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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MARTIN H. FISHMAN and CHICAGO)	Appeal from the Circuit Court
TITLE LAND TRUST COMPANY, as)	of Du Page County.
successor trustee to American National Bank)	
and Trust Company, under trust dated April)	
25, 1990, Trust No. 10900-08,)	
)	
Plaintiffs/Counterdefendants-Appellees)	
and Cross-Appellants,)	
)	
v.)	Nos. 05-MR-620
)	05-LM-1813
FOX RIVER COMMONS SHOPPING)	07-L-1018
CENTER, LLC,)	08-LM-2286
)	
Defendant/Counterplaintiff-Appellant)	
and Cross-Appellee)	
)	Honorable
(Connie's Food Products, Inc., Plaintiff/)	Kenneth L. Popejoy,
Counterdefendant-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly ruled in favor of investor and tenant in dispute over shopping center restaurant on majority of issues, but erred in its damage award to investor. In addition, there was no legal basis for the award of attorney fees to tenant.

¶2 This case involves a long-running dispute relating to an outbuilding (Building) in a shopping center located at 844 South Route 59 in Naperville. Fox River Commons, LLC, (Fox River) owns and operates the shopping center. Fox River entered into a lease (Land Lease) with an investor who constructed the Building. The investor then entered into a different lease (Building Lease) with a tenant that operated a full-service restaurant. The current successors to the original investor are Martin Fishman and the land trust of which he is the beneficiary, for which Chicago Title Land Trust Company is the current trustee (collectively, Fishman). The current successor of the tenant is Connie's Food Products, Inc. (Connie's).

¶3 Over the course of several years, Connie's sought to extricate itself from its operations in the Building by assigning or subleasing its tenancy, but Fox River declined to allow any of the proposed replacement tenants. After several such attempts had failed, Connie's sued Fox River for breach of contract and tortious interference. Fox River then filed an eviction suit against Connie's and Fishman. Fishman then sued Fox River on much the same theories as Connie's had raised in its suit, but sought its own damages. The final suit in this quartet of lawsuits (all of which were eventually consolidated in the trial court) was a new eviction suit brought by Fox River solely against Fishman. The cases were tried in a bench trial. The trial court found largely in favor of Fishman and Connie's and against Fox River, but it did not award the victorious parties all of the attorney fees they sought. Fox River has appealed various aspects of the judgment in each of the consolidated cases, and Fishman has cross-appealed the reduction of its attorney fee request. We modify one award of damages and vacate the award of attorney fees to Connie's, but otherwise affirm the trial court's rulings.

¶4

BACKGROUND

¶ 5 The saga begins in 1990, when Fox River leased a portion of its shopping center to DD Partners, Inc., under the Land Lease. The Land Lease provided that DD Partners would construct a building of approximately 9,000 square feet to be operated as a restaurant, bar, nightclub, or similar use, and would pay a monthly rent to Fox River. Under the Land Lease, the tenant was required to be open for business during all normal business hours and to operate in 100% of the Building. Events constituting a default included, among other things, vacating the premises for longer than 60 days, failing to pay rent, or failing to comply with any other provision for at least 30 days after a written notice of such default. The Building could be subleased or assigned, but any assignee or sublessee would have to assume the obligations of the Land Lease and provide Fox River with an assumption agreement to that effect. In addition, the assignment or sublease would not release DD Partners from its obligations under the Land Lease. No assignment or sublease could be made without Fox River's consent, which could not be unreasonably withheld. If there were litigation to enforce any provision of the Land Lease, the prevailing party's attorney fees would be paid by the losing party.

¶ 6 DD Partners constructed the Building and initially operated its own restaurant there. In 1994, DD Partners began leasing the Building to Bertucci's Restaurant Corporation under the Building Lease. Fox River was not a party to the Building Lease. However, the Building Lease contained a provision similar to the Land Lease requiring Fox River's consent to any sublease or assignment of any portion of the Building, which consent could not be unreasonably withheld. (The Building Lease also had a similar provision regarding attorney fees in the event of any litigation over the lease.) As required by the Land Lease, Bertucci's provided Fox River with an assumption agreement. Fox River did not require Bertucci's to submit any financial information before consenting to the leasing of the Building.

¶ 7 Shortly after the Building Lease was signed, Fox River, DD Partners, and Bertucci's entered into a "Non-Disturbance, Attornment and Consent Agreement." This agreement provided that the Building Lease was subordinated to the Land Lease, and that Fox River would not sue Bertucci's (the tenant) for any default by DD Partners (the Building lessor). The Non-Disturbance Agreement also provided that, if the Land Lease were terminated for any reason, the Building Lease would remain in effect, with the same terms and conditions, as a direct lease between Fox River and the tenant.

¶ 8 In 1998, DD Partners assigned its interests in the Building, the Building Lease, and the Land Lease to Martin Fishman. Fishman subsequently transferred those interests into a land trust of which he was the beneficiary.

¶ 9 In January 2000, Bertucci's assigned its interests in the Building Lease to Connie's Pizza, Inc., which was owned by James Stolfe. The assignment provided that Bertucci's remained liable for any later defaults under the Building Lease. Connie's Pizza, Inc. began operating a full-service restaurant in the Building.

¶ 10 In April 2004, Connie's Pizza Inc. assigned the interests in the Building Lease to Connie's, a company operated by James Stolfe's son, Marc. Once again, the assignment provided that the assignor remained liable for any defaults under the Building Lease that might later occur. Fox River approved both of these assignments without requiring the submission of financial statements of the assignees or personal guarantees from anyone affiliated with the assignees.

¶ 11 At trial, Marc Stolfe testified that, as of April 2004, the Connie's restaurant in the Building had been losing money for some time. Accordingly, once Connie's became the assignee Stolfe immediately began looking for a new tenant to take over the space. Stolfe hired a real estate broker

to seek potential assignees. (We briefly describe here the subsequent events. We will provide greater detail when discussing the testimony at trial.)

¶ 12 In August 2004, Connie's entered into an agreement with Chicago Franchise Systems, Inc. (Chicago Franchise) under which the latter would buy the assets of Connie's restaurant and would assume Connie's obligations under the Building Lease. Connie's ceased operating its restaurant in the Building the next month. On December 31, 2004, Connie's and Chicago Franchise entered into a final purchase agreement. However, Fox River did not approve the assignment. On February 25, 2005, Anthony Di Mucci, the owner of Di Mucci Companies (the entity that is the current beneficial owner of Fox River) wrote the attorney for Connie's, declining to accept the assignment and advising Connie's that it was in default of section 4.02 of the Land Lease because its restaurant was not in operation.

¶ 13 On March 14, 2005, Fox River (acting through Thomas Niemira, who also worked for the Di Mucci Companies), sent the attorney for Connie's another letter giving "Tenant (D&D [*sic*] and Connie's)" notice of the default (*i.e.*, the fact that the restaurant was closed) and 30 days to cure the default.

¶ 14 On March 31, 2005, Connie's attorney wrote Niemira, saying that Connie's had signed another asset sales agreement with a prospective assignee, "The Mojitos Group, LLC." A copy of the proposed assignment was attached. Niemira responded, asking for financial statements and advising that its consideration of the assignment was not a waiver of the default. The Mojitos Group provided financial information, but on April 28, 2005, Di Mucci wrote the attorney for the Mojitos Group, stating that "[a]t this time, the landlord is not looking favorable [*sic*]" on the assumption of Connie's obligations under the Building Lease. On April 29, 2005, Di Mucci sent Fishman and Connie's a letter stating that the default identified in the March 14, 2005, letter had not been cured,

and that Fox River would terminate the lease five days after receipt of the current letter. In early May, after a flurry of correspondence, Connie's reopened for business at the Building. However, its operation was limited to a takeout and delivery operation only, without the full-service restaurant.

¶ 15 On June 1, 2005, Connie's filed a three-count complaint against Fox River in case no. 05-MR-620, seeking a declaratory judgment and damages for breach of contract and tortious interference with prospective economic advantage (the Connie's Suit).¹ All of the counts were based on the allegation that Fox River had unreasonably withheld its consent to Connie's proposed assignments of its interests. Fox River filed a counterclaim asserting that Connie's had breached the Building Lease by failing to operate a full-service restaurant in the Building. Fox River also filed an eviction action against Connie's and Fishman (case no. 05-MR-1813, the 2005 Eviction). In July 2005, the two cases were consolidated over Fox River's objection.

¶ 16 In September 2005, Stolfe decided to re-open a full-service restaurant in the Building. Connie's engaged in several months of "re-concepting" and renovation, and opened Pizza to the People, a 1960s-themed restaurant, in March 2006. Stolfe testified that, although the restaurant was "successful" for a limited time, it was not profitable.

¶ 17 In November 2005, Fox River filed a motion for substitution of judge as of right. This motion was denied on the ground that the trial court had already ruled on a substantial issue in the case (the motion for consolidation). Fox River appealed this ruling. The appeal took some time, due in part to a false start: we dismissed Fox River's first appeal (docket no. 2-06-0673) for lack of jurisdiction because the trial court had made no finding pursuant to Supreme Court Rule 304(a) (eff. Jan. 1, 2006). Fox River then obtained such a finding by the trial court and filed a new appeal.

¹Connie's voluntarily withdrew count I, which sought declaratory judgment, prior to trial. The trial court thereafter referred to Connie's remaining claims as counts I and II, although technically they were labeled as counts II and III in the complaint.

¶ 18 Meanwhile, in September 2007, Fishman filed its own suit against Fox River (case no. 07-L-1018, the Fishman Suit), alleging breach of contract, tortious interference, and interference with quiet enjoyment. (Although the suit also named Di Mucci and Niemira as defendants, these individuals were eventually dismissed from the case.) As with the Connie's Suit, the focus of the allegations in the Fishman Suit was the contention that Fox River unreasonably withheld consent to Connie's proposed assignments of interest, but Fishman alleged its own resulting damages.

