINUM GROUP PROPERTIES, LLC; PLATINUM GROUP PROPERTIES, LLC-SUNNYCREST; and PAUL ZERROUKI, Individually and d/b/a BZ MANAGEMENT, a/k/a BZ MANAGEMENTEMP, Defendants-Appellees.	)	Appeal from Circuit Court of Champaign County No. 12LM159 Honorable Charles McRae Leonhard, Judge Presiding.

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

ORDER

¶ 1 *Held*: The decision in the bench trial is not against the manifest weight of the evidence, and given the decision in the bench trial, which was unfavorable to all of plaintiff's individual claims, any error the trial court made earlier, when denying the amended motion for class certification, is moot, since a plaintiff lacking in his or her own right a meritorious claim cannot serve as a class representative.

¶ 2 The plaintiff is Joseph Mazurkiewicz. The defendants are Platinum Group Properties, LLC (Platinum); Platinum Group Properties, LLC-Sunnycrest; and Paul Zerrouki, individually and doing business as BZ Management or BZ Managementemp. Plaintiff alleged that, in November 2011, he was defendants' tenant and that they constructively evicted him, in addition to violating various Urbana ordinances. After denying plaintiff's amended motion for

class certification, the trial court held a bench trial, in which it found against plaintiff and in defendants' favor on all of his individual claims. Plaintiff appeals.

¶ 3 The decision in the bench trial is not against the manifest weight of the evidence. Given the decision in the bench trial, which we uphold, any error the trial court previously made regarding the amended motion for class certification is moot, since plaintiff, lacking a meritorious claim in his own right, cannot serve as a class representative. Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Amended Complaint

¶ 6 The amended complaint, which plaintiff pleaded "on behalf of himself and all others similarly situated," had five counts.

¶ 7 1. *Count I*

¶ 8 Count I invoked section 11-13-15 of the Illinois Municipal Code (65 ILCS 5/11-13-15 (West 2010)), which provided that if a building were maintained in such a way as to violate an ordinance, and if the violation "substantially affected" any owner or tenant of real property within 1,200 feet of the building, that person could bring an action to abate the violation. According to count I, defendants had violated the Urbana Code in one or more of the following ways:

> "(a) failing to maintain the subject matter premises [(apartment No. 18, 2018 South Fletcher Street, Urbana, Illinois)] including without limitation by, *inter alia*, permitting and/or failing to ameliorate infestations of cockroaches, bedbugs;

(b) failing to disclose the true name and contact information of the managing agent for the subject matter property in violation of § 12.5-21 of the [Urbana Code (Urbana, Ill., Code § 12.5-21 (2011))];

(c) other violations of the [Urbana Code]."

¶ 9 2. *Count II*

¶ 10 Count II alleged that defendants had violated section 12.5-10 of the Urbana Code (Urbana, Ill., Code § 12.5-10 (2011)) by deliberately attempting to enforce illegal provisions in a lease that plaintiff signed on October 28, 2011, for apartment No. 18.

¶ 11 3. *Count III*

¶ 12 Count III alleged that defendants had violated section 12.5-20 of the Urbana Code (Urbana, Ill., Code § 12.5-20 (2011)) by failing to return plaintiff's security deposit.

¶ 13 4. *Count IV*

¶ 14 Count IV alleged that defendants had violated section 12.5-19 of the Urbana Code (Urbana, Ill., Code § 12.5-19 (2011)) by failing to pay interest on plaintiff's security deposit.

¶ 15 5. *Count V*

¶ 16 Count V alleged that defendants had violated section 12.5-12 of the Urbana Code (Urbana, Ill., Code § 12.5-12 (2011)) by failing to provide him a summary or copy of chapter 12.5 of the Urbana Code (Urbana, Ill., Code, ch. 12.5 (2011)) at the time he signed the lease.

¶ 17 B. Denial of Class Certification

¶ 18 On July 23, 2014, the trial court held a hearing on plaintiff's motion for class certification. For essentially two reasons, the court denied the motion.

¶ 19 First, the court had doubts about the legal sufficiency of the amended complaint. The court was unconvinced by plaintiff's interpretation of various provisions of the lease.

¶ 20 Second, after receiving an opportunity to conduct discovery on class issues, plaintiff was unable to provide any "factual basis" for his belief that there was a "condition or custom or practice *** warrant[ing] class action."

¶ 21 C. The Bench Trial

¶ 22 On October 29, 2014, there was a bench trial on plaintiff's individual claims.

¶ 23 The first witnesses plaintiff called were two Urbana inspectors, John Schneider and Stephen Chrisman. The substance of their testimony was that, in 2010, the city found violations of the housing code at 2018 South Fletcher Street but that, afterward, on December 13, 2010, the city sent the owner of the property a "clear letter" finding that, upon reinspection, the violations had been corrected.

¶ 24 We will recount the testimony of plaintiff and Paul Zerrouki in somewhat more detail.

¶ 25 1. *The Testimony of Plaintiff*

¶ 26 In October 2011, plaintiff was a student at the University of Illinois in Urbana, and he and a roommate shared a two-bedroom apartment. They split the rent of $940 a month, but the roommate was the only lessee obligated on the lease.

¶ 27 Plaintiff decided he wanted an apartment of his own. He saw a studio apartment advertised on Craigslist, and he telephoned Paul Zerrouki and set up an appointment to look at the apartment. It was apartment No. 18, on the third floor of an apartment building at 2018 South Fletcher Street. Zerrouki showed the apartment to him on October 28, 2011, and they signed a lease that same day.

¶ 28 According to the lease (plaintiff's exhibit A), the lessor was Platinum, and the managing agent was "BZ Management." The rent was $450 a month. The term of the lease was November 1, 2011, to June 31, 2012. There was to be a security deposit in the amount of $450, "which, if necessary, [would] be forfeited and applied to the costs of repairing damages incurred by Lessee [or] rent due." Under the heading of "Condition of Premises," the lease provided: "It is stipulated that Lessee has examined the premises *** and that at the time of this lease, they are in good order and repair, and in a safe, clean, habitable condition." Plaintiff signed the lease as the "Lessee," and Paul Zerrouki signed it, on behalf of BZ Management, as the "Lessor's Agent." Underneath Zerrouki's signature, the lease gave a post office box and two telephone numbers for BZ Management. Also, there was a third telephone number, next to the word "maintenance."

