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2012 IL App (3d) 110222-U
(Consolidated with 110743-U)

Order filed August 29, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

BOYD PALMER and PHYLLIS R. PALMER,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois
Plaintiffs-Appellees,	)	
	)	Appeal Nos. 3-11-0222
v.	)	3-11-0743
	)	Circuit No. 09-MR-119
HEARTLAND ILLINOIS FOOD CORP.,	)	
	)	Honorable Stuart P. Borden,
	)	Honorable Michael Brandt,
Defendant-Appellant.	)	Judges, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held*: The trial court's order of March 2, 2011, did not violate the mandate of this court in *Palmer I.* The trial court did not abuse its discretion in dismissing defendant's counterclaim and affirmative defenses or denying defendant leave to amend the same.

¶ 2 This litigation involves a contract dispute between plaintiffs, Boyd and Phyllis Palmer, and defendant, Heartland Illinois Food Corporation (Heartland). Heartland filed notice of appeals from two separate orders. As both appeals arise from the same underlying contract dispute, they have been consolidated. The first order Heartland appeals from granted summary judgment in favor of the plaintiffs. Heartland claims, *inter alia*, the trial court's judgment awarding plaintiffs summary judgment directly conflicts with a previous mandate of this court and, as such, cannot stand. The second order appealed from awarded plaintiffs damages following the dismissal of Heartland's counterclaim and affirmative defenses. Heartland argues the trial court erred in awarding plaintiffs damages as the dismissal of its counterclaim and affirmative defenses was improper. Heartland further claims the trial court erred in denying its motion for leave to file amended affirmative defenses and an amended counterclaim. We affirm.

¶ 3 BACKGROUND

¶ 4 The Palmers owned a parcel of commercial real estate in Peoria, Illinois. On May 24, 1989, they entered into a triple-net commercial lease with Drury Management, a Burger King franchisee. The terms of the lease state that it "is for a period of twenty (20) years. If the Lessee shall comply with each of the terms, provisions and conditions of this Lease, the Lessee shall have an option to extend this Lease for an additional two (2) consecutive terms of five (5) years each ***. This Lease shall be automatically extended for the next occurring Option Period unless Lessee shall notify Lessor in writing of its intention not to exercise such Option Period, which notice shall be given by Lessee to Lessor at least six (6) months before the expiration of the then current Lease term." The lease also placed all maintenance and repair obligations on the

tenant.

¶ 5 Heartland purchased Drury's assets in June of 2005, acquiring Drury's interest in the property and duties under the lease. Thereafter, Heartland operated a Burger King franchise on the leased property. On February 16, 2009, with 3½ months remaining on the current lease term, Heartland notified the Palmers that it intended not to renew the lease. On April 13, 2009, the Palmers filed a declaratory judgment action seeking interpretation of the lease. Specifically, the Palmers sought a declaration that the automatic renewal clause in the lease extended the lease to May 23, 2014, as defendant had not notified plaintiffs of its intention to terminate the lease at least six months prior to the current term's expiration. The trial court found that the lease was not renewed and granted summary judgment to Heartland. In *Palmer v. Heartland*, No. 3-09-0845 (2010) (unpublished order under Supreme Court Rule 23) (*Palmer I*), this court reversed the trial court, finding the lease enforceable through May 23, 2014.

¶ 6 While *Palmer I* pended, Heartland abandoned the premises in December of 2009. The Palmers immediately began searching for a new lessee or purchaser to mitigate their damages. They listed the property for lease and sale. On March 4, 2010, the Palmers entered into an agreement with a potential buyer who wanted to use the property for a bagel franchise. On March 30, 2010, however, the potential buyer terminated that agreement due to the presence of environmental contamination of the premises.