¶ 19 In December 2007, Fishman contacted Fox River about the possibility of an investor opening an Italian restaurant, Scapa, in the Building. On December 17, 2007, Niemira wrote the investor's attorney, stating that Fox River's lease with another restaurant in the shopping center, Carrabas, contained a restrictive covenant prohibiting Fox River from permitting an Italian restaurant other than Connie's from opening in the Building. If that obstacle could be overcome, Niemira wanted the investor's financial statements and an acknowledgment that the investor would personally sign the assignment of the Building Lease. Fishman wrote Niemira, disputing that the restrictive covenant applied because the assignment to Connie's predated the lease with Carrabas. However, the investor chose not to proceed with the opening of Scapa in the Building.

¶ 20 The parties pursued settlement off and on throughout the litigation. The settlement effort heated up during the late fall and winter of 2007. In January 2008, Fishman sent Fox River a proposal under which Fox River would buy Fishman's interest in the Building in return for a payment plus an assignment of the right to receive rent from Connie's through the end of the current lease period; Connie's would tender possession of the Building to Fishman by February 1, 2008, and Fishman would then tender possession to Fox River; and Fishman and Fox River would release each other from the Leases and all claims and judgments in the pending litigation. Fox River initially

indicated that it would accept this proposal. In February 2008, Connie's closed the Pizza to the People restaurant and ceased all operations at the Building.

¶ 21 On March 24, 2008, this court held that the motion for substitution of judge as of right should have been granted, because the ruling on the motion to consolidate was not a substantive ruling. See *Fox Valley Commons Shopping Center LLC v. American Nat'l Bank & Trust Company*, docket no. 2-07-0350 (unpublished order pursuant to Supreme Court Rule 23(b) (eff. May 23, 2005)). Accordingly, all of the orders entered in the consolidated cases after that motion had been filed—including orders adding Fishman as a plaintiff in the Connie's Suit, granting summary judgment in favor of Connie's and Fishman in the 2005 Eviction, and awarding attorney fees to Connie's and Fishman under the Leases—were vacated.

¶ 22 On March 31, 2008, Fox River sent Fishman and Connie's a notice of default, advising Fishman that the Land Lease had been violated by Connie's closing of its restaurant and giving the parties 30 days to cure the default. Fishman then sent Connie's a similar notice of default, stating that the Building Lease would be terminated unless the default were cured within 30 days. Fishman and Fox River nevertheless continued to pursue possible settlement. Fox River insisted that Connie's also release its claims against Fox River. Fishman responded that it could not achieve this, as Connie's was not a party to the agreement. Fishman's payment of rent in April 2008 was the last payment of rent received by Fox River.

¶ 23 On May 1, 2008, Connie's gave Fishman the keys to the Building and formally relinquished all of its rights to possession under the Building Lease. The efforts at settlement faded, and on May 7, 2008, Fox River sent Fishman and Connie's a 5-day notice terminating the Leases unless the continuing default (failure to operate) were cured by the fifth day. Fishman responded with a letter asserting that it was trying to cure the default by finding a new tenant, but that default could not

“with due diligence be cured within” the 30 days following the initial notice and so the Land Lease could not be terminated. Fox River replied that it still considered Fishman to have defaulted and noted as well that Fishman had failed to pay May or June rent.

¶ 24 On June 24, 2008, Fox River filed an eviction action against Fishman only, alleging default and nonpayment of rent (case no. 08-LM-2286, the 2008 Eviction). Fishman successfully moved to transfer and consolidate the case with the Fishman Suit. Then, on February 4, 2009, all four cases (the Connie’s Suit, the 2005 Eviction, the Fishman Suit and the 2008 Eviction) were consolidated under the name *Martin H. Fishman, et al., v. Fox River Commons Shopping Center, LLC*. In July 2009, Fishman filed an amended complaint in the Fishman Suit, adding count V, a claim for specific performance of an alleged settlement agreement (the January 2008 proposal).

¶ 25 Fox River filed motions for summary judgment on all of its claims raised in the Connie’s Suit, the Fishman Suit, and the 2008 Eviction. On November 17, 2009, the trial court partially granted Fox River’s motion for summary judgment in the 2008 Eviction, awarding Fox River possession of the Building but reserving the remaining issues for trial. The trial court denied the other motions for summary judgment.

¶ 26 A four-day bench trial commenced on May 31, 2011. The first witnesses were Randee Becker, a real estate broker specializing in restaurant leases and sales, and Stolfe. Dave Howey, the owner of Chicago Franchise, the franchisor for Nancy’s Pizza and Al’s Beef, also testified. In the spring of 2004, Stolfe retained Becker to locate new tenants to take over Connie’s lease of the Building. The first potential tenant Becker found was Howey. Howey testified that he really liked the location and was very enthusiastic about the possibility of opening a Nancy’s Pizza there. Chicago Franchise entered into a purchase agreement with Connie’s, under which Chicago Franchise would buy all of the Connie’s business assets in the Building and assume Connie’s obligations under

the Building Lease. (Although the Connie's restaurant was not operating at this time, all of the equipment and furnishings remained in the building.) Connie's provided Chicago Franchise with a proposed assumption agreement and copies of the previous assignment assumption agreements to review. In December 2004, Chicago Franchise entered into a final purchase agreement with Connie's, with the closing set for January 2005.

¶ 27 On January 11, 2005, Chicago Franchise wrote to Fox River saying that the proposed assumption agreement was acceptable, but that the entity assuming the lease would not be Chicago Franchise itself but rather a franchisee. The franchisee was a group of investors including the former hockey player Steve Smith (the Smith Group). At trial, Howey testified that, besides Smith, the group of investors included several wealthy individuals and an experienced real estate investor, and Chicago Franchise had no problem approving the Smith Group as a franchisee. Howey was pleased that the group was savvy enough to recognize their lack of experience in operating a restaurant and had hired a restaurant management firm. Thereafter Smith sent Connie's a letter stating that the Smith Group would be "capitalized with assets of \$500,000 or more" and offering to provide additional information if needed. On January 31, 2005, Connie's sent Chicago Franchise a letter terminating the purchase agreement on the ground that the closing had not occurred by that date as required. Separately, on February 25, 2005, Di Mucci wrote Connie's to say that Fox River would not accept the Smith Group as an assignee, because it believed that the Smith Group was undercapitalized, as the estimated startup costs were \$700,000. Di Mucci also stated that Chicago Franchise "refused to personally get involved in Mr. Smith's lease for the property and even Mr. Smith was not going to sign personally." Howey testified that he and Smith had met with Niemira to introduce him to Smith. During that meeting, Niemira did not suggest that the Smith Group was undercapitalized. Rather, in Howey's view, the reason the deal did not go through was because Fox

River would not approve the assignment unless Chicago Franchise also was on the lease. As a rule, Chicago Franchise never entered into leases or assignments on behalf of its franchisees because doing so would require substantially more complex filings with regulatory bodies. The Smith Group went on to open other restaurants, one of which cost more than \$650,000 to open.

¶ 28 In March 2005 Becker brought Connie's a second potential assignee, Edwin Rios, the owner of Café Rumba in downtown Chicago, who wanted to open a restaurant called The Blue Mojito in the Building. Rios testified that the investors for the project included him and his wife, along with others (the Mojitos Group). On March 29, 2005, Connie's and the Mojitos Group entered into an asset purchase agreement and agreed that the Mojitos Group would assume Connie's lease. Connie's then forwarded the proposed assignment and asked Fox River to consent. On April 15, Fishman involved itself in the proposed assignment as well, asking for a variety of information including financial statements and federal and state tax returns for the last two years; a current judgment lien search; a copy of "organization documents," operating agreement and a list of its members; and a list of "proposed guarantors under the lease." On April 26, the Mojitos Group sent Fox River several financial statements for Café Rumba, a construction budget for the proposed restaurant totaling \$1.35 million, and biographical and financial information on Rios himself. At trial, Rios testified that Café Rumba entered chapter 11 bankruptcy at some point, and may have still been in bankruptcy at the time he became interested in the Blue Mojito project. However, it does not appear that Connie's, Fishman, or Fox River knew of the bankruptcy at the time the Mojitos Group was proposed as an assignee. Rios also admitted that earlier, when he had opened Café Rumba, he had underbudgeted the costs of the opening, and he had found that running a restaurant on his own was different from his previous experience operating restaurants for Hyatt and Hilton.

¶ 29 On April 28, 2005, Di Mucci wrote the Mojitos Group, commenting that the financials for Café Rumba showed that the restaurant was only now showing any profit after the first two and a half years of operation. Di Mucci also noted that, given the high construction budget, financing the proposed restaurant in the Building could cost about \$100,000 annually. The Rioses' own assets, net of their home and the interest in Café Rumba, totaled about \$300,000, "which they would be pledging for the construction loan and operating expenses." Di Mucci continued, "[t]here should be additional investment capital for this venture or a longer more sustained income stream" from Café Rumba. Di Mucci closed by saying that, "at this time," the "landlord" (Fox River) was not looking favorably on an assumption of the Building Lease by the Mojitos Group.

¶ 30 The following day, the attorney for the Mojitos Group wrote to Connie's saying that Fox River did "not appear to be open to" the Mojitos Group assuming Connie's lease. The attorney noted that, while Di Mucci's assessment of the Rioses' personal and business finances was correct, the assessment of construction costs was incorrect because those costs would be funded by investor equity rather than debt. The attorney closed by noting that the Mojitos Group had already expended substantial time and resources in pursuing the location and in light of Di Mucci's letter, it would "cease further due diligence" until it received a concrete assurance that Fox River would consent to the assignment. Thus, the proposed assumption and assignment did not go through. Becker testified at trial that, in 33 years of doing business as a real estate broker for restaurants, she had never seen a deal fail because of the landlord's failure to consent.

¶ 31 Connie's did not pass on to Fox River the corrected information about the Mojitos Group's planned financing of the construction costs. Rather, in correspondence to Fishman, Connie's took the position that it was unreasonable for Fox River to refuse to consent to assignments based on the financial conditions of the proposed assignees because there were already four entities that remained

liable to ensure that Fox River received its rent despite any future defaults: Bertucci's, Fishman, Connie's Pizza, Inc., and Connie's. Fishman wrote to Fox River and asserted the same position. Fox River responded that receiving rent was not its sole concern; it was also concerned that any future tenants be able to keep the restaurant open and operating.

