SECOND DIVISION
September 30, 2016

No. 1-14-1968

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GLADSTONE GROUP I, INC., as agent for Owners of 829 W. Higgins Rd., Schaumburg, IL,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 13 M3 3074
v.	)	
ASGHAR HUSSAIN and ZAHID HUSSAIN, as limited guarantors,	)	The Honorable Sandra Tristano, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE MASON delivered the judgment of the court.[1]
Justice Lavin concurred in the judgment.
Justice Pucinski dissented.

ORDER

¶ 1 *Held:* The trial court erred in finding that the landlord unreasonably withheld consent to sublease because the defaulted guarantors failed to tender a sublease for the landlord's consent. Rather, guarantors proposed that landlord enter into a new lease either with them or new tenants at lower rent. The landlord was entitled to damages given guarantors' undisputed breached of the lease.

¶ 2 Following a bench trial, the trial court entered judgment in favor of defendants Asghar Hussain (Ashgar) and Zahid Hussain (referred to collectively as "guarantors") finding that

[1] This matter was recently reassigned to Justice Mason.

plaintiff Gladstone Group I, as agent for the building owners of 829 W. Higgins Road, Schaumburg Illinois, unreasonably withheld consent to a sublease for premises leased to guarantors' business, BBQ King, LLC. Gladstone appeals claiming that guarantors failed to tender a prospective subtenant who was ready, willing and able to step into guarantors' shoes and complete the remainder of the lease term at the rental price specified in the executed lease. Gladstone also claims that the trial court erred in denying all damages resulting from BBQ King's undisputed breach of the lease and guarantors' breach of their guaranty. Because nothing in the record supports a finding that guarantors ever tendered a sublease for Gladstone's consent, we reverse and remand for the calculation of damages to which Gladstone is entitled.

¶ 3 BACKGROUND

¶ 4 On June 1, 2011, Gladstone, a property management company, entered into a lease with lessee BBQ King for the premises. Asghar Hussain, Zahid Hussain and Kamal Syed,[2] signed the lease on behalf of BBQ King and separately guaranteed payment of rent and costs, including reasonable attorney fees, and performance of all obligations under the lease.

¶ 5 The lease term began on July 1, 2011, and ended on January 31, 2017, with the option to extend the lease for an additional five years. Base rent started at $4,167 per month and increased annually according to an itemized schedule attached to the lease as an exhibit. Per the schedule, no base rent was due for the initial six-month period from July 1, 2011 to January 31, 2012, to allow guarantors to build-out the space for the restaurant's operation. BBQ King made certain improvements to the premises, which, according to the terms of the lease, became property of Gladstone upon termination or expiration of the lease.

[2] The trial court dismissed with prejudice defendant Syed for lack of service.

¶ 6 In addition to base rent, the monthly rental amount included a pro-rata share of real estate taxes and assessments for the premises. In the event of default, the lease provided for a late payment fee, interest and attorney fees incurred in enforcing the lease. Among the restrictions in the lease, paragraph 31 prohibited guarantors from subletting the premises without first obtaining Gladstone's written consent, which Gladstone could not unreasonably withhold.

¶ 7 BBQ King's opening was delayed for an additional two months after the initial six-month build-out period. Unfortunately, BBQ King's business foundered and beginning in September 2012, guarantors failed to pay the monthly rent in full. During the next year, guarantors made partial payments in some months and failed to pay any rent in other months. On August 9, 2013, Gladstone served guarantors with a landlord's five-day default notice. On October 11, 2013, Gladstone filed a verified complaint for possession and rent against guarantors. Gladstone asserted damages relating to the default totaling $50,386.35.

¶ 8 On March 6, 2014, the case proceeded to a bench trial. The following relevant evidence was adduced at trial.

¶ 9 According to Ken O'Connor, Gladstone's controller, BBQ King first breached the lease in September 2012, when it tendered only partial payment of the rent. In August 2013, after BBQ King stopped paying any rent, Gladstone served a landlord's five-day notice on the guarantors. BBQ King, however, did not abandon the premises and was still in possession at the time of trial. In September 2013, Gladstone received at least one key from guarantors and began showing the property to prospective tenants. O'Connor was not aware of any subleases presented to Gladstone. O'Connor prepared a schedule itemizing the damages resulting from the breach, which consisted of past due rent, interest, fees and attorney fees. The schedule was admitted into evidence without objection.

¶ 10 Justyna Lesniak, Gladstone's office manager and then property manager, knew of the business' financial difficulties and saw a "closed" sign on the restaurant around the end of July or beginning of August 2013. Lesniak also noticed that the property appeared vacant.

¶ 11 Around the end of November 2013, Lesniak became Gladstone's property manager replacing the former property manager. During that same time, Gladstone hired a real estate broker and there were two or three showings of the premises in December 2013, four or five showings in January 2014, and two or three showings in February 2014. Lesniak also showed the property in addition to the broker's showings. To conduct the showings, Lesniak obtained a key to the premises from Asghar, who also owned a store (Marhaba Place) located next door to BBQ King. Lesniak was not aware of any sublease offers from guarantors' prospective subtenant.

¶ 12 Guarantors presented the testimony of John Reese, Gladstone's former property manager. Reese acknowledged that guarantors submitted three offers to Gladstone to have someone else lease the property and that he spoke with Ashgar about subleasing the property to another business. Ashgar approached Reese on three separate occasions regarding prospective buyers for the business who also wanted to rent the premises, but at a lower rental amount. Reese forwarded each offer to Lesniak to give to her boss, and Gladstone rejected each offer. Reese "was told that no rent would be accepted that would be other than what was currently being paid." But Reese personally thought that the $8,300 per month rent guarantors were paying was "over market based on the bad economy, so when the offer of [$]7500 came in, I thought it was pretty fair in my estimation" and reasonable.

¶ 13 Asghar stated that he handwrote a $6,500 per month offer letter dated September 9, 2013, on behalf of Kamlesh