¶ 7 Plaintiffs then, on May 14, 2010, issued a letter to the adjoining property owner, PKM Corporation (PKM), discussing the contamination and how it impacted the marketability of the subject property. Five days after this letter issued, oral arguments were held in this court in

Palmer I. Five days thereafter, on May 24, 2010, the Palmers and PKM executed a letter of intent for the sale of the subject property. Plaintiffs did not inform the court of their ongoing efforts to sell the property during the pendency of *Palmer I.*

¶ 8 This court issued the *Palmer I* ruling on July 29, 2010. On October 25, 2010, the Palmers completed the sale of the property to PKM for $325,000. The "Affidavit of Seller" delivered by the Palmers to PKM during the purchase stated, under oath, that no leases, outstanding contracts, other agreements or conveyances affecting the property existed at the time of sale.

¶ 9 The *Palmer I* mandate issued on January 5, 2011. Approximately six weeks later, on January 24, 2011, the Palmers filed a motion for entry of judgment with the trial court. The motion sought the entry of an order holding that the lease extended through May 23, 2014. In response, Heartland argued, *inter alia*, that the lease could not extend through 2014 as the Palmers sold the property on October 25, 2010, thereby voluntarily terminating the lease. The trial court entered an order on March 2, 2011, finding that lease terminated on the date of sale. Heartland filed a notice of appeal from the March 2 order, which initiated appeal No. 3-11-0222 (*Palmer II*). Heartland claims in *Palmer II*, that the trial court's March 2, 2011, order did not conform with this court's mandate in *Palmer I,* that the Palmers lacked standing to enforce the lease due to the sale of the property, that the lease should have been terminated by frustration of purpose, and that the original action should be dismissed due to the Palmers' failure to inform the court of the pending sale during *Palmer I.*

¶ 10 After Heartland filed appeal No. 3-11-0222, the Palmers filed a petition for further relief with the trial court seeking damages under the lease through the date of sale. Heartland

responded by filing a counterclaim and affirmative defense. By order dated September 8, 2001, the trial court dismissed Heartland's counterclaim and affirmative defenses. The trial court also denied Heartland's motion for leave to amend its counterclaim and affirmative defenses. Heartland then initiated appeal No. 3-11-0743 (*Palmer III*), claiming the trial court erred when dismissing its counterclaim and affirmative defenses and denying its motion for leave to amend. We granted Heartland's unopposed motion to consolidated appeals No. 3-11-0222 and No. 3-11-0743.

¶ 11 ANALYSIS

¶ 12 I. Case No. 3-11-0222 (*Palmer II*)

¶ 13 As noted above, following our decision in *Palmer I*, the trial court entered an order on March 2, 2011, stating "that summary judgment be entered in favor of plaintiffs and against defendant declaring that the lease, as set forth in plaintiffs' complaint, expired on May 23, 2004 but for the intervening event-being the plaintiffs' sale of the premises; therefore, the lease is hereby declared to have expired on October 25, 2010 and for plaintiffs' costs of the proceedings." Heartland argues that this order is not in accord with our mandate of *Palmer I*. As such, Heartland claims it cannot stand and must be reversed.

¶ 14 We review a trial court's grant of summary judgment *de novo*. *Forsythe v. Clark USA, Inc*, 224 Ill. 2d 274, 280 (2007). When an appellate court reverses and remands a cause with directions, "the only proper issue on a second appeal is whether the trial court's order is in accord with the mandate." *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005).

¶ 15 When analyzing this court's decision in *Palmer I*, in claiming that the trial court's March

2, 2011, order violated our holding in *Palmer I*, Heartland argues the *Palmer I* court held "that the Palmers could enforce a five (5) year Option Period expiring May 23, 2014 against Heartland." Therefore, Heartland posits that since the March 2, 2011, order states the lease "expired on October 25, 2010," it runs afoul to the mandate of *Palmer I.*

¶ 16 The sole issue determined by the *Palmer I* court was whether "the option period is *** enforceable." *Palmer I,* No. 3-09-0845 (2010) (unpublished order under Supreme Court Rule 23), page 7. This court answered that question in the affirmative holding that the "renewal provision is enforceable and operates to extend the lease until May 23, 2014." *Id.* at 9. We find the trial court's March 2, 2011, order did not violate the mandate of this court despite the order's language indicating the lease expired on October 25, 2010.