¶ 29 On October 31, 2011, plaintiff paid Zerrouki November's rent, a security deposit, and an application fee in the amount of $15. Zerrouki gave him the keys to the apartment, allowing him to move in a day early.

¶ 30 Late at night on October 31, 2011, plaintiff moved some of his belongings into the apartment, and he saw 5 to 10 cockroaches scurrying up the walls of a closet. He had seen no cockroaches three days ago, when inspecting the apartment. Now he saw cockroaches in the kitchen drawers, cockroaches in and behind the refrigerator, cockroaches on the stove, and cockroaches in the living room. In all, he saw between 30 and 50 cockroaches in the apartment, some dead and some alive.

¶ 31 Also, the windows would not lock, and the blinds would not draw completely.

¶ 32 That night, around 9:30 or 10 p.m., plaintiff telephoned Zerrouki, but all he got was voicemail. Unable to endure the cockroaches, plaintiff gathered up whatever of his things he could carry, and he returned immediately to his old apartment.

¶ 33 The next day, November 1, 2011, plaintiff spoke with Zerrouki on the telephone. Plaintiff testified:

> "A. I called Mr. Zerrouki, I told him about the problem with the cockroaches, and asked if there would be a remedy. And he said that he would get a look into it. And at this point I started moving my stuff back to my old apartment.
>
> Q. Now did you ever go over to see Mr. Zerrouki again after that?
>
> A. Yes, a couple of times.
>
> Q. And did he ever tell you that he finalized, or rectified, or remedied the roach problem?
>
> A. He never touched on it, no.
>
> Q. Did he ever return your money, or offer to return your money?
>
> A. No."

¶ 34 Plaintiff never showed Zerrouki the infestation in the apartment. But he talked with Zerrouki on November 1 and 2, 2011, about the need to spray for bugs, and all Zerrouki said was that he would "look into it."

¶ 35 On November 8, 2011, plaintiff's attorney, Berton N. Ring, faxed and mailed Zerrouki a letter, which stated:

> "[Plaintiff] moved in on the 31st of October and moved out the next day on November 1, 2011. The apartment had substantial infestation of various types of bugs including cockroaches and

other numerous violations of the Housing Code. The unit was not cleaned nor in a condition to be habitable.

* * *

As you are aware, an infestation of bedbugs [*sic*] existing since the commencement of my client's tenancy, along with your failure to remedy it, has rendered the above-captioned property uninhabitable. This is a breach of your duties under the Urbana [Code]. Therefore, the rental agreement is terminated. My client returned the keys earlier. You must immediately return all security, interest due, and prepaid rent which is presently $900."

In addition, Ring demanded "moving expenses" in the amount of $500 and attorney fees in the amount of $750.

¶ 36 On December 9, 2011, Zerrouki faxed Ring a letter, reminding him that plaintiff had agreed, in the lease, to pay rent in the total amount of $4,050. The letter continued:

"It was explained to [plaintiff] that he would be released from his lease in exchange for payment of $900 (Nov + Dec rent) and forfeiture of his security deposit of $450. He agreed. Perhaps he has not communicated this with you?

Please know that your client and our tenant has simply changed his mind about renting the apartment. Under the circumstances, he is lucky to be released from a $4,050 obligation in exchange for $1,350. Since he has already paid $900, please let you[r] client know that we would gladly terminate his lease in

exchange for an additional $450 payment in certified bank check or money order."

¶ 37 In his testimony, plaintiff denied ever agreeing to a settlement with Zerrouki.

¶ 38 Defendants' attorney asked plaintiff:

"Q. You brought no pictures of these cockroaches with you today, correct?

A. Correct.

Q. And did you own a cell phone back in November, October, of 2011?

A. I've always had a cell phone since—

Q. Okay. No, it's okay.

A. —yes.

Q. But at the time did you have a cell phone?

A. Yes.

Q. Did it have the ability to take pictures?

A. Yes.

Q. And you took no pictures, correct?

A. I did take pictures.

Q. But you don't have them now?

A. No."

¶ 39 2. *The Testimony of Paul Zerrouki*

¶ 40 Paul Zerrouki testified he was the member manager of Platinum, which owned the apartment building at 2018 South Fletcher Street. Originally, he managed the apartment building

under the auspices of BZ Management, a partnership, but being unfamiliar with the legal technicalities of business organizations, he did not know if BZ Management still existed. In any event, he still managed the apartment building.

¶ 41 Defendants' attorney asked Zerrouki:

> "Q. Can you tell the court what is your recollection about the circumstances giving rise to [plaintiff's] coming to you and trying to rent the unit from you?
>
> A. He came to my office, and they [*sic*] discussed situation where he told me he was going to get out of the situation where he wasn't feeling safe with his roommate. And—
>
> Q. Can you describe his demeanor, or his mannerisms?
>
> A. He was kept shaking a little bit, nervous. Then he said he wanted to get an apartment immediately. He said[,] ['H]elp me.[']
>
> Q. Did you, on that occasion then, show him Unit Number 18?
>
> A. I did take him there and show the apartment.
>
> Q. And you and he were in the apartment and looked at the apartment?
>
> A. He looked at it, yes.
>
> Q. And you didn't see any bug infestation at that time?
>
> A. No, not at all."

¶ 42 Plaintiff signed the lease and paid $900, and Zerrouki allowed plaintiff to move into the apartment a day early, on October 31, 2011.

¶ 43 "Probably the next day," Zerrouki received a telephone call from plaintiff. Defendants' attorney asked Zerrouki:

> "Q. And what did he say to you, and what did you say to him?
>
> A. He told me he finally worked out the deal with his roommate to come back there. And he's happy to go back there, but he said that he wished his money back, and I said[,] ['W]ell, we have signed a lease now, it's difficult to get the money back like that.[']
>
> Q. Did he ever say anything to you, or make any complaints about any bug problems or infestations?
>
> A. No, not at all.
>
> Q. When's the next time that you had received any communication from [plaintiff]?
>
> A. I believe the next, the next time I heard was through the—his attorney."