¶ 32 Thereafter, Connie's filed the Connie's Suit. However, Connie's continued to pay rent under the Building Lease until April 2008. At trial, the chief financial officer for Connie's, Ivan Matsunaga, testified that he calculated that, between January 2005 and April 2008, Connie's paid \$621,846 in rent.

¶ 33 In addition to Becker, Stolfe, and Rios, other witnesses testified at trial, including Niemira, Di Mucci, Fishman, and one of Fishman's attorneys, Steven Lavin. These witnesses largely provided their own points of view about the events and documents described above. In addition, Fishman testified that he was not really aware of Connie's efforts to sublease or assign its lease to the Smith Group, and only became involved in the efforts to assign the lease to the Mojitos Group. However, he had no objection to either of the proposed assignments. Connie's paid all of its ordinary rent until it vacated the building in 2008. However, under the Building Lease Connie's was also supposed to pay, as additional rent, any legal fees incurred by Fishman as a result of any defaults by Connie's, and Connie's did not pay all of these amounts. Fishman had possession of the Building from May 1, 2008, through November 17, 2009, when the trial court granted possession to Fox River. During that time they made several efforts to find a new tenant, and Fishman detailed these. Lavin testified regarding the same events as Fishman, but in greater detail, especially with regard to the January 2008 proposal. Lavin also testified about Fishman's efforts to land Scapa Italian Kitchen as a tenant in the Building.

¶ 34 Niemira testified that he had a background in accounting and had helped Di Mucci operate multiple shopping centers for several years. Regarding the possible assignment of Connie's tenancy to the Smith Group, Niemira stated that Fox River refused to consent to the assignment because the investors were undercapitalized. He also noted that on January 31, 2005, Connie's sent Chicago Franchise a letter terminating their purchase agreement on the ground that closing had not occurred as required by the agreement, and that this termination occurred before Fox River formally rejected the assignment on February 25, 2005. Niemira ate dinner at Café Rumba during the time that he was assessing a possible assignment to the Mojitos Group, and he found the food and atmosphere very enjoyable. However, Fox River rejected the Mojitos Group as an assignee based on financial information. Di Mucci's testimony focused in part on the need to keep all of the stores and buildings in the shopping center filled. He noted that some shopping center tenants had required him to guarantee a certain level of occupancy. At the close of the evidence, the trial court ordered the parties to submit written closing arguments and separate proposed findings of fact. (These documents presumably were submitted, but they are not part of the record on appeal.)

¶ 35 The Trial Court's Findings of Fact and Judgments

¶ 36 On July 29, 2011, the trial court issued its findings of fact and its judgment in each of the four cases. As to the Connie's Suit, which alleged that Fox River breached the Building Lease by unreasonably withholding its consent to assignment of the lease, and that Fox River's actions constituted tortious interference with prospective economic advantage, the trial court found, *inter alia*, that the Smith Group and the Mojitos Group were both ready, willing, and able to assume Connie's obligations under the Building Lease. Fox River demanded financial information and guarantees from these potential assignees but had never made similar demands to its previous assignees—Fishman, Bertucci's, Connie's Pizza, Inc., and Connie's—all of whom remained liable

to protect Fox River against any losses due to defaults under the Land Lease or Building Lease. Accordingly, Fox River's refusal to consent to these assignments was unreasonable. Moreover, Connie's had a reasonable expectancy of entering into a sale of assets and assignment of the Building Lease with both the Smith Group and the Mojitos Group; Fox River knew about those expectancies; and Fox River's unreasonable refusal to consent to the assignments constituted intentional interference that prevented those expectancies from ripening into a valid business relationship. If Fox River had approved either of these assignments, the payments of rent by the assignee would have equaled Connie's rent obligation under the Building Lease. However, Connie's was not in privity with Fox River under the Land Lease: the only parties to that Lease were Fox River and Fishman.

¶ 37 Based on these findings, the trial court entered judgment in favor of Fox River on Connie's breach of contract claim, and in favor of Connie's on its claim of tortious interference. The trial court granted Connie's a total of \$615,895 in damages, the majority of which was compensation for rent Connie's was required to pay between January 2005 and May 2008. The trial court's written comments indicated a belief that Connie's had not yet paid this rent and it was due and owing to Fishman. The trial court denied Connie's request for an additional \$727,039 of reimbursement expenses related to "re-concepting" and renovating the restaurant into Pizza to the People, finding that these costs were the result of a voluntary decision by Connie's and were not a foreseeable result of Fox River's actions.²

²Although we find no record of the disposition of Fox River's counterclaim (for breach of the Land Lease based on Connie's failure to continuously operate a full-service restaurant), presumably it would fail for the same reason that Connie's breach of contract claim failed, the lack of contractual privity between Fox River and Connie's under the Land Lease. We note that no issue relating to this counterclaim was raised on appeal.

¶ 38 Regarding the 2005 Eviction, the trial court found that Fox River did not provide proper notice of the alleged defaults under the Land Lease to Fishman (either individually or through his land trust, which was the actual tenant under that lease). Rather, the March 14, 2005, notice was addressed only to Connie's, who was not a party to the Land Lease. Moreover, it was sent by Niemira on stationery from Di Mucci Companies, which was not the landlord under the Land Lease. The April 29, 2005, notice had fewer defects—it was sent on behalf of Fox River to both Connie's and Fishman himself (although Fox River still neglected to serve the trustee of Fishman's land trust). However, all of the notices were sent by regular mail, which was not an acceptable method of service under either the Land Lease, the Building Lease, or the Forcible Entry and Detainer Act (735 ILCS 5/9-11 (West 2004)). Finally, the trial court found that Connie's cured the alleged default within five days of May 2, 2005, (the date when it received the April notice) by re-opening its restaurant on May 6, 2005. For all of these reasons, the trial court entered judgment in favor of Connie's and Fishman. However, the trial court denied their requests for attorney fees under the Leases, on the ground that Fox River had sought to voluntarily dismiss this case on February 16, 2010, but Connie's and Fishman had objected and the trial court had denied the request.

¶ 39 The Fishman case involved Fishman's claims that Fox River's refusal to consent to the proposed assignments constituted a breach of the Land Lease, tortious interference with contractual rights under the Building Lease, and interference with the right to quiet enjoyment (counts I through III). Fishman alleged that Fox River's conduct injured Connie's, which then in turn injured Fishman because (1) during the period from June 2005 on, Fishman sustained litigation costs which it was unable to recoup from Connie's as provided by the Building Lease, and (2) during the period after April 2008, when Connie's stopped paying rent, Fishman was deprived of that rent while still having

to pay Fox River under the Land Lease. In addition, Fishman brought a claim for specific performance of the January 2008 settlement proposal (count V).

¶ 40 The trial court found that, consistent with its findings in the Connie's Suit, Fox River's conduct in refusing to consent to the proposed assignments was unreasonable and constituted a material breach of the Land Lease. Further, this conduct could be viewed as an attempt to wipe out Fishman's interests in the Building (which had cost more than \$1.5 million to construct) and to obtain the Building at no cost by wrongly seeking to terminate the Land Lease. The trial court therefore found in favor of Fishman and against Fox River on counts I through III, awarding damages in the amount of \$628,197 and also requiring Fox River to return the \$30,000 security deposit. The trial court ordered that the amount awarded to Connie's in the Connie's Suit be set off against this amount so that the two awards were not cumulative. The trial court denied Fishman's request for prejudgment interest and also denied any punitive damages, finding that Fox River's conduct did not rise to the level of willful and wanton. Moreover, the trial court denied Fishman's request for attorney fees on the basis that Fishman's status as a prevailing party sounded primarily in tort and was not solely the result of any breach of the Land Lease. As to count V, the trial court found that despite Fox River's purported "acceptance" of the January 2008 proposal, there was no meeting of the minds. Accordingly, the trial court entered judgment for Fox River on count V.³

¶ 41 The final suit in the quartet was the 2008 Eviction filed by Fox River against Fishman, which included two counterclaims as well. (The two counterclaims mirrored Fishman's allegations in the Fishman Suit: the first alleged tortious interference and breach of contract, while the second alleged

³The fourth count of Fishman's complaint sought injunctive relief, namely, an order restraining Fox River from declaring Connie's to be in default. The disposition of this count is not clear from the record; the trial court's judgment mentions only counts I through III, and count V. However, as no party raises any issue with respect to this count in either the appeal or cross-appeal, we need not consider it further.

a breach of the January 2008 proposal.) The trial court found that Fox River's notices of default, which included a 30-day notice of default sent on March 31, 2008, and a 5-day notice to quit sent on May 7, 2008, were properly sent to Connie's, Fishman, and Fishman's trust. However, they were defective in that Connie's vacating of the Building (the basis for the notice of default) was required under the January 2008 proposal. Even if the notices had been effective, Fox River's own conduct in refusing to consent to the proposed assignments constituted a prior breach of the Land Lease that relieved Fishman of its obligation under that lease to ensure that a restaurant operated in the Building. Moreover, as of May 2008 Fishman was attempting to re-let the Building in order to cure the default, but simply was unable to do so within the 30 days allotted. On June 11, 2008, Fox River wrote Fishman that Fox River had terminated the Land Lease, and this indeed had the effect of terminating that lease. Under the Non-disturbance Agreement signed by the predecessors to Fox River, Fishman, and Connie's, upon the termination of the Land Lease the Building Lease continued in full force and effect as a direct lease between Connie's and Fox River. Thereafter, Fishman was not liable to Fox River for rent under the Land Lease. The trial court found that there was no evidence that Fox River had attempted to mitigate its damages by seeking a tenant for the Building.

¶ 42 For all of these reasons, the trial court held that Fox River was not entitled to damages in the form of rent owed between May 2008 and October 31, 2010 (the end of that lease term for the Land Lease). The trial court entered judgment in favor of Fishman on both Fox River's claim for damages and Fishman's counterclaims, although Fishman was awarded only the same relief that he received in the Fishman Suit. (Possession had been resolved previously in November 2009 when Fox River was granted possession of the Building via court order.) The trial court ordered the parties to bear their own costs and fees.