¶ 17 The *Palmer I* decision did not foreclose the possibility that the lease would terminate prior to May 23, 2014. The *Palmer I* court did not hold Heartland owed rents through May 23, 2014, or bar Heartland from asserting contractual or other affirmative defenses. *Palmer I* involved an appeal from the trial court's holding that the renewal provision was unenforceable, as a matter of law, following a finding that the contract omitted an integral provision: that being, what rent would be charged during the five-year extended term of the lease.

¶ 18 The *Palmer I* court held the trial court erred when finding the lease failed to specify the amount of rent to be charged during the five-year extension (*Id*. at 7) and, as such, that the "renewal provision is enforceable *** until May 23, 2014." *Id.* at 9. Again, the *Palmer I* decision did not find Heartland owed rents until that date or that it was foreclosed from asserting other contractual or affirmative defenses.

¶ 19 We find the trial court's order of March 2, 2011, complies with the *Palmer I* decision. It acknowledges that the *Palmer I* court held the lease was *enforceable* until May 23, 2014, not that it must remain in full force and effect until that date. The order goes on finding that an "intervening event-being the plaintiffs' sale of the premises" terminated the lease before that date.

¶ 20 Heartland makes three additional claims of error in *Palmer II*. Initially, Heartland argues that the Palmers had no standing to seek enforcement of the lease due to their sale of the property. As such, Heartland claims the trial court erred in granting the Palmers' motion for summary judgment. This argument is without merit.

¶ 21 Plaintiffs have standing to bring an action if they "have suffered an 'injury in fact' for which a judicial decision may provide a redress or remedy." *P&S Grain, LLC v. County of Williamson*, 399 Ill. App. 3d 836, 842 (2010). Heartland cites to no authority, and we know of none, for the proposition that the sale of real property bars a plaintiff from seeking damages he suffered in relation to the property while he owned it. The subsequent sale of the property is no bar to seeking rents lost during the Palmers' ownership of the property.

¶ 22 Next, Heartland argues that the property is unsuitable for restaurant purposes and, on this basis, the trial court should not have entered judgment for the Palmers. Specifically, defendant argues that the circuit court's "judgment entry of March 2, 2011 does not make mention of the evidence adduced by Heartland demonstrating that the demised premises were rendered unsuitable for restaurant purposes by virtue of environmental contamination. The circuit court's judgment could serve to deprive Heartland of the opportunity to litigate the question of the impact of the environmental contamination and resulting unsuitability of the demised premises

for their intended purpose on the enforceability of the lease." Heartland furthers this argument by discussing the doctrine of commercial frustration, claiming it might "prevail on a defense of commercial frustration."

¶ 23 Our review of the record, however, indicates that prior to the entry of the trial court's March 2, 2011, order, Heartland neither pled the affirmative defense of commercial frustration or sought leave to amend its affirmative defenses to include the defense of commercial frustration.

¶ 24 At the time the trial court entered its March 2, 2011, order, Heartland's only affirmative defenses included claims that: (1) Palmers' claims are barred based on lack of consideration; (2) Palmers' claims are barred based on the doctrine of waiver; (3) Palmers' claims are barred based on the doctrine of equitable estoppel; (4) Palmers' claims are barred based on the doctrine of promissory estoppel; and (5) the plaintiffs have failed to mitigate damages, if any. Following our mandate in *Palmer I* and the Palmers' motion for entry of judgment, Heartland filed a response in opposition to Palmers' motion for entry of final judgment.