¶ 44 Zerrouki testified the first time he heard anything about cockroaches in apartment No. 18 was in the letter of November 8, 2011, from plaintiff's attorney, Berton N. Ring. It should be noted, however, that, in paragraph 13 of their verified response to plaintiff's request for admission of facts, defendants stated: "Defendant [*sic*] admits that the Plaintiff complained about cockroaches when the Plaintiff turned his keys in and left the day after taking possession."

See *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 34 ("An admission in response to a request to admit is a judicial admission that cannot be controverted by contradictory evidence.").

¶ 45 In the bench trial, defendants' attorney asked Zerrouki:

> "Q. Did you have occasion after you received the telephone call from [plaintiff], to actually go back and look at the Apartment Number 18?
>
> A. I don't recall that. He called me back?
>
> Q. At some point later. Not when he called you back, but did you go back to the apartment for inspect the property at some point [*sic*]?
>
> A. Yes, I did.
>
> Q. And when you did that, did you see any cockroaches, dead or alive, or any evidence of infestation?
>
> A. No, none of that, I haven't seen.
>
> Q. And you did that within a short period of time after he left?
>
> A. Correct."

¶ 46 Zerrouki testified that the "rental season" was July to September and that from October to February it was "a flat market because the students [were] already all housed." After plaintiff abandoned apartment No. 18 and repudiated the lease, Zerrouki advertised the apartment on Craigslist, and he showed the apartment to prospective tenants, along with four other vacant

apartments in the building. But he did not "receive anyone who wanted to lease it in either November or December of 2011."

¶ 47 Defendants' attorney asked Zerrouki:

"Q. Can you describe for the court what floor is this unit on?

A. It's on the third floor, south side of the building.

Q. Is there any access to any windows from the outside, other than on the third floor itself?

A. No. There is no access to the windows, the window space [*sic*] in the parking lot on the third floor, south side.

Q. Did you rent this particular property unfurnished?

A. Correct.

Q. The blinds that [plaintiff] talked about, were these simply blinds left by the previous tenants?

A. Correct

* * *

Q. And with respect to the window, are you familiar with that window and how it opens and closes?

A. Yes.

Q. And how does it work?

A. It's double hung windows, so you have to push the top one up, the other bent inward to enlarge the lock, the hatch [*sic*] inside.

Q. And when you observed this window, were there any defects or problems?

A. No, absolutely not. I just—I think I'm used to the window, and that's all."

¶ 48 On cross-examination, plaintiff's attorney asked Zerrouki:

"Q. And you didn't do any spraying either, did you, of the unit?

A. Is that a question?

Q. Did you spray? Did you hire anybody to spray anything?

A. We do spray, yes, we do.

Q. And we asked you for those record[s], and you didn't provide any in discovery.

A. We have a company doing that.

* * *

Q. Well, and I asked for all those records, and you didn't provide them?

A. We also—we also—we provide—we provide it, we provide this product for the people allergic to it, but we very careful. It's—some people they just don't want to be sprayed, too, so it's—we do it, we spray.

Q. So are you saying you did spray, or didn't spray after he moved out? What are you saying?

A. We did spray. We did—

Q. I'm sorry?

A. We did for the apartment. We do all the apartments.

Q. When did you spray his apartment?

A. Well, I can't give you the time and date. We [spray] it once a month at the request of the tenant and—

* * *

Q. And you didn't bring any evidence concerning that you did spray or did anything to eradicate any potential cockroach problem back there years ago?

A. I believe you haven't brought any evidence, there was any, no pictures, where anyone could see there was roaches there, too.

Q. So the answer is no, you brought nothing, and you gave us nothing in discovery, correct?

A. That's because there isn't any roaches, sir.

Q. Well, I'm confused. You didn't spray or you did spray after he moved out?

A. I said at a preventive, preventatively we do it, we spray it, whether we have them, whether we don't, it's a routine in the business."

¶ 49 At the close of the evidence, the attorneys agreed that, instead of orally making their closing arguments, they would file their closing arguments, in writing, by a certain time and

that they thereafter, within a certain time, would file any reply to each other's closing arguments. Defendants filed a closing argument. Plaintiff filed no closing argument.

¶ 50 On March 16, 2015, the trial court held a hearing to announce its decision from the bench. Defendants' attorney was in attendance. Plaintiff's attorney did not appear.

¶ 51 After criticizing plaintiff's attorney for failing to submit a written argument, for filing an amended complaint that was "more readily characterized as an ad hominem political rant," and for "completely abandon[ing] even an appearance of advocacy in the case," the trial court addressed the merits of the case. The court said:

> "But even leaving aside the fundamental fatal flaws in [plaintiff's] amended pleadings, the evidence adduced at trial establishes that each of the plaintiff's claims is thoroughly meritless. In the first place, the testimony rendered by [plaintiff] to the effect that there's this revelation of a cockroach infestation, even taking it as true, does not objectively establish a violation of the implied warranty of habitability. He testified to the effect that he observed some 50 or so cockroaches on the premises, whether alive or dead. He also testified to there being some window treatments, and perhaps even a window that was in disrepair. But whether viewed singly, or in combination, those matters simply do not even come close to establishing a violation of an implied warranty of habitability.
>
> The other infirmity in that claim is that it is elemental that an aggrieved tenant must bring an infirmity to the attention of a

> landlord and provide the landlord with an opportunity to cure. And that wasn't done here, and that leads the court to another global and freestandingly dispositive infirmity in the plaintiff's case.
>
> Leaving aside the pleadings in this case, the evidence in the case establishes that within a period measurable in hours, [plaintiff], presumably with the advice of counsel, utterly repudiated this lease. He explicitly did so. And within 24 to 48 hours of the execution of the lease it was [plaintiff] who breached the lease in the biggest of possible ways. He simply repudiated [it] in its entirety.
>
> And so the evidence establishes that [plaintiff] committed the first material breach of this lease, and that the remaining defendants were discharged from further execution of their duties thereunder."