¶ 43 Fox River, Connie's, and Fishman all filed motions for reconsideration. Both Fox River and Connie's challenged portions of the judgment in the Connie's Suit. Fox River raised substantive arguments to the effect that its conduct was not unreasonable and did not amount to tortious interference. The trial court denied this motion. Connie's pointed out that it had actually paid rent to Fishman through April 2008, and argued that therefore the award in the Connie's Suit should be payable to Connie's and should be cumulative to the award to Fishman in the Fishman Suit. The trial court granted this motion.

¶ 44 In the 2005 Eviction, both defendants (Connie's and Fishman) asked the trial court to reconsider its decision not to award contractual attorney fees to them. They argued that the court order from February 26, 2010, did not reflect any motion by Fox River to voluntarily dismiss the case, and that they were entitled to attorney fees under the Leases as prevailing parties. Fox River responded that, even if the court order did not reflect any formal motion to voluntarily dismiss the case, the transcript from that date showed that Fox River had indeed stated that it believed that the case was moot (as it had received possession of the Building a few months earlier) and it would be willing to enter a non-suit, but the trial court denied this request due to the other parties' objections. The trial court took these motions under consideration and ultimately ruled in favor of Connie's and Fishman, permitting them to file petitions for attorney fees.

¶ 45 The judgment in the Fishman Suit was challenged by both Fox River and Fishman. Fox River raised substantive arguments similar to those raised in the Connie's Suit, arguing that its actions were reasonable, taken in good faith, and did not constitute either a breach of contract or tortious interference. The trial court denied this motion. Fishman challenged the trial court's decision not to award prejudgment interest or attorney fees under the contract. The trial court denied this motion as to the prejudgment interest but granted it as to the attorney fees.

¶ 46 The judgment in the 2008 Eviction was attacked only by Fox River. Fox River argued that it had no duty to mitigate damages until November 2009, because it did not have possession of the Building until then. Fox River also argued that the trial court had misconstrued the Non-Disturbance Agreement, that it did not release Fishman from the obligation to pay rent after the termination of the Land Lease in June 2008, and that Fishman owed Fox River \$254,794 in holdover rent for the period from June 2008 through November 2009. The trial court denied this motion to reconsider.

¶ 47 Thereafter, Connie's and Fishman filed petitions setting out the amount of attorney fees to which they believed they were entitled as prevailing parties in the litigation. Per the trial court's orders, these parties were to seek reimbursement only for those fees relating to the 2005 Eviction and the Fishman Suit. (No contractual attorney fees were available in the Connie's Suit because there was no privity between Connie's and Fox River under the Land Lease, and in the 2008 Eviction Fishman received only the same relief it received in the Fishman Suit.) Connie's sought \$98,283 in attorney fees. After reviewing all of the supporting documentation and hearing arguments, the trial court held that the rates charged by Connie's attorneys, which ranged from \$155 to \$270 per hour, were largely within the community standard, but that the calculation of the billable time was insufficiently detailed. Based on its own calculations that the attorneys properly expended approximately 300 hours on the case, using an average hourly rate of \$250, the trial court awarded Connie's \$75,000 of attorney fees.

¶ 48 Fishman's fee petition was far larger. Fishman's attorneys sought \$681,714.50 in attorney fees and \$182,607 in late fees, which it argued were owed under the terms of its retention agreement. The trial court held that the late charges could not be charged to Fox River because it was not a party to the retention agreement. It also decreased the reimbursement for attorney fees to a total of \$150,000. In reaching this number, the trial court rejected the average billing rates of \$343 per hour

as not being within community standards in Du Page County, especially when many of those hours occurred as long ago as 2005. The trial court therefore applied an average hourly rate of \$250 instead. Moreover, the trial court noted that, dividing the fees being sought by the \$343 hourly rate, the fee petition suggested that approximately 1,958 hours were expended solely on the 2005 Eviction and the Fishman Suit. The trial court found that this total was unreasonably high, giving as examples of overbilling 54.6 hours purportedly spent reviewing the lease documents, and 262.9 hours billed for research, including entries on 6 separate days over 7 years for research on mitigation of damages and entries on 9 separate occasions for research on the Forcible Entry and Detainer Act. The court also commented at length on the repeated use of vague and insufficiently detailed listings such as “review issues,” “analyze correspondence and status,” “analyze legal and procedural issues,” and “review and analyze facts.” The trial court concluded by finding the time entries “grossly excessive,” and found instead that an appropriate amount of time would have been 600 hours.

¶ 49 Fox River filed a timely notice of appeal, raising a variety of issues with respect to the judgments. Fishman cross-appealed, contending that the trial court’s evaluation of its attorney fees was too low.

¶ 50

ANALYSIS

¶ 51

I. Fox River’s Appeal

¶ 52

A. Issues Relating to the Connie’s Suit and the Fishman Suit

¶ 53 On appeal, Fox River argues that the trial court erred in finding, in both the Connie’s Suit and the Fishman Suit, that Fox River’s refusal to consent to the assignment of the Building Lease to the Smith Group and the Mojitos Group was unreasonable and constituted tortious interference with prospective economic advantage as well as a material breach of the Land Lease. With respect to the Connie’s Suit, Fox River also argues that Connie’s was not entitled to damages for rent it paid

while remaining in possession. As to the Fishman Suit, Fox River raises two additional arguments: that Fox River's refusal to consent to an assignment to Scapa was reasonable, and that the damages awarded to Fishman were excessive. We examine each of these arguments in turn.

¶ 54 1. Arguments Common to Both Suits: Reasonableness of Fox River's Conduct

¶ 55 Fox River's first argument is that its conduct in rejecting the proposed assignees was in fact reasonable. Fox River contends that we should review the trial court's ruling on this issue *de novo*, but this assertion is incorrect. In a bench trial, the trial court sits as the trier of fact, hearing the witnesses and reviewing the direct presentation of the evidence, and it is in the best position to make credibility determinations and factual findings. *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007). Accordingly, we will not reverse the judgment in a bench trial unless it is against the manifest weight of the evidence; that is, unless "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 543 (2007).

¶ 56 In this case, the evidence amply supports the trial court's determination that Fox River's rejection of the Smith Group and the Mojitos Group was unreasonable.⁴ "It is well established in Illinois that where a lease forbids any sublease or assignment without the consent of the lessor, the lessor cannot unreasonably withhold his consent to a sublease." *Jack Frost Sales, Inc. v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 944 (1982). To show that a landlord's refusal to consent to an assignment of the lease was unreasonable, the tenant must show that (1) it had on hand a proposed assignee that was ready, willing, and able to assume the lease, and (2) the proposed assignee met "commercially reasonable standards." *Vranas & Associates, Inc. v. Family Pride Finer*

⁴Fox River also raises an argument that it did not unreasonably refuse to enter into an assignment with Chicago Franchise, but the trial court never found that it had. Thus, the argument is not relevant to the validity of the trial court's judgment and we ignore it.

Foods, Inc., 147 Ill. App. 3d 995, 1003 (1986). “A prospective purchaser of real estate is deemed ready, willing and able to purchase if he has agreed to buy property and has sufficient funds on hand or if he is able to command necessary funds with which to complete [the] purchase within the time set by offer.” *Id.* at 1005. Factors bearing on whether a proposed assignee meets “commercially reasonable standards” include the financial responsibility of the proposed assignee, the type of business that the assignee will be conducting, and whether the assignee’s business will compete with that of the landlord or any other tenant. *Id.* at 1003.

¶ 57 The evidence showed that the Smith Group was ready, willing, and able to take over the lease and that it was a commercially reasonable assignee. The Smith Group had been approved by Chicago Franchise as a franchisee, and was willing to assume Connie’s obligations under the Building Lease. Howey, the owner of Chicago Franchise, testified that he viewed the group very favorably due not only to the investors’ wealth and one investor’s real estate experience, but also the group’s willingness to recognize their own lack of experience in running a restaurant and to retain a restaurant management company to operate the project. Steven Smith, a principal of the Smith Group, provided a written assurance that the project “would be capitalized with assets of \$500,000 or more.” Moreover, after its efforts to open a restaurant in the Building were rejected, the Smith Group opened restaurants at different locations at a cost of over \$650,000, demonstrating their ability to put in the capital that would have been necessary to open in the Building. See *Golf Management Co., Inc. v. Evening Tides Waterbeds, Inc.*, 213 Ill. App. 3d 355, 363 (1991) (evidence of later equivalent financial transactions is relevant to the question of whether the proposed assignee was ready, willing, and able to assume the lease, and met commercially reasonable standards); *Vranas*, 147 Ill. App. 3d at 1005-06. On appeal, Fox River concedes that the initial startup costs would have totaled \$483,353. This amount would have been covered by the Smith Group’s proposed

capitalization. (Fox River incorrectly argues that the Smith Group was not willing to put more than \$500,000 into the project, but the Smith Group's letter committed to capitalization of "\$500,000 *or more.*")

¶ 58 Fox River points to various facts to support its contention that its rejection of the Smith Group was reasonable. None of these arguments have merit. For instance, Fox River points out that Smith's letter containing the commitment to capitalization of \$500,000 or more was the only financial information it received, and argues that this was insufficient documentation. However, there is no evidence that anyone at Fox River asked for any additional information, and Fox River's letter rejecting the Smith Group made no mention of insufficient financial information. Fox River also argues that the fact that Fishman was not involved in Connie's effort to assign the Building Lease means that Fox River had no obligation to consider the assignment request, but it offers no legal support for this argument. Fox River then suggests that Howey's refusal to have Chicago Franchise on the lease was due to Howey's unwillingness to take on the "risk" of inadequate capitalization posed by the Smith Group, a position that was reasonably echoed by Fox River. However, this suggestion is contradicted by the record: Howey testified that Chicago Franchise's refusal to enter into leases for its franchisees was a company-wide policy unrelated to any particular franchisee, and that the policy was based on a desire to avoid additional regulatory requirements, not financial risk.