¶ 25 Heartland's response in opposition mentions the environmental contamination of the premises, yet failed to discuss the doctrine and affirmative defense of commercial frustration. The doctrine of commercial frustration is an extension of the affirmative defense of impossibility. *American National Bank v. Richoz*, 189 Ill. App. 3d 775, 780 (1989). It is axiomatic to note that " 'an issue not presented to or considered by the trial court cannot be raised for the first time on review.' " *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 535 (1996) (quoting *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994)). This argument is forfeited.

¶ 26 Finally, Heartland argues that due to the Palmers' failure to inform this court of the

environmental contamination and pending sale of the property during the pendency of *Palmer I*, the original declaratory judgment actions should be dismissed as a sanction. Supreme Court Rule 137 authorizes "sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose." *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995). A petition for sanctions under Rule 137 "must identify: (1) the offending pleading, motion, or other paper; (2) which statements in the document were false; and (3) the fees and costs that directly resulted from the untrue allegations." *Id.* Heartland argues that paragraphs 31 and 32 of its response to the Palmers' motion for entry of judgment satisfy this pleading requirement. We disagree.

¶ 27 Heartland's response states:

> "31. Not only are the Palmers not entitled to the relief requested in their Motion for Entry of Judgment, their lack of candor and overreaching warrant the dismissal of the action as a sanction.
>
> 32. The Palmers' conduct in the present case is not unlike the plaintiff's conduct in the case of *Lohmann Golf Designs, Inc. v. Keisler*, 260 Ill. App. 3d 886 *** (1994)."

These two paragraphs do not sufficiently comply with the pleading requirements for a petition under Rule 137. At a minimum, they fail to identify which statements in the Palmers' motion for entry of judgment are allegedly false. We find the trial court did not err in entering the March 2, 2011, order.

¶ 28 Heartland's ultimate complaint with the trial court's order declaring the lease expired on the date of sale (October 25,2010) when this court held the lease enforceable through May 23, 2014, seemingly stems from a disgust that the Palmers would attempt to enforce the extended lease term after selling the property during that term. Heartland's position in this regard is puzzling. Of course, the Palmers could only recover damages for the period they owned the property. As an aside, the parties stipulated below to the damages if Heartland was liable.

¶ 29 Heartland acknowledges it abandoned the property for business, not contamination, reasons in December of 2009 after failing to provide timely notice pursuant to the automatic renewal provision. Heartland is also aware that the lease states, in pertinent part:

> "if Lessee shall abandon or vacate the Demised Premises before the end of the Demised Term, Lessor may thereupon take possession of the Demised Premises and relet the same without such action being deemed an acceptance of a surrender of this Lease or in any way terminating Lessee's liability thereunder, and Lessee shall remain liable to pay rent, together with other charges set out herein, less the net amount realized from such reletting, after deduction of any expenses incident to such repossession and reletting, or the Lessor, at its option, may without further notice to Lessee, terminate the Lease."

¶ 30 Not only did the Palmers have the right under the lease, once Heartland abandoned the property, to take possession of the premises and attempt to relet or sell it, but they also had a duty

to attempt to mitigate their damages when doing so. 735 ILCS 5/9-213.1 (West 2010) ("After January 1, 1984, a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee."). The lease terms further specify that taking possession of the property by the Palmers in no way effects their rights to seek rents against Heartland. Again, we are puzzled at Heartland's insistence that the Palmers' action of selling the property somehow forecloses them from attempting to enforce the lease and seek rents, given the clarity of the contract as outlined above and the simplicity of the principle mandating an aggrieved party mitigate damages.

¶ 31 II. Appeal No. 3-11-0743 (*Palmer III*)

¶ 32 During the pendency of *Palmer II*, the Palmers filed a petition for further relief, seeking damages under the lease through the date of sale. In response, Heartland filed a counterclaim and affirmative defense. The trial court granted the Palmers' motion to dismiss the counterclaim and affirmative defense. Subsequently, Heartland sought leave to file an amended counterclaim and affirmative defense, which the trial court denied. Heartland then stipulated to the amount of damages claimed by the Palmers through the date of sale, reserving the right to appeal the dismissal of the counterclaim and affirmative defense. Appeal No. 3-11-0743 followed.