Therefore, the court entered judgment in favor of defendants and against plaintiff.

¶ 52 This appeal followed.

¶ 53 II. ANALYSIS

¶ 54 A. Plaintiff's Objections to Defendants' Brief

¶ 55 Defendants have attached, as an appendix to their brief, two documents, which appear to bear the file stamp of the circuit clerk: (1) their closing argument to the trial court and (2) their motion that the trial court hold plaintiff in default for failing to file a closing argument or, alternatively, grant them an extension of time within which to file a reply to plaintiff's closing argument, if and when he eventually filed one. Plaintiff objects to the inclusion of these two

documents in the appendix to defendants' brief, because, on September 25, 2015, we denied defendants permission to supplement the record with these documents. Plaintiff also objects to argumentative matter in the statement of facts in defendants' brief. See Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013) ("Statement of facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment"); Ill. S. Ct. R. 341(i) (eff. Feb. 6, 2013) (making paragraph (h)(6) applicable to the appellee's brief).

¶ 56 Plaintiff moves that we punish these violations by striking defendants' brief. We deny the motion. Instead, we will disregard the appendix of defendants' brief, and we also will disregard any argumentative matter in the statement of facts in their brief. See *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass'n*, 2015 IL App (1st) 150169, ¶ 24.

¶ 57 B. Plaintiff's Claim of Constructive Eviction

¶ 58 Plaintiff argues the trial court made a finding that was against the manifest weight of the evidence by finding against him on his claim that defendants had constructively evicted him from apartment No. 18. Plaintiff insists the apartment was useless to him because it was infested with cockroaches and because the window latches and window blinds did not work. (Apparently, he has abandoned his allegation that the apartment also was infested with bedbugs. And, besides, we note the record appears to be devoid of evidence to support that allegation.) "Constructive eviction has been defined as something of a grave and permanent character done by the landlord with the intent of depriving the tenant of the enjoyment of the premises. *** Where premises leased are rendered useless to the tenant or the tenant is deprived, in whole or in part, of the possession and enjoyment thereof as the result of the wrongful act of the landlord, there is a constructive eviction." (Internal quotation marks omitted.) *John Munic Meat Co. v. H.*

Gartenberg & Co., 51 Ill. App. 3d 413, 416-17 (1977). (It appears the only difference between a breach of the implied warranty of habitability and a constructive eviction is that, in a case of constructive eviction, the tenant abandoned the premises or surrendered possession of them. See *Gillette v. Anderson*, 4 Ill. App. 3d 838, 842 (1972).) The question is indeed whether the court made a finding that was against the manifest weight of the evidence when finding against plaintiff on his claim of constructive eviction. See *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 153 (1988). A finding is against the manifest weight of the evidence only if the evidence clearly requires the opposite finding. *Faith Builders Church, Inc. v. Department of Revenue*, 378 Ill. App. 3d 1037, 1042 (2008).

¶ 59 We are unconvinced the evidence clearly requires a finding that defendants constructively evicted plaintiff. The trial court did not have to believe plaintiff when he testified the apartment was infested with cockroaches. (The court remarked: "In the first place, the testimony rendered by [plaintiff] to the effect that there's this revelation of a cockroach infestation, *even taking it as true*, does not objectively establish a violation of the implied warranty of habitability." (Emphasis added.) The phrase "even taking it as true" implies the court did not necessarily believe plaintiff's testimony regarding a cockroach infestation.) The court could have chosen, instead, to believe Zerrouki. He testified he saw no cockroaches either when he showed the apartment to plaintiff or when he inspected the apartment after plaintiff abandoned it. This is just another case in which the testimony of one witness is pitted against the testimony of another witness. "[I]t is not this court's role to reevaluate witness credibility or reweigh conflicting evidence ***." *Hanks v. Illinois Department of Healthcare & Family Services*, 2015 IL App (1st) 132847, ¶ 20. We cannot say it would be impossible for a reasonable trier of fact to believe Zerrouki over plaintiff.

¶ 60 The same observation applies to the allegedly defective window latches. The trial court could have chosen to believe Zerrouki when he testified he had inspected the window latches and had found no defect in them.

¶ 61 In short, "[t]he trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while [they] testify[], to judge their credibility, and to determine the weight their testimony should receive." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995).

¶ 62 Alternatively, even if the trial court believed plaintiff about the cockroach infestation, the court was justified in finding that, before abandoning the apartment, plaintiff failed to give defendants a reasonable opportunity to eliminate the cockroaches. Allegedly, plaintiff took one look at the cockroaches and moved out immediately—on the first day of the lease (November 1, 2011), according to Ring's letter to Zerrouki. To quote defendants' response to plaintiff's request for admission of facts, admitted in evidence as plaintiff's exhibit No. 10, "[p]laintiff complained about cockroaches when the [p]laintiff turned his keys in and left the day after taking possession." "The tenant may not abandon the premises before allowing the lessor a reasonable opportunity to remedy the problem." *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d at 149.

¶ 63 The opportunity for a cure ties in with the idea that the habitability problem must be intractable. To effect a constructive eviction, the defect in the premises must be not only "grave" but "permanent." (Internal quotation marks omitted.) *John Munic*, 51 Ill. App. 3d at 416. The record affords no basis for supposing that the cockroach infestation was permanent. This is not to deny that if such an infestation is bad enough, it can resist efforts at extermination. But we just do not know if that is the case here. *Cf. Applegate v. Inland Real Estate Corp.*, 109

Ill. App. 3d 986, 990 (1982) (it is questionable that giving the defendant a greater opportunity to eliminate the cockroaches would have helped, considering that the defendant "had already made several unsuccessful inspections and sprayings of the apartment"). According to plaintiff's testimony, he complained to Zerrouki of the cockroaches, and Zerrouki responded that he would "look into it." Zerrouki testified that, every month, he hired a pest-control company to come in and spray the apartments, as a preventive measure, and that he also had apartments sprayed at the request of tenants. Plaintiff's attorney asked Zerrouki if he had apartment No. 18 sprayed, and Zerrouki answered he had done so, as a preventive measure; he just could not recall the time and date. Plaintiff never testified that, after allowing a reasonable time for a cure, he went back to the apartment to see if the cockroaches were still there. Instead, he abandoned the apartment immediately.