¶ 59 Finally, Fox River points to Connie's January 31, 2005, letter to Chicago Franchise, terminating their purchase agreement on the basis that closing had not occurred as scheduled. Fox River argues that this letter shows that Connie's itself terminated the possible assignment even before Fox River advised Connie's that it was rejecting the assignment on February 25, 2005. However, purchase agreements and closing dates can be extended, and there is no indication in the

record that this would not have occurred if Fox River had approved the assignment. The mere presence of future events that would also have to occur will not justify a landlord in unreasonably refusing to consent to a proposed assignee, when there is no evidence that the other requirements could not have been met. *Golf Management*, 213 Ill. App. 3d at 362 (citing *Jack Frost*, 104 Ill. App. 3d at 944). We therefore find all of these arguments relating to Fox River's rejection of the Smith Group to be without merit.

¶ 60 The evidence also supports the trial court's finding that Fox River rejected the Mojitos Group as a proposed assignee and that this rejection was unreasonable. Rios provided substantial financial documentation to Fox River, including profit and loss statements for Café Rumba, personal financial statements, and a construction budget. Rios had over 20 years of experience operating restaurants, had successfully raised the capital needed to open a restaurant before (Café Rumba), had deposited earnest money and prepared drawings of the new restaurant, and was able to produce a construction budget that Di Mucci acknowledged appeared realistic. Despite Fox River's suggestions to the contrary, the evidence shows that Fishman was aware of the proposed assignment and had no objection to it.

¶ 61 Fox River argues that it rejected the Mojitos Group because the financial information suggested that the Rioses would be carrying too great a debt burden from the opening of the restaurant. It points out that the Mojitos Group acknowledged that Fox River had correctly assessed the financial statements. In addition, although the Mojitos Group told Connie's that in fact it would be financing costs through equity, not debt, no one provided that information to Fox River. Finally, it points to Rios's testimony at trial that Café Rumba may have been undergoing chapter 11 bankruptcy at the time, and that he had not formally registered the Mojitos Group as an LLC nor had

he yet gone out to seek the investors at the time of the rejection.⁵ It therefore argues that the Mojitos Group was like the proposed assignee in *Jack Frost* and, as in that case, it cannot be held to have acted unreasonably in rejecting the assignment.

¶ 62 We acknowledge that the financial picture for the Mojitos Group was not uniformly positive. However, a significant factor distinguishes the present case from *Jack Frost*. Although a lessor may have a legitimate interest in the financial wherewithal of a proposed assignee, that interest is diminished where, as here, previous assignees and tenants remain liable under the lease, thereby providing the lessor with protection against potential losses. This point was made by the court in *Jack Frost*, which noted that one factor supporting its determination that the landlord acted reasonably in withholding consent to the proposed assignment was that the current tenant was not willing to guarantee performance of the lease by the assignee. *Jack Frost*, 104 Ill. App. 3d at 947. Here, by contrast, four entities—Fishman, Bertucci’s, Connie’s Pizza, Inc., and Connie’s—would have remained liable for any default in the Leases. Thus, the risk to Fox River (and any legitimate interest in ensuring a perfect financial backing by the proposed assignees) was greatly reduced. We do not hold that Fox River had no legitimate interest at all in ensuring that proposed assignees were financially sound. As Di Mucci testified, Fox River had an interest in ensuring that the Building was not vacant. But given the fact that Connie’s had not been operating its restaurant on the premises for over six months at this point, Di Mucci’s purported desire to keep the building from being “dark”

⁵Fox River also argues that Rios was not going to be involved with the operation of the new restaurant and was instead going to accept another hotel job. However, it has not provided any cites to the record in support of these assertions and we therefore disregard them. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (arguments must be supported with citation to the pages of the record relied upon); *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005) (“A reviewing court *** is not simply a repository in which appellants may dump the burden of argument and research; an appellant’s failure to properly present his own arguments can amount to waiver of those claims on appeal.”).

should have made him more interested, not less so, in getting a new tenant in. We hold that, under the circumstances here, where the financial returns on the Building were protected by four layers of continuing obligation, Fox River could not reasonably require the level of financial assurances that it did.

¶ 63 Moreover, Fox River's argument ignores the presence of another factor—objective indications that Fox River did not give good-faith consideration to the Mojitos Group as an assignee. One of the stipulated trial exhibits was a memorandum from Niemira to Di Mucci, dated March 18, 2005. This was a few weeks after Fox River had rejected the Smith Group as an assignee, and only a few days after Fox River had sent Connie's a 30-day notice of default. In the memorandum, Niemira stated that he viewed the rejection of the Smith Group as a reasonable business decision, but he was being told that more potential assignees were "in the works." Niemira noted that any exercise by Connie's of its option to renew under the Building Lease did not directly benefit Fox River. However, there was a possibility that a decision by Connie's *not* to renew the Building Lease could benefit Fox River by allowing Fox River to gain possession of the Building. This could occur if Connie's did not timely notify its lessor (which Niemira referred to as "D&D Partners" although by this time Fishman was the lessor of the Building) that it wished to renew the Building Lease. In that case, the Building Lease would expire and Fishman could take possession, but that event also could lead Fishman to notify Fox River that it did not wish to renew the Land Lease, in which case Fox River would get possession of the Building.

¶ 64 On March 31, 2005, shortly after Niemira wrote this memorandum, Connie's contacted Fox River, forwarding a copy of the asset sales agreement between Connie's and the Mojitos Group and asking for Fox River's consent to the Mojitos Group as an assignee. A few days later, Niemira forwarded the sales agreement to Di Mucci and Fox River's attorney with the comment that "their

time is running out.” On April 15, Fox River wrote Connie’s a letter in which it laid out various conditions it would insist upon in order to approve the assignment, including the same type of assumption of future defaults under the Building Lease as had been agreed to by Bertucci’s, and extensive financial documentation. The letter also advised Connie’s that it “remain[ed] in default under the lease, which default is continuing and not waived by lessor.” On April 27, Niemira forwarded the Mojitos Group’s financial information to Di Mucci. Di Mucci’s handwritten comments on the cover memo said “rejected—undercapitalized at this time.” The following day, Fox River wrote to the Mojitos Group saying that it was not looking favorably on the proposed assignment. The very next day, Fox River sent Fishman and Connie’s its five-day notice to quit, citing the reason that the default identified in the March 15 notice had not been cured within the 30 days. Coincidentally, the fifth day after the five-day notice was sent was May 4, 2005, which Smith’s attorney had calculated was the last day for Fishman to notify Fox River that it did not wish to renew the Land Lease.

¶ 65 It is clear that the trial court considered this chain of events to indicate that Fox River was seeking to terminate Connie’s tenancy in the hopes that Fox River might be able to take over the Building. The trial court found that Fox River’s conduct, “including its attempt to wipe out Fishman’s position and ownership of the Building by obtaining the Building for no cost whatsoever,” was a breach of the implied duty of good faith and fair dealing under the Land Lease. This same course of conduct indicates that Fox River did not engage in an unbiased consideration of the proposed assignment to the Mojitos Group. For all of these reasons, we hold that the trial court’s rulings—that Fox River acted unreasonably in rejecting the proposed assignments to the Smith Group and the Mojitos Groups—are not against the manifest weight of the evidence.

¶ 66 2. Additional Arguments Relating to the Connie’s Suit

¶ 67 Fox River's next challenge to the judgment in the Connie's Suit is that Connie's was not entitled to damages for rent it paid while remaining in possession. Fox River argues that, regardless of whether it interfered with Connie's economic advantage, it did not disturb Connie's possession of the premises, and accordingly Connie's was not entitled to reimbursement for the rent it was contractually obligated to pay during that possession, which lasted through April 2008. The type of damages available for a particular injury is a legal issue, and we therefore review it *de novo*. *People v. Brown*, 225 Ill. 2d 188, 198 (2007).

¶ 68 The flaw in Fox River's argument is that, although Connie's indeed possessed the Building, it sought to give up that possession by assigning its rights and obligations under the Building Lease, but Fox River prevented it from doing so. Compensatory damages are designed to put the injured party in as good a position as if the injury had not occurred. *Gambino v. Boulevard Mortgage Corporation*, 398 Ill. App. 3d 21, 61 (2009). Here, the trial court determined that Fox River unreasonably refused to consent to assignments to the Smith Group or the Mojitos Group, either of which would have paid rent in an amount at least equal to the rent owed by Connie's, and that conduct caused Connie's injury by causing it to pay approximately three years of rent (from February 2005 through March 2008) which it otherwise would not have paid. These findings were not against the manifest weight of the evidence, and there was no legal error in the trial court's imposition of these compensatory damages. *Id.*

¶ 69 Accordingly, we reject all of Fox River's arguments against the judgment in the Connie's Suit (05 MR 620), and affirm that judgment in full.

¶ 70 3. Additional Arguments Relating to the Fishman Suit

¶ 71 We turn to Fox River's additional arguments pertaining to the Fishman Suit. (We have already disposed of Fox River's argument that its conduct in rejecting the Smith Group and the

Mojitos Group was reasonable.) Fox River begins by arguing that the trial court erred in finding that the proposed assignment to Scapa failed because of Fox River's actions. Rather, Fox River contends, the deal failed because Scapa realized that it would face opposition from Carrabas, an existing restaurant in the shopping center that had an exclusivity provision. We need not decide this issue, as—regardless of our view of the Scapa deal—the trial court's judgment in the Fishman suit can be upheld based upon its rulings that Fox River breached the Land Lease and engaged in tortious interference through its rejections of the assignments to the Smith Group and the Mojitos Group. Accordingly, we decline to address this issue. See *People v. White*, 2011 IL 109689, ¶ 153 (appellate court should not engage in analysis of issues that are unnecessary to its resolution of the appeal).

¶ 72 Fox River's remaining argument against the judgment in the Fishman Suit is that the trial court's award of damages was excessive. Specifically, Fox River argues that the \$628,196.93 that was awarded to Fishman as damages (for lost rent that could have been received from Connie's during the period from April 2008 through May 2011, when the Building Lease would have expired) should be reduced by the following amounts: \$65,210.87 for common area maintenance (CAM) fees and property taxes; and \$274,190.58 in rent owed by Fishman to Fox River during the same period, under the Land Lease. Fox River argues that, absent any breach or tortious conduct by itself, Fishman would not have been entitled to receive the gross amount of rent from Connie's, only the profits on that rent, net of (a) pass-through expenses like the CAM fees and taxes, the payments for which it was obliged to pass on to Fox River, and (b) rental payments Fishman owed under the Land Lease. Thus, Fox River contends, the trial court's award of the gross rent from Connie's as damages constituted a windfall that placed Fishman in a better position than it would have been in if the breach had never occurred.