¶ 33 A. Dismissal of Counterclaim and Affirmative Defense

¶ 34 A motion to dismiss "should not be granted unless it clearly appears that no set of facts could ever be proved that would entitle the plaintiff to recover." *Mount Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995). We review the grant of a motion to dismiss *de novo*. *In re Anderson*, 313 Ill. App. 3d 578, 581 (2000). "A counterclaim

is an independent cause of action, separate from a complaint, and it must stand or fall on its own merits, regardless of the disposition of the complaint." *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 589 (1999). A counterclaim "differs from an answer in that a counterclaim must be a cause of action, and it seeks affirmative relief." *Wilson v. Tromly*, 404 Ill. 307, 309 (1949).

¶ 35 The final paragraph of Heartland's counterclaim states: "Based on the foregoing, Heartland respectfully submits that the Palmers are not entitled to the relief they seek, and that their lack of candor and overreaching warrant the dismissal of the action as a sanction, plus an award to Heartland of attorney's fees and [c]ourt costs." By its own terms, the counterclaim asserted no independent cause of action and sought no affirmative relief. As such, we find the trial court properly dismissed the counterclaim.

¶ 36 Heartland's affirmative defense repeats other previously discussed factual allegations then states:

> "20. The Subject Property was badly contaminated with petroleum contamination, and was not useable as a restaurant during the period for which Plaintiff's seek payment of rent.
>
> 21. Heartland's appeal is presently pending before the Appellate Court."

¶ 37 It appears Heartland intended to plead the affirmative defense of commercial frustration. The doctrine of commercial frustration is not to be liberally applied. *American National Bank v. Richoz*, 189 Ill. App. 3d 775 (1989). In fact, our research reveals only 18 reported cases that even mention the doctrine.

¶ 38 The doctrine renders a contract unenforceable if a party's performance under the contract is rendered meaningless due to an unforeseen change in circumstances. *Illinois-American Water Co. v. City of Peoria,* 332 Ill. App. 3d 1098, 1106 (2002). In order to apply the doctrine, there must be a frustrating event not reasonably foreseeable and the value of the parties' performance must be totally or almost totally destroyed by the frustrating cause. *Id.*; *Smith v. Roberts*, 54 Ill. App. 3d 910, 913 (1977). "[T]he defense of commercial frustration is a viable doctrine in Illinois and will be applied when the defendant has satisfied two rigorous tests: (1) the frustrating event was not reasonably foreseeable; and (2) the value of counterperformance by the lessee had been totally or nearly totally destroyed by the frustrating cause." *Smith v. Roberts*, 54 Ill. App. 3d 910, 913 (1977); *Illinois-American Water Co..* 332 Ill. App. 3d at 1106.

¶ 39 Heartland's affirmative defense contains no allegation that the frustrating event, the contamination, was not reasonably foreseeable. This is an essential element of commercial frustration. It is likely Heartland failed to assert lack of foreseeablility as the record belies any such assertion. The record on appeals contains a letter dated October 31, 2005, from Heartland's attorney to Boyd Palmer discussing the necessity for environmental testing on the demised premises. The letter notes that "the premises in question are in fact contaminated and that the source of contamination appears to be emanating from the gasoline service station and dry cleaners located north of the subject property." Despite being armed with the knowledge in October of 2005 that the property was contaminated, a mere three months after acquiring the property from Drury, Heartland used the property for its intended purpose until finally abandoning it in December of 2009, when it was no longer in Heartland's best interest to

continue using it. The record belies any argument suggesting environmental contamination served as an unforeseeable frustrating event giving rise to the defense of commercial frustration. As such, the trial court did not err in dismissing Heartland's affirmative defense.