¶ 64 C. Illegal Lease Provisions

¶ 65 Count II of the amended complaint alleges that defendants violated section 12.5-10 of the Urbana Code (Urbana, Ill., Code § 12.5-10 (2011)) by enforcing, or attempting to enforce, illegal lease provisions. According to plaintiff, five provisions of his lease were illegal and unenforceable.

¶ 66 The first provision, in paragraph 1 of the lease, is that the lessee shall "pay the full amount of Total Rent as set forth in this lease, without regard to the number of days said unit is actually occupied by Lessee."

¶ 67 The second provision, in paragraph 7, is that the "Lessee shall not have the right to terminate this lease except by written consent of the Lessor."

¶ 68 The third provision, in paragraph 13, is that the lessor may re-let the premises after the lessee abandons them and that "such entry and re-letting shall not discharge Lessee from liability for rent herein reserved, nor from any other obligation under the terms of this lease."

¶ 69 The fourth provision, in paragraph 14, is that the "Lessee shall owe rent for the full term of the lease even if Lessee chooses to move out early."

¶ 70 The fifth provision, in paragraph 16, is that "[t]he termination of Lessee's possession of said premises shall not terminate Lessee's liability for rent, which becomes due after the possession is terminated."

¶ 71 Plaintiff regards these lease provisions as illegal and unenforceable for three reasons.

¶ 72 First, he argues that, under section 9-213.1 of the Forcible Entry and Detainer Act (735 ILCS 5/9-213.1 (West 2010)), a landlord must "take reasonable measures to mitigate damages recoverable against a defaulting lessee." In other words, a landlord must make reasonable efforts to re-let the premises and thereby reduce the landlord's (and hence the defaulting tenant's) exposure. *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 290-91 (1998). Plaintiff understands the above-cited provisions of the lease, particularly paragraphs 13, 14, and 16, as purporting—illegally, in his view—to release the landlord from this statutory duty to mitigate damages.

¶ 73 Second, plaintiff understands the lease provisions as requiring the tenant to pay rent *no matter what* and as prohibiting a tenant from terminating a lease for cause, whereas sections 12.5-23(a) and (b) of the Urbana Code (Urbana, Ill., Code §§ 12.5-23(a), (b) (2011)) permit deductions from rent as remedies for "cited housing code violations" and section 12.5-

23(c) (Urbana, Ill., Code § 12.5-23(c) (2011)) permits the termination of a rental agreement in certain circumstances.

¶ 74 Third, plaintiff interprets *Oak Park Trust & Savings Bank v. Village of Mount Prospect*, 181 Ill. App. 3d 10 (1989), as holding that "the obligation to pay rent is contingent upon actual possession." That is, plaintiff believes "a tenant is *not* required to pay rent if the tenant is not actually occupying the premises" (emphasis in original), whereas, under paragraph 1 of the lease, the tenant must "pay the full amount of Total Rent as set forth in this lease, without regard to the number of days said unit is actually occupied by Lessee."

¶ 75 Let us assume, for the sake of argument, that all five of the cited provisions of the lease are illegal and unenforceable for the reasons plaintiff has stated. We are unclear how he proceeds from that proposition to the further proposition that he is entitled to damages. He reasons, essentially, that because defendants, as the drafters, included some illegal provisions in a contract—a contract to which he freely agreed—he is entitled to damages. He writes in his brief: "In sum, the case law is clear that a lease provision which conflicts with *** [chapter 12.5 of the Urbana Code (Urbana, Ill., Code §§ 12.5-1 to 12.5-51 (2011))], or any state or federal law, is void. Under [section 12.5-10 of the Urbana Code (Urbana, Ill., Code § 12.5-10 (2011))], that creates a private right of action for damages."

¶ 76 Plaintiff oversimplifies section 12.5-10. Nowhere does section 12.5-10 say that, simply because a lease contains a prohibited provision, a tenant has a private right of action for damages. Instead, a tenant is entitled to damages only if the landlord "*deliberately attempts to enforce* any provision in a rental agreement which is prohibited." (Emphasis added.) Urbana, Ill., Code § 12.5-10(b) (2011). And the phrase "deliberately attempts to enforce" is specially defined in subsection (b). Urbana, Ill., Code §§ 12.5-10(b)(1), (b)(2), (b)(3), (b)(4) (2011).

¶ 77 We will quote section 12.5-10 in full:

"(a) Except as otherwise provided by this article, no rental agreement between the landlord and the tenant shall contain any provision:

(1) Waiving the rights or remedies provided under this article;

(2) Waiving any statutory rights or remedies provided under state or federal law;

(3) Providing that either the landlord or the tenant confess judgment on a claim arising out of the rental agreement;

(4) Providing that either the landlord or the tenant may recover attorney's fees incurred to enforce the rental agreement unless the rental agreement stipulates that both the landlord and the tenant be entitled to recovery of attorney's fees under identical terms and conditions;

(5) Limiting the liability of the landlord or the tenant arising under law;

(6) Prohibiting the tenant from subletting the rental unit;

(7) Requiring a monthly late fee in excess of five (5) percent of the monthly rental payment per month; fees

in excess of this amount may be charged if the landlord demonstrates actual costs which are greater;

(8) Providing for tenant's payment of lock-out charges, sublet fees, late checkout charges or any other fees or penalties that exceed the landlord's actual costs for services; or

(9) Automatically renewing the rental agreement by reason of the tenant's failure to provide notice of intent not to renew.

(b) A provision prohibited by subsection (a) included in a rental agreement is unenforceable. If the landlord deliberately attempts to enforce any provision in a rental agreement which is prohibited, the tenant may recover an amount totaling not more than two (2) months' rent and such damages, costs and reasonable attorney's fees as a court shall determine and award. The landlord shall be considered to have deliberately attempted to enforce a prohibited lease provision if the landlord knew or reasonably should have known that the provision was prohibited and the landlord:

(1) Refuses to approve a sublease as required by law or requires, as a condition of granting approval of a sublease, payment of a prohibited sublease charge,

acceleration of rent or payment of a higher rental rate than stipulated in the lease agreement;

(2) Refuses to provide a service because of the tenant's nonpayment of a prohibited fee or charge;

(3) Serves the tenant with written demand stating the intention to terminate the rental agreement for nonpayment of prohibited fees or charges;

(4) Files suit against the tenant to enforce the prohibited provision." Urbana, Ill., Code § 12.5-10 (2011).