¶ 73 Fox River is correct that the usual measure of compensatory damages is the amount necessary to place the plaintiff in as good a position as it would have been in absent the defendant's wrongdoing, and should not provide a windfall to the plaintiff. *Gambino*, 398 Ill. App. 3d at 61. Accordingly, "gross revenue is generally not an appropriate measure of damages because revenue is calculated without regard to the costs the plaintiff incurred in the course of making that revenue." *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 647 (7th Cir. 2011); see also *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 285 Ill. App. 3d 914, 918 (1996) (damages for lost profits must be based on net profits, which are calculated by subtracting the expenses the plaintiff would have incurred in fulfilling its own performance). In response to this argument, Fishman asserts that the trial court's damages calculations were correct and that the expenses associated with its right to receive rent from Connie's are "irrelevant," but it cites no case law at all in support of that assertion.

¶ 74 A miscalculation regarding the type or proper measure of damages that flow from an injury is an error of law. *e360 Insight*, 658 F.3d at 648. Pursuant to Supreme Court Rule 366 (eff. Feb. 1, 1994), this court may modify a judgment without remand if the facts are undisputed. Here, Fishman has not argued that Fox River's calculations are incorrect, only the premise for those calculations.

¶ 75 We therefore agree with Fox River that Fishman's damages in the Fishman Suit should be reduced. We calculate the proper amount of lost profit for which Fishman should be compensated to be \$288,795.48, an amount reached by subtracting \$65,210.87 (pass-through CAM fees and taxes Fishman owed) and \$274,190.58 (the amount Fishman would have paid in rent during the relevant period) from \$628,196.93 (the amount of gross rent—which included CAM fees and taxes—that Fishman would have received from Connie's). To this amount, we add the \$30,000 security deposit which the trial court ordered Fox River to return to Fishman, an award that Fox River has not

challenged. Accordingly, we affirm the judgment in the Fishman Suit (07 L 1018) but modify the damages awarded to \$318,795.48.

¶ 76 *B. Issues Relating to the 2005 Eviction*

¶ 77 Fox River attacks the trial court's judgment in favor of Connie's and Fishman in the 2005 Eviction case (05 MR 1813) on three grounds. First, it argues that this case was moot once Fox River obtained possession of the Building in November 2009 and therefore the case should not have proceeded to trial. Second, it argues that the trial court erred in finding that the notices of the alleged default that Fox River sent were defective. Finally, it argues that Connie's could not recover any attorney fees incurred in this case because it was not a party to the Land Lease.

¶ 78 The first of these arguments is forfeited. Like any other argument, the argument that an issue or an action is moot can be forfeited if a party fails to raise it in a timely fashion. *Gray v. National Restoration Systems, Inc.*, 354 Ill. App. 3d 345, 366 (2004). Here, the first allusion to the possibility that the 2005 Eviction could be viewed as moot came on November 17, 2009, during the hearing on Fox River's motion for summary judgment in its other eviction action, the 2008 Eviction (08 LM 2286). In that case, Fox River sought summary judgment in its favor on two issues, possession and rent. Fishman noted that, in count V of the complaint in the Fishman Suit, they alleged that in May 2008 they had told Fox River that they were prepared to tender possession of the Building. The trial court accordingly ruled that Fox River was entitled to possession of the Building "at this point in time." However, the court also ruled that "any issues as to future damages, rent, *** setoff," and specific performance should go to trial, and it therefore denied the remainder of the motion for summary judgment in the 2008 Eviction.

¶ 79 Near the end of the hearing, the subject of the 2005 Eviction (the only action in which Fox River had *not* sought summary judgment) arose. One of the attorneys for Connie's or Fishman (the

record does not disclose which) suggested that, given the fact that Fox River now had possession of the Building as a result of the ruling on the 2008 Eviction, the 2005 Eviction “was of no significance” except for the fact that Connie’s and Fishman contended that the 2005 Eviction was improperly brought, and they had been required to defend that action for over a year before obtaining summary judgment in their favor. (That order granting summary judgment in the 2005 Eviction was later vacated on appeal as one of the orders entered after the motion for substitution of judge had been filed.) Connie’s and Fishman therefore sought reimbursement for their attorney fees incurred in defending the action. The unidentified attorney asked that the issue of attorney fees be reserved for trial, and the trial court agreed.

¶ 80 On February 16, 2010, the consolidated cases appeared on the trial call. All of the parties answered that they were ready for trial. In discussing the best way to proceed on the four consolidated cases, the trial court recalled that one of the evictions was “moot at this point.” Fox River agreed. Fishman and Connie’s stated that the only remaining issues in the 2005 Eviction were their petitions seeking attorney fees as prevailing parties in that case. Fox River argued that there were no prevailing parties in that case, inasmuch as the summary judgment in favor of Connie’s and Fishman had been vacated. Further, Fox River had not sought rent in that case, and possession was no longer an issue, so there was “really no reason to go forward on that.” Fox River stated that it would be willing to dismiss the 2005 Eviction. Fishman objected, saying that the motion for summary judgment was still pending, as were the fee petitions. The trial court then stated that, with respect to the attorney fees issue in the 2005 Eviction, it would defer any ruling on that until it had heard the evidence in the other cases.

¶ 81 Subsequently, Fox River did not file any motion to voluntarily dismiss the 2005 Eviction, nor did it seek dismissal of the case on the basis of mootness. On May 31, 2011, the first day of trial,

Fox River did not renew its offer to dismiss the case. Further, it did not object at trial to questioning or evidence regarding the notices of default upon which it relied in bringing the 2005 Eviction, or argue in its closing argument that the 2005 Eviction was moot. Finally, it did not raise the supposed mootness of the 2005 Eviction in its motion to reconsider the judgment in that case. A reviewing court will not consider arguments not presented to the trial court. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010). Having permitted the 2005 Eviction to be presented to the trial court without objection, Fox River cannot now complain that the trial court considered that case and ruled upon it. We therefore find the mootness argument forfeited, and we decline to consider it. *Id.*

¶ 82 We next address Fox River's contention that the trial court erred in finding that Fox River's notices of default were defective. Whether a notice complies with a contractual or statutory provision is an issue of law, which we review *de novo*. *People v. Brown*, 225 Ill. 2d 188, 198 (2007); *Figueroa v. Deacon*, 404 Ill. App. 3d 48, 52 (2010).

¶ 83 Under the Land Lease, Fox River was required to provide notice of any alleged default to the tenant under that lease, which was Fishman's trust. (Fishman notified Fox River in 2000, during the course of the assignment to Connie's Pizza, Inc., that Fishman's trust was the lessee under the Land Lease and the lessor under the Building Lease. At that time, the trustee was American National Bank.) As Fox River notes, Connie's was not a party to the Land Lease. Thus, Fox River's contractual obligations to notify the tenant of any default were owed solely to Fishman's trust. The 2004 assignment from Connie's Pizza, Inc. to Connie's provided that notices to Fishman's trust could be directed to Fishman personally, at his own address.

¶ 84 All of the parties read section 9.01 of the Land Lease (the lease under which Fox River alleged a default) as providing that, in the event of a default, the nondefaulting party was required to notify the defaulting party of the claimed default and provide 30 days to cure the default. The

Land Lease also required a second notice before the lease could be terminated: once the 30 days had elapsed without the default being cured, the landlord could give the tenant “a notice of intention to cancel this Lease at the expiration of five (5) days from the date of the service of the notice.” If the default still were not cured by that point, the lease would terminate.

¶ 85 Here, Fox River sent two notices of default, the first dated March 14, 2005, and the second dated April 29, 2005. The March 2005 notice alleged a default in the Land Lease (in that no restaurant was open for business in the Building), and gave 30 days to cure the default. The April 2005 notice stated that the default identified earlier had not been cured and that the Land Lease would therefore terminate unless the default were cured within five days from receipt of the notice.

¶ 86 There is no evidence that the first notice was actually sent in March 2005 to Fishman’s trust, either at a bank trustee’s address or at Fishman’s own address. Rather, both notices were mailed to Fishman on or about April 29, 2005, in the same envelope. Fishman testified that, on May 2, he received both the April 2005 notice (which was addressed to him), and a copy of the March 2005 notice (which had been addressed solely to Connie’s).

¶ 87 Fishman and Connie’s argue that one of the prerequisites to a suit for eviction is that the landlord must serve a proper notice on the tenant. Because Fox River sought to evict Fishman and Connie’s under the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2008)), the provisions of the Act apply in addition to the provisions of the Land Lease. We begin by considering the Act’s requirement that a landlord notify the tenant of the alleged default and then provide a certain amount of time for the tenant to cure the default before declaring the tenancy terminated and seeking possession. Under the Act, the relevant period for any claimed default in the lease other than nonpayment of rent is 10 days: a landlord must give the tenant at least 10 days’ notice of the nature of the default and the fact that the landlord demands possession on the basis of

that default. 735 ILCS 5/9-210 (West 2008); see also *Nance v. Bell*, 210 Ill. App. 3d 97, 101 (1991).

The Land Lease required a longer notice period for defaults than this—30 days—and thus a proper 30-day notice under the Land Lease would, generally speaking, also satisfy the 10-day notice period under the Act. (The statutory notice period does not begin to run until the tenant received the notice (*Avdich v. Kleinert*, 69 Ill. 2d 1, 9 (1977)), while the Land Lease provided that the notice would be “deemed to have been given at the time it [was] *** placed in the mails.”) Unlike the Land Lease, however, the Act does not require a second notice.