¶ 40 B. Leave to Amend

¶ 41 Heartland sought leave to file an amended counterclaim and affirmative defense, which the trial court denied. Heartland argues that the trial court abused its discretion in not granting leave to amend. The trial court's power to allow amendments should be freely exercised so that a party may fully present its cause of action. *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893 (2010). "Whether to allow an amendment to pleadings is within the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of an abuse of discretion." *Id.* at 897. A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. *Id.* Factors to be considered when determining whether to allow a motion to amend pleadings are whether the amendment would cure all defects in the pleading and whether there were previous opportunities to amend the pleadings. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467-68 (1992).

¶ 42 Attached to its motion for leave to amend, Heartland included a copy of the proposed amendment. The proposed amendment alleges that "as early as December, 2009," the Palmers "were aware of the extent of the contamination, and of the fact that the Demised Premises were unsuitable for use as a restaurant" yet "did not notify Heartland of the fact that the Demised Premises could not safely be used for a restaurant." This, Heartland suggests, amounted to fraudulent concealment.

¶ 43 To properly plead a cause of action for fraudulent concealment, a plaintiff must allege that the defendant concealed a material fact under circumstances that created a duty to speak, that defendant intended to induce a false belief, that the plaintiff could not have discovered the truth through reasonable inquiry or inspection and justifiably relied upon defendant's silence as a representation that the fact did not exist, that the concealed information was such that plaintiff would have acted differently had it been aware of it, and that plaintiff's reliance resulted in damages. *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902 (2005).

¶ 44 Heartland's proposed amended counterclaim is deficient in many respects. The only allegation we find in Heartland's proposed counterclaim suggesting the Palmers fraudulently concealed any fact is found in paragraph 15 which reads, "The Palmers did not notify Heartland of the fact that the Demised Premises could not safely be used as a restaurant." At a minimum, Heartland's proposed amended complaint is deficient for failing to allege that it was somehow prevented from discovering the allegedly concealed fact through reasonable inquiry or inspection. Indeed, any such assertion is belied by the record, as we have noted above that the record clearly indicates that Heartland knew of the contamination in October of 2005. More specifically, the record reflects that Heartland's counsel contacted Boyd Palmer in September of 2005 regarding a "License for Access Agreement dated September 23, 2005" which allowed a third party on the premises "for the purpose of conducting environmental testing."

¶ 45 Again, the October 31, 2005, letter from Heartland to Boyd Palmer indicates "that the premises in question are in fact contaminated and that the source of contamination appears to be emanating from the gasoline service station and dry cleaners located north of the subject

property." The letter requests that the parties "discuss this matter so as to devise a game plan for dealing" with the contamination. It further requests that "in the event the IEPA requires remediation *** that said remediation be done in such a manner as to minimize the impact upon and disruption of [Heartland's] operations ***." Given the facts contained in the record, we are at a loss as to how Heartland believes its proposed amended counterclaim stated a colorable cause of action for fraudulent concealment of the environmental contamination. We find Heartland's proposed amended counterclaim failed to properly plead an independent cause of action and, as such, the trial court did not abuse its discretion when denying Heartland leave to file it.

¶ 46 Heartland's proposed amendment replaces the affirmative defense of commercial frustration with a claim that entry of judgment in the Palmers' favor violates the doctrine of unclean hands. In its proposed affirmative defense, Heartland alleges that plaintiffs "had a duty to disclose the environmental condition of the property" but failed to do so. Therefore, Heartland argues that plaintiffs' complaint should be "barred pursuant to the unclean hands doctrine."

¶ 47 Again, any allegation that the Palmers somehow enticed Heartland into acting by failing to disclose the environmental contamination after October of 2005 is simply belied by the record and without merit for the reasons mentioned above. Moreover, "the unclean hands doctrine bars only equitable remedies and does not affect legal rights." *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006). The doctrine provides no defense against an action for damages due under this lease. As such, the trial court did not abuse its discretion denying Heartland leave to amend its pleadings with the affirmative defense of unclean hands.