¶ 78 Thus, subsection (a) (Urbana, Ill., Code § 12.5-10(a) (2011)) enumerates the lease provisions that the city of Urbana prohibits, and subsection (b) (Urbana, Ill., Code § 12.5-10(b) (2011) says that any such provision is unenforceable. Unenforceability does not automatically create a right of action for damages. Under subsection (b), a landlord does not incur liability for damages merely by making an out-of-court demand that the tenant perform a lease provision that subsection (a) prohibits. Unless the demand to perform the illegal provision takes the form of a lawsuit against the tenant (Urbana, Ill., Code § 12.5-10(b)(4) (2011)), the demand must have a certain kind of sanction or coercion attached to it (Urbana, Ill., Code §§ 12.5-10(b)(1), (b)(2), (b)(3) (2011)). If, for example, the demand is to pay a prohibited sublease charge, accelerated rent, or a rental rate higher than that stipulated in the lease, the landlord must tell the tenant, "Pay it, or else I won't approve the sublease." Urbana, Ill., Code § 12.5-10(b)(1) (2011). If the landlord demands the payment of "a prohibited fee or charge," the landlord must "[r]efuse[] to provide a service" (Urbana, Ill., Code § 12.5-10(b)(2) (2011)) or "[s]erve the tenant with a written demand stating the intention to terminate the rental agreement" (Urbana, Ill., Code

§ 12.5-10(b)(3) (2011)) as a consequence of nonpayment. As far as we can see from the record, defendants have taken none of those punitive or coercive measures against plaintiff. They have not sued him, either.

¶ 79 Plaintiff disputes, though, that section 12.5-10(b) "is an exhaustive list." He compares section 12.5-10(b) of the Urbana Code to section 2 of the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510/2(a) (West 2010)), which contains a nonexhaustive list of deceptive trade practices (*Francorp, Inc. v. Siebert*, 211 F. Supp. 2d 1051, 1054 (N.D. Ill. 2002)), and to section 1692e of the Fair Debt Collection Practices Act (15 U.S.C. § 1692e (1996)), which contains a nonexhaustive list of unfair debt collection practices (*Miller v. Wolpoff & Abramson, LLP*, No. 1:06-CV-207-TS, 2007 WL 2694607, at *6 (N.D. Ind. Sept. 7, 2007)).

¶ 80 Unlike the list in section 12.5-10(b), however, the list in section 2(a) of the Illinois Uniform Deceptive Trade Practices Act signifies its nonexhaustiveness by ending with a general, catchall item:

> "(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:
>
> (1) passes off goods or services as those of another;
>
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> * * *
>
> (12) engages in *any other conduct which similarly creates a likelihood of confusion or misunderstanding*."

(Emphasis added.) 815 ILCS 510/2(a) (West 2010).

¶ 81 Section 1692e of the Fair Debt Collection Practices Act indicates the nonexhaustiveness of its list by stating that the list has no limiting significance:

> "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. *Without limiting the general application of the foregoing*, the following conduct is a violation of this section:
>
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
>
> (2) The false representation of—
>
> (A) the character, amount, or legal status of any debt; or
>
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
>
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney." (Emphasis added.) 15 U.S.C. § 1692e (1996).

Then section 1692e continues with 13 additional examples of "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt"—which evidently are nonexhaustive, because, as section 1692e says in its second sentence, they do not "limit[] the

general application of the foregoing," namely, that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.*

¶ 82 Plaintiff identifies no similar, open-ended language in section 12.5-10(b) of the Urbana Code. He points to no language signaling that the items in subsections (b)(1), (b)(2), (b)(3), and (b)(4) (Urbana, Ill., Code §§ 12.5-10(b)(1), (b)(2), (b)(3), (b)(4) (2011)) are nonexhaustive examples. Therefore, in our *de novo* interpretation of section 12.5-10 (see *Ford Motor Co. v. Chicago Department of Revenue*, 2014 IL App (1st) 130597 ¶ 5), we conclude that the list in subsection (b) is indeed exhaustive. "Where, as here, the statute provides specific limitations *** to its application, the inference is that all other omissions should be interpreted as exclusions." *Hocraffer v. Trotter General Contracting, Inc.*, 2013 IL App (3d) 120539, ¶ 12.

¶ 83 By specially defining the phrase "deliberately attempted to enforce a prohibited lease provision," the city council provided specific limitations to the application of that phrase. " 'In construing statutes the ordinary, usual[,] and commonly accepted definitions of the words employed therein are to be taken as the correct definitions of such words, *unless the statute gives special definitions to the contrary* ***.' " (Emphasis in original.) *Lo v. Provena Covenant Medical Center*, 356 Ill. App. 3d 538, 545 (2005) (quoting *Wahlman v. C. Becker Milling Co.*, 279 Ill. 612, 622, 117 N.E. 140, 144 (1917)).

¶ 84 We reject plaintiff's proposed expansion of the specially defined phrase "deliberately attempted to enforce a prohibited lease provision." When the special definition is given effect, section 12.5-10(b) of the Urbana Code (Urbana, Ill., Code § 12.5-10(b) (2011)) affords him no right of action for damages.

¶ 85 D. The Security Deposit

¶ 86 1. *Defendants' Retention of the Security Deposit*

¶ 87 Plaintiff argues that, under section 12.5-20(b) of the Urbana Code (Urbana, Ill., Code § 12.5-20(b) (2011)), he is entitled to damages and other remedies for defendants' retention of his security deposit.