¶ 88 Here, it is undisputed that both Fishman and Connie’s received the March 2005 notice. Connie’s received that notice on or about March 14, 2005, when it was faxed to Connie’s. The notice was not sent to Fishman until April 29, 2005, however, when Fox River placed a copy of it in the same envelope used to mail the April 2005 notice. Thus, under *Avdich*, the 30-day period set out in that notice did not begin to run until April 29, 2005, the date on which Fox River sent the notice to the tenant under the Land Lease. (As noted, Fishman was the designated recipient for notices to Fishman’s trust, and thus his receipt of the notice counts as receipt by the trust.) Under the Land Lease, Fishman therefore had until May 29, 2005, to cure the default identified by the notice.

¶ 89 On May 6, 2005, Connie’s reopened for business, providing carry-out and delivery service only. On May 12, Fox River wrote Fishman, stating that the carry-out business did not cure the default in the Land Lease, because that lease required the tenant to operate a full-service restaurant in all of the Building. In this letter, Fox River acknowledged that Fishman was current in its rent (and thus presumably May rent had been paid). On May 13, 2005, Fishman wrote Fox River, saying only that Fox River’s notices were defective and that no rent was due or owing. Fox River sent no

further notice of its intention to cancel the lease after May 29, 2005. Fox River filed the 2005 Eviction on June 17, 2005.

¶ 90 Fishman and Connie’s successfully argued at trial that Fox River’s attempts to serve notice of the default were ineffective because of various flaws. For instance, the March 2005 notice was on the letterhead of Di Mucci Companies and lacked any reference to Fox River. Inasmuch as there was no evidence that this fact misled the parties in any way—Fishman and Connie’s acted at all times as if they understood that the March 2005 notice was sent on behalf of Fox River—we find it to be without legal significance. Fishman and Connie’s also argue that Fox River never sent any notices to Fishman’s trust, as the April 2005 notice was addressed to Fishman himself. We reject this argument because the 2004 assignment stated that notices to Fishman’s trust could be sent to Fishman personally.

¶ 91 The most important defect in the notices, however (according to Fishman, Connie’s, and the trial court), was that they were not served via one of the methods of service listed as acceptable in the leases or the Act. Section 13.05 of the Land Lease provides that notices “shall be by personal delivery, telecopy, courier service, or certified mail with return receipt requested.” (Confusingly, article XVIII of the same lease provides that notices “shall be deemed given when deposited in the United States registered mail.”) The Act provides that a landlord’s notice of a default must be served on the tenant by (1) personal delivery to the tenant (or someone over the age of 13 living in the same home), or (2) certified or registered mail, return receipt requested. 735 ILCS 5/9-211 (West 2008).

¶ 92 Fox River first attempted to serve its 30-day notice on March 14, 2005, by faxing it and mailing it (via regular mail) to Connie’s. We think that “by fax” is similar enough to “by telecopy” to comply with the provisions of the Land Lease. However, this attempt at service was not effective because it was directed at Connie’s rather than at Fishman’s trust, which was the tenant under the

Land Lease, and there is no evidence that Fishman received a copy of the notice at this time. On April 29, 2005, Fox River mailed to Fishman, via regular mail, both a copy of the 30-day notice and a copy of its April 2005 notice. Fishman admitted that he received this copy of these notices on May 2, 2005, but argues that the notices were ineffective because they were mailed via regular mail instead of certified or registered mail, return receipt requested.

¶ 93 For the reasons discussed below, we view this argument as shaky at best. However, we need not resolve this issue here, because regardless of whether Fox River's use of regular mail instead of a method listed in the Land Lease or the Act has any legal significance, Fox River did not provide the second notice in a manner that would comply with the requirements of the Land Lease.

¶ 94 In *Avdich v. Kleinert*, 69 Ill. 2d 1 (1977), the supreme court held that a landlord's failure to serve the notice on the tenant using the methods of service listed in the Act did not necessarily preclude the landlord from bringing an eviction suit where the tenant admitted receiving the notice. *Id.* at 7. However, the statutory notice period (which, under the language of the Act, commenced on the date the notice was received) did not begin to run until the date the tenant testified that he received the notice. *Id.* at 9. Thus, the eviction suit, which had been filed before that date, was premature. *Id.*

¶ 95 Similarly, in this case the Land Lease required Fox River first to give Fishman 30 days' notice of the default and then, once that time period had expired without a cure, to give Fishman a second notice declaring the lease terminated unless the default was cured within the next 5 days. Fox River did not send the 30-day notice of default to Fishman until April 29, 2005. (Under the Land Lease (unlike the Act), a notice of default is deemed served on the date of mailing.) Under *Avdich*, the 30-day period therefore did not begin running until April 29, 2005. Once the 30-day period had expired, however, Fox River sent no further notices to Fishman. The 5-day notice that Fox River

did send to Fishman (on April 29, 2005) was not effective because the Land Lease required such a notice to be sent after the 30-day cure period had elapsed. As Fox River did not comply with the provisions of the Land Lease allowing an early termination of that lease on the basis of a default, the termination was not effective and Fox River had no right to seek eviction. Accordingly, the trial court did not err in entering judgment in favor of Fishman and Connie's in the 2005 Eviction.

¶ 96 Fox River points out that Fishman never notified it of the change in the trustee for his land trust, and argues that this failure relieved Fox River of any obligation to provide any notice to the trust. This argument fails on both factual and legal grounds. As a factual matter, Fishman had specified in the 2004 assignment that any notices to the trust could be sent to his home address, and thus his failure to inform Fox River about the later change in trustee did not prevent Fox River from performing its obligations under the Land Lease to provide proper notice to Fishman's trust. We also note that Fox River did not even attempt to provide timely notice of the asserted default to the last known trustee, such as by sending a copy of the March 2005 notice to its last known address. As a legal matter, we note that none of the case law cited by Fox River provides any support for the proposition that one party's failure to give notice of a relatively minor change in the identity of a trustee would relieve the opposing party of a significant contractual obligation to provide proper notice of an asserted default. Accordingly, we reject this argument.

¶ 97 Fox River also suggests that its failure to give Fishman's trust proper notice under the Land Lease lacked legal significance because Fishman's attorney was "aware of the breach" (*i.e.*, that Connie's was not operating the restaurant) in mid-March. In support, it points to billing entries submitted in connection with Fishman's petition for attorney fees which it asserts indicate such knowledge. However, our review of the record does not support this argument. The billing entries from mid-March say "Call to M. Fishman" and "Review of lease and correspondence," neither of

which affirmatively shows knowledge of conduct by Connie's that could be construed as a default under the Land Lease. Moreover, even if these entries did show knowledge of the restaurant being closed, Fox River has cited no case law that knowledge of a potential default waives a tenant's right to insist on proper notice (1) that the landlord considers the situation to be a default and (2) setting out a time period in which the default must be cured. We therefore reject this argument as well, and affirm the trial court's entry of judgment in favor of Fishman and Connie's in the 2005 Eviction.

¶ 98 The parties raise other arguments about the 2005 Eviction, but in light of our conclusion that Fox River failed to comply with the Land Lease's requirements governing early termination of the lease, we need not address them.

¶ 99 Fox River's final argument regarding this case is that, even if the trial court was correct in finding that Fishman and Connie's were entitled to judgment in their favor, the trial court erred in awarding Connie's attorney fees. Generally, a party is responsible for paying its own attorney fees unless there is a statutory or contractual basis for shifting those fees. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 64. Fox River notes that the Act does not provide for statutory attorney fees. Fox River further argues that, because Connie's was not a party to the Land Lease (the lease under which the 2005 Eviction was brought), there was no contractual basis on which Connie's could recover its attorney fees.

¶ 100 Connie's responds that, although the two parties do not share contractual privity under the Land Lease, they are both signatories to the 2004 assignment. Paragraph 7 of that assignment states that, "[i]n the event of any litigation arising out of this Assignment, the prevailing party shall be entitled to recover its attorney's fees from the other parties." Connie's argues that the assignment is the instrument that permitted its possession of the Building, which in turn was the basis for Connie's inclusion as a defendant in the 2005 Eviction.

¶ 101 Although we are sympathetic to Connie's travails, we must reject this its argument. The 2005 Eviction does not "arise out of" the 2004 assignment, because it was not a suit to enforce that assignment or in connection with that assignment. Rather, the 2005 Eviction was a suit based upon the Land Lease in which Connie's was joined as a defendant because it was in possession at the time. Fox River also argues that Connie's could only succeed to the legal rights possessed by Bertucci's (from whom Connie's' assignment derives), and the Non-disturbance Agreement that spells out those rights makes no mention of attorney fees. For all of these reasons, we must vacate the trial court's judgment granting Connie's fees in this case.

¶ 102 *C. Issues Relating to the 2008 Eviction*

¶ 103 In this case, Fox River sought possession and back rent owed from May 2008 onward. Fishman filed two counterclaims. The first was essentially a restatement of Fishman's first three counts in the Fishman Suit, and sought damages on the grounds that Fox River had injured Fishman by unreasonably withholding its consent to the proposed assignees. The second counterclaim restated Fishman's claim for specific performance of the January 2008 agreement. In its judgment in this case, the trial court noted that the issue of possession had been resolved in November 2009 when Fox River was granted possession via court order. The trial court did not enter any judgment on the issue of rent. However, in its findings of fact, it found that Fishman did not owe any rent under the Land Lease. It also found that the notices of default sent by Fox River in 2008 were defective, and that Fox River had not attempted to mitigate its damages.

¶ 104 As to the counterclaims, the trial court's rulings mirrored those in the Fishman Suit, entering judgment in favor of Fishman on the first counterclaim and in favor of Fox River on the second counterclaim. The trial court ruled that Fishman's recovery on the first counterclaim was the same

as in the Fishman Suit (thereby preventing a double recovery), and that each party was to bear its own costs and attorney fees.

¶ 105 On appeal, Fox River raises two challenges to these rulings. First, it argues that it was entitled to recover rent from Fishman during the 18-month period that Fishman had possession of the Building (from May 2008, when Connie's gave the keys to Fishman, through November 2009, when Fox River was awarded possession of the Building by the trial court). Second, it contends that the trial court wrongly held that Fox River was not entitled to attorney fees because it failed to mitigate its damages.