¶ 48 CONCLUSION

¶ 49 For the forgoing reasons, the judgments of the circuit court of Peoria County in No. 3-11-0222 and No. 3-11-0743 are affirmed.

¶ 50 No. 3–11–0222, affirmed.

¶ 51 No. 3–11–0743, affirmed.

¶ 52 JUSTICE WRIGHT, specially concurring:

¶ 53 As noted by the majority, days before oral argument in *Palmer I*, plaintiffs issued a letter to PKM, dated May 14, 2010. This letter discussed the impact PKM's contamination could have on the marketability of the property. Ten days later, just five days after the oral argument in *Palmer I*, the Palmers and PKM executed a letter of intent for the sale of the contaminated property. This letter was dated May 24, 2010.

¶ 54 The decision in *Palmer I* was issued on July 29, 2010, holding that the lease, automatically extended by Heartland's inaction, was valid and enforceable until 2014. That decision was not unanimous, with this justice dissenting.

¶ 55 I write separately to note that an *unfulfilled* intent to sell the property to PKM, while *Palmer I* was under advisement from May 19, 2010, until July 29, 2010, does not establish fraud because the ownership of the property did not change before our decision was announced. After the announcement of our decision in *Palmer I*, Heartland filed a petition for leave to appeal with our Supreme Court on October 5, 2010. Three weeks later, the Palmers actually completed the sale of the property to PKM for $325,000, on October 25, 2010.

¶ 56 Interestingly, at the time of this sale, the Palmers signed an "Affidavit of Seller," stating

under oath that no leases, outstanding contracts, other agreements or conveyances affecting the property existed at the time of sale on October 25, 2010. Given the majority's unequivocal language in *Palmer I*, holding that the automatic five-year renewal clause for the lease was valid and enforceable until May 23, 2014, in my view, the verified affidavit prepared by the Palmers to facilitate a sale, either mistakenly or inaccurately reflected the trial court's decision that the lease could not be automatically extended. Clearly, the trial court's ruling had been reversed. However, this inaccuracy contained in the seller's affidavit has no impact on the mandate issued by the majority in *Palmer I* on January 5, 2011, after our supreme court denied Heartland's request for further review on November 24, 2010.

¶ 57 Days after the mandate issued in *Palmer I*, the Palmers requested the trial court to enter an order, based on the mandate in *Palmer I*, reversing the trial court and holding the lease renewal provision was enforceable and operative through May 23, 2014. Heartland views the failure to disclose the sale as an attempt to mislead the trial court.

¶ 58 Given this procedural history, I am not puzzled by Heartland's "disgust" concerning the perceived attempt to enforce the extended lease in the trial court with reference to the 2014 date, contrary to Palmer's affidavit representing to the buyer that the property was not subject to any lease on October 25, 2010. Yet, I agree with the majority that neither fraud nor overreaching could be properly set forth as either a counterclaim or an affirmative defense.

¶ 59 First, Heartland was aware of some contamination to the property since 2005. More importantly, any potential fraud on the trial court was averted because Heartland supplied the trial court with accurate information concerning the 2010 sale to PKM prior to entry of the judgment in

the trial court following our mandate. Consequently, the trial court was able to act judiciously, based on *Heartland's* pleadings, and declare the lease terminated on the date of the sale in 2010, which seemed contrary to the specific language issued by this court in *Palmer I*.

¶ 60 As the majority in this case articulately states, the trial court's decision declaring the lease terminated in 2010 rather than 2014, was in compliance with the holding in *Palmer I* decision. The trial court did a commendable job of sifting through the complex history of this case in order to reach the correct result. For these reasons, I concur in the result reached by the majority in these consolidated cases now before this court.

¶ 61 However, my position is not intended to condone the Palmers' conduct following the oral arguments in *Palmer I,* particularly with reference to contents of the "Affidavit of Seller", brought to this court's attention by Heartland in support of their unsuccessful contentions of fraud and overreaching in the trial court.