¶ 88 As in the interpretation of any legislation, our starting point is the text of the legislation—in this case, the text of the ordinance. Sections 12.5-20(a) and (b) provide as follows:

> "(a) A lessor of residential real property who has received a security deposit from a lessee to secure the payment of rent or to compensate for damage to the leased property may not withhold any part of that deposit *as compensation for property damage* unless he or she has, within thirty (30) days of the date that the lessee vacated the premises, furnished to the lessee, delivered in person or by mail directed to his or her last known address, an itemized statement of the damage allegedly caused to the premises and the estimated or actual cost for repairing or replacing each item on that statement, attaching the paid receipts, or copies thereof, for the repair or replacement. *** If no such statement and receipts, or copies thereof, are furnished to the lessee as required by this section, the lessor shall return the security deposit in full within forty-five (45) days of the date that the lessee vacated the premises.

> (b) Upon a finding by a circuit court that the landlord has refused to supply the itemized statement required herein, or has supplied such statement in bad faith, and has failed or refused to return the amount of the security deposit due within the time limits provided, the landlord shall be liable for an amount equal to twice the amount of the security deposit due, together with court costs and reasonable attorney's fees." (Emphasis added.) Urbana, Ill., Code §§ 12.5-20(a), (b) (2011).

¶ 89 The quoted text of this ordinance is almost a *verbatim* repetition of section 1 of the Security Deposit Return Act (765 ILCS 710/1 (West 2010)). (The only substantive difference is that section 1 is limited in its application to "lessor[s] of residential real property[] *containing 10 or more units*." (Emphasis added.) 765 ILCS 710/1 (West 2010).) It would be reasonable to infer, then, that, in January 1994, when enacting section 12.5-20 of the Urbana Code, the city council intended the above-quoted language of that section to have the same meaning the language had in section 1 of the Security Deposit Return Act, as interpreted by the courts.

¶ 90 In 1982—12 years before the enactment of section 12.5-20 of the Urbana Code—the appellate court interpreted section 1 of the Security Deposit Return Act as regulating only the retention of a security deposit "*as compensation for property damage*." (Emphasis in original.) *Applegate*, 109 Ill. App. 3d at 991 (quoting Ill. Rev. Stat. 1981, ch. 80, ¶ 101). Section 1 was irrelevant if the landlord withheld the security deposit for some other reason, such as to apply it toward unpaid rent after the tenant abandoned the premises and, in the landlord's view, unjustifiably repudiated the lease. *Id.*

¶ 91 A couple of years later, in *Hayward v. Tinervin*, 123 Ill. App. 3d 302, 306 (1984), we "agree[d] with *Applegate* that the statute [was] not applicable to situations where there [was] a good faith dispute over the deposit for reasons other than a claim of property damage." We added: "[A] landlord has some burden to come forward with some evidence of a good faith dispute for other reasons in order to avoid a presumption that the deposit is being withheld because of a claim of damages." *Id.*

¶ 92 We interpret section 12.5-20 of the Urbana Code the same way: it raises a presumption that the landlord's retention of the security deposit is because of property damage, and the landlord has the burden of rebutting that presumption by coming forward with "some evidence" that the landlord retained the security deposit for a "good[-]faith" reason other than property damage. *Id.* In the present case, the trial court could have reasonably found that defendants had rebutted that presumption—or even that plaintiff, by his own evidence, had rebutted it: a mere week after the lease began (or judging by the request for admission, the first day of the lease), plaintiff abandoned the premises and repudiated the lease. In defendants' good-faith opinion, plaintiff had no cause for doing so. Forty-five days after his abandonment of the premises (which normally would have been the deadline for the return of the security deposit (see Urbana, Ill., Code § 12.5-20(a) (2011)), defendants still had not found a new renter, so, in accordance with paragraph 2 of the lease, they applied the security deposit toward December's "rent due." "[O]nce evidence [was] introduced contrary to the presumption, the bubble burst[] and the presumption vanishe[d]" (*Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 462 (1983)), whereupon "the issue [was] determined on the basis of the evidence adduced at trial as if no presumption had ever existed" (*Diederich v. Walters*, 65 Ill. 2d 95, 101 (1976)).

¶ 93 In the absence of evidence that defendants are retaining plaintiff's security deposit "as compensation for property damage" (Urbana, Ill., Code § 12.5-20(a) (2011)), section 12.5-20(b) of the Urbana Code (Urbana, Ill. Code § 12.5-20(b) (2011)) affords plaintiff no remedy.

¶ 94 2. *The Nonpayment of Interest on the Security Deposit*

¶ 95 Plaintiff claims that, under section 12.5-19 (Urbana, Ill., Code § 12.5-19 (2011)), he was entitled to interest on his security deposit.

¶ 96 We disagree. Section 12.5-19(b) (Urbana, Ill., Code § 12.5-19(b) (2011)) provides:

> "The landlord shall, within thirty (30) days after the end of each twelve-month rental period, pay to the tenant any interest, by cash or credit to be applied to rent due, *except when the tenant is in default under the terms of the lease*. For purposes of this provision, *default shall mean nonpayment of rent* or a successful claim by the landlord for possession of the premises for good cause other than nonpayment of rent." (Emphases added.)

Because the trial court found against plaintiff on his claim of constructive eviction—a finding which, as we have discussed, is not against the manifest weight of the evidence—and because plaintiff's nonpayment of rent for December 2011 was therefore unexcused, he was "in default under the terms of the lease," and section 12.5-19 is inapplicable. Urbana, Ill., Code § 12.5-19(b) (2011).

¶ 97 Plaintiff argues, however, that the theory of a default on his part is untenable because it puts defendants in a self-contradiction. He writes in his reply brief:

> "Defendants cannot have it both ways. Defendants, in arguing that they did not breach the implied warranty of habitability, argue that the lease had been terminated by Plaintiff's letter. Yet if the lease had been terminated, Plaintiff could not have been in default on that lease—and therefore, his security deposit should have been returned."

¶ 98 Thus, by plaintiff's reasoning, all a tenant has to do to avoid defaulting on a lease is send the landlord a letter terminating the lease, because it is impossible to be in default on a lease that no longer exists. We are unconvinced. Obviously, there is such a thing as the anticipatory repudiation of a contractual duty, that is, a repudiation of a contractual duty before the time for performance has arrived. E. Allan Farnsworth, Contracts § 8.20, at 655 (2d ed. 1990). If A and B have a contract in which B promises to render future performance and if B, before the promised performance falls due, makes a clear and definite statement (or "manifestation") to A, who is not in material breach, that B is unable or unwilling to render the promised performance, A may regard B's statement as an "anticipatory breach." *Student Transit Corp. v. Board of Education*, 76 Ill. App. 3d 366, 369 (1979).

¶ 99 When plaintiff's attorney wrote Zerrouki on November 8, 2011, stating, "[T]he rental agreement is terminated," and demanding the refund of the security deposit and November's rent, he clearly signified his client's unwillingness to pay rent for future months. In the absence of any preceding material breach of the lease by defendants, plaintiff, by his unequivocal repudiation of the lease, committed an "anticipatory breach" of the lease—meaning he rendered himself in default as to future monthly installments of rent before they even fell due. *Id.* By putting apartment No. 18 back on Craigslist and showing it to prospective renters,

defendants elected to treat the lease as ended, detrimentally changing their position in reliance on plaintiff's repudiation of the lease. *Builders Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 105 (1978). By trying to mitigate their damages (see 735 ILCS 5/9-213.1 (West 2010)), defendants did not take plaintiff out of default. His contractual promise to pay rent from December 2011 to June 2012 onward remained unfulfilled. In the words of section 12.5-19(b), he was "in default under the terms of the lease" because of his "nonpayment of rent" that he had promised to pay. Urbana, Ill., Code § 12.5-19(b) (2011).

¶ 100 E. Failure To Provide Plaintiff a Copy or Summary of Chapter 12.5 of the Urbana Code

¶ 101 Again, count V of the amended complaint alleges that defendants violated section 12.5-12 of the Urbana Code (Urbana, Ill., Code § 12.5-12 (2011)) by failing to provide plaintiff a summary or copy of chapter 12.5 of the Urbana Code (Urbana, Ill., Code, § 12.5 (2011)) at the time he signed the lease.

¶ 102 In his brief, plaintiff makes no argument on count V. Therefore, any issue regarding count V is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 103 F. Denial of Class Certification

¶ 104 Plaintiff complains that, in denying class certification, the trial court scrutinized the merits of his individual claims rather than assuming their merits, as courts are supposed to do when ruling on motions for class certification. See *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 764 (2008).

¶ 105 Given, however, that we are affirming the judgment against plaintiff on his individual claims, the denial of class certification is moot. Plaintiff cannot serve as the representative of a class if he, individually, has no viable claim. See *Fakhoury v. Pappas*, 395

Ill. App. 3d 302, 312 (2009); *Cwik v. Topinka*, 389 Ill. App. 3d 21, 32 (2009); *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 693 (2007).

¶ 106 *Jensen* is analogous to the present case in that the would-be class representative lost on his individual claims. In *Jensen*, the plaintiff sued Bayer Corporation, the manufacturer of a recalled medication, Boycol, which the plaintiff formerly used. *Id.* at 683-84. He filed an amended motion for class certification, in which he raised claims of consumer fraud, breach of implied warranty, and medical monitoring, all in connection with the marketing and sale of Boycol. *Id.* at 684.

¶ 107 The trial court first entered an order denying the amended motion for class certification, finding no factual commonality. *Id.* at 686.

¶ 108 Later, the trial court granted summary judgment in the defendant's favor on all of the plaintiff's individual claims. *Id.* at 687.

¶ 109 The plaintiff appealed, and the appellate court affirmed the summary judgment. *Id.* at 689-93.

¶ 110 The appellate court then said:

> "Based on our conclusion that plaintiff's individual claims lacked merit, we believe that the trial court properly denied plaintiff's motion for class certification because plaintiff was an inadequate representative. See *Landesman v. General Motors Corp.*, 72 Ill. 2d 44, 48 (1978) (stating that class certification requires that 'the named representative[] of the putative class possess[ ] a valid cause of action' against defendant)." *Id.* at 693.

¶ 111 It is true that, in a case on which plaintiff heavily relies, *Cruz*, the appellate court reversed the denial of a motion for class certification because the trial court had prematurely evaluated the merits of the case. *Cruz*, 383 Ill. App. 3d at 782. The appellate court said:

> "Accordingly, we hold that the trial court may conduct any factual inquiry necessary to resolve the issue of class certification presented by the record. However, we emphasize that the trial court's discretion is limited to an inquiry into whether [the] plaintiff is asserting a claim which, assuming its merits, will satisfy the requirements of [section 2-801 (735 ILCS 5/2-801 (West 2006))] as distinguished from an inquiry into the merits of [the] plaintiff's particular individual claims. [Citation.] Thus, the trial court is not to determine the merits of the complaint, but only the propriety of class certification, and its factual inquiry and resolution of factual issues is to be limited solely to that determination." (Internal quotation marks omitted.) *Id.* at 764.

¶ 112 In *Cruz*, however, a trial had not yet occurred. Rather, the case was before the appellate court on a petition to appeal pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Jan. 1, 2003) (interlocutory appeal by permission "from an order of the circuit court denying or granting certification of a class action under section 2-802 of the Code of Civil Procedure"). *Cruz*, *383 Ill. App. 3d* at 753. The present case, by contrast, is not an interlocutory appeal pursuant to Rule 306(a)(8). Instead, this case proceeded to trial on plaintiff's individual claims, and defendants prevailed. The result in the bench trial—which we uphold—renders moot any contention that the trial court erred by denying plaintiff's amended motion for class certification.

See *Jensen*, 371 Ill. App. 3d at 693; *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 97 (4th Cir. 2011); *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1006 (7th Cir. 1994).

¶ 113 In short, it *now* makes no difference whether the trial court improperly considered the ultimate merits when ruling on the amended motion for class certification. A subsequent development in the case made the error academic: the court subsequently determined, in a bench trial, that plaintiff, individually, had no meritorious claim. Thus, he can represent no class.

¶ 114 III. CONCLUSION

¶ 115 For the reasons stated, we affirm the trial court's judgment.

¶ 116 Affirmed.