¶ 106 We begin with the second argument, which we reject because the record does not support it. Although the trial court did find that Fox River failed to mitigate its damages, that was not the basis for its decision not to award attorney fees and costs to Fox River. Rather, the reason that the trial court did not award attorney fees and costs—to either side—is that it determined that neither party qualified as “the prevailing party.” Fox River won some aspects of the suit, as it was awarded possession and received a judgment in its favor on Fishman's second counterclaim, but Fishman prevailed on its first counterclaim and was awarded damages in excess of those sought by Fox River as back rent. Accordingly, the trial court implicitly found that, on balance, neither party was “the prevailing party” so as to be entitled to attorney fees in this suit. Fox River does not identify any defect in this determination. (As we noted, its sole argument on this point relates to mitigation.) We find no error and affirm the trial court's decision not to award attorney fees to either side in this case.

¶ 107 As to the first argument, Fox River is correct that Fishman owed rent during the period from May 2008 to November 2009. However, this obligation was offset by Fox River's liability for its own breaches of the lease, with the result that Fox River could not recover from Fishman. Accordingly, the trial court's determination that, overall, Fishman did not owe rent under the Land

Lease is correct. However, because some of the trial court's findings with respect to the issue of rent are problematic, we examine those findings in some detail.

¶ 108 As we have discussed, the trial court held that Fox River acted unreasonably in withholding consent to the proposed assignees, and this determination was not against the manifest weight of the evidence. In considering this conduct in the context of the claims and counterclaims in the 2008 Eviction, the trial court found that Fox River's conduct was a prior default that relieved Fishman of the duty to pay rent. This finding rests on a legal error. The law is clear that the duty to pay rent is independent of the duties that may be owed by a landlord under the lease. *Quincy Mall, Inc. v. Kerasotes Showplace Theatres, LLC*, 388 Ill. App. 3d 820, 826 (2009). Thus, even accepting (as we do) that Fox River was the party that initially breached the lease by unreasonably withholding its consent, that did not relieve Fishman of the independent duty to pay rent. Rather, Fox River's conduct merely provided a basis for a counterclaim that could be set off against any rent that was owed. *Id.* at 826-27.

¶ 109 That is what happened here. Fox River's claim for rent during the 18-month period at issue must be set off against Fishman's claim for damages flowing from Fox River's own breach, its unreasonable withholding of consent. As we have discussed in the context of the Fishman Suit, Fishman's damages on its counterclaim are limited to its lost profits—the amount it would have made but for Fox River's actions, net of its necessary costs—and thus Fishman's liability for rent owed to Fox River is already incorporated into Fishman's damages award. The trial court therefore was correct in ruling that the final outcome of this process is that Fishman did not owe Fox River any rent under the Land Lease.

¶ 110 We acknowledge that the trial court also found that Fishman's obligation to pay rent under the Land Lease ceased when Fox River sent Fishman a letter in June 2008 stating that Fox River

“had terminated” the lease, as this effectively terminated the Land Lease. However, the termination of a lease does not necessarily relieve a tenant of any further obligation to pay rent if that tenant remains in possession. See *Pole Realty Co. v. Sorrells*, 84 Ill. 2d 178, 183 (1981) (tenant’s duty to pay rent continues as long as it is in possession); *Nationwide Mutual Fire Insurance Co. v. T & N Master Builder and Renovators*, 2011 IL App (2d) 101143, ¶ 24 (when a tenant remains in possession after the termination of a lease, either a tenancy at sufferance or a holdover tenancy results). Moreover, the trial court also found that the notices of termination sent by Fox River in May 2008 were defective, a finding that conflicts with the finding that Fox River’s declaration of termination in June 2008 was effective. Under the Land Lease, Fox River could not terminate the lease early unless it complied with the lease provisions regarding notice of the claimed default. In light of the conflicts between these holdings, we find that Fishman’s obligation to pay rent continued during the time that it was in possession. However, for the reasons of set off laid out above, Fox River is not entitled to recover for the back rent owed. We therefore affirm the trial court’s judgment in the 2008 Eviction.

¶ 111 II. Fishman’s Cross-Appeal: Amount of Attorney Fees Awarded

¶ 112 We now turn to Fishman’s cross-appeal, in which it argues that the trial court erred in determining the attorney fees recoverable in connection with the 2005 Eviction and the Fishman Suit. Although Fishman requested over \$681,000 in attorney fees and over \$180,000 in late fees, the trial court found the attorney fees excessive and unreasonable, both as to the hourly rates charged and the hours billed, and therefore awarded \$150,000. The trial court also refused to award any late fees, finding that the retainer agreement’s provision regarding such fees did not bind a third party such as Fox River.

¶ 113 Fishman argues that the trial court should have awarded it the late fees incurred, and also should have awarded it higher attorney fees. Fishman cites no legal authority for the proposition that his own failure to timely pay his attorney fees (the cause of the late fees at issue) should be laid at the feet of Fox River merely because of the contractual obligation to pay the prevailing party's attorney fees. Accordingly, we agree that such late fees are not encompassed within the attorney fees recoverable under the Land Lease, and affirm the trial court's decision to deny reimbursement for the late fees. We therefore turn to the issue of the attorney fees themselves.

¶ 114 It is well settled in Illinois that the award of attorney fees is a matter committed to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Mountbatten Surety Co., Inc. v. Szabo Contracting, Inc.*, 349 Ill. App. 3d 857, 873 (2004). A trial court will award only those fees that are reasonable, consisting of reasonable charges for reasonable services. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987). The reasonableness of the fees is based upon the following factors: the skill and standing of the attorney; the nature of the action and the novelty and difficulty of the questions at issue; the value and importance of the subject matter; the degree of responsibility in managing the action; the time and labor reasonably required; the usual and customary charge in the community; and the benefits to the client. *Mountbatten Surety*, 349 Ill. App. 3d at 873 (citing *Hanover Insurance Co. v. Smith*, 182 Ill. App. 3d 793, 797 (1989)). "When deciding whether to grant a fee petition, trial courts have broad discretionary powers, may exercise their independent judgment and are not limited to the evidence presented by the parties in arriving at a reasonable fee." *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 596 (2009).

¶ 115 Fishman first argues that the trial court should have accepted its attorneys' usual hourly billing rates of between \$315 and \$424 (averaging \$343) per hour rather than reducing those rates

to an average of \$250 per hour. Citing federal case law, it argues that the best evidence of the reasonable value of legal services is what the client was willing to pay for it, and Fishman (and Connie's, which was liable for Fishman's attorney fees under the Building Lease and paid some of them) was willing to pay the attorneys' usual hourly rates. Here, however, it is clear that from the outset, each party contemplated shifting the cost of its attorney fees onto someone else's shoulders under the attorney fees provision of the various agreements between the parties. In fee-shifting cases where attorney fees are being imposed on a third party, many of the usual motivations to rein in excessive fees may be lacking. In such cases stricter scrutiny of the fee request is warranted "because the attorney submitting billing statements *** has no fiduciary relationship with the party ultimately liable for payment" of those fees. *Gaylord*, 317 Ill. App. 3d at 596-97. Moreover, in the cases on which Fishman relies, the client had already paid the attorney fees that were the subject of the later fee petition, providing some indication that the fees charged were reasonable. See *Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996); *Berthold Types Ltd. v. Adobe Systems, Inc.*, 186 F. Supp. 2d 834, 840 (N.D. Ill. 2002). Here, by contrast, the imposition of late fees indicates that Fishman has not in fact paid all of his legal bills, and indeed he himself could still choose to challenge their reasonableness. Nor was Connie's initial payment of some of the fees a significant indicator of their reasonableness; Connie's was attempting to avoid having Fishman sue it, and was unlikely to antagonize Fishman by objecting to the high hourly rates. We therefore reject Fishman's argument that his (and Connie's) willingness to pay an average hourly rate of \$343 showed that the trial court abused its discretion in using a lower rate.

¶ 116 Fishman also argues that the trial court should not have reduced the compensable hours to the extent that it did. Responding to the trial court's exhaustive analysis of its fee petition and comments regarding excessive time being billed, Fishman disputes the accuracy of some of these

comments. For instance, Fishman contends that, although the trial court found that Fishman's attorneys had spent 54.6 hours on reviewing lease documents, in fact the attorneys had only spent 9 hours on this task. Fishman raises a similar argument regarding the amount of time spent on research. Fishman's sole support for these arguments is an exhibit it attached to its brief, which it claims is a summary of its attorney's billing records. However, Fishman may not supplement the record on appeal by simply attaching items not contained in the record to its appellate brief. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001). We therefore disregard the exhibit. Fishman has not supported its arguments about any of these alleged inaccuracies with citations to the record, and thus has forfeited these particular arguments. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 677 (2007).

¶ 117 Fishman also suggests that the trial court may have set the fee award too low because the particular judge that made the award, Judge Kenneth Popejoy, presided over the case only during the last two years of its six-year life. However, Judge Popejoy made it clear that he had not merely relied on his own experience with the case (which was in any case considerable), but had carefully reviewed the entire course of the quartet of consolidated cases. We therefore reject this argument as well.

¶ 118 Our own review of the record supports the trial court's determination that Fishman was not entitled to recover much of the amount requested in the fee petition. For instance, one of the factors to be considered in making a fee award is the value of the claim. *Mountbatten Surety*, 349 Ill. App. 3d at 873. Here, the trial court initially awarded Fishman a total of \$628,197 in damages. On appeal, we have determined that the proper amount of damages is \$318,795. Fishman's fee request of \$681,714 was larger than the total damages initially awarded, and more than twice the correct amount of damages to which it was entitled. We also note that the amount awarded by the trial court

to Fishman was twice that awarded to Connie's for its attorneys' work on largely identical issues. In summary, our review of the record convinces us that the trial court did not abuse its discretion in setting the award of attorney fees as it did. We therefore deny all of the relief requested in the cross-appeal.

¶ 119

CONCLUSION

¶ 120 For the reasons stated, we modify the amount of the judgment in favor of Fishman in case no. 07-L-1018 to \$318,795.48 and vacate the award of attorney fees to Connie's in case no. 05-LM-1813, but otherwise affirm in all respects the judgments entered by the circuit court of Du Page County in cases no. 05-MR-620, 05-LM-1813, 07-L-1018, and 08-LM-2286.

¶ 121 Affirmed in part as modified and vacated in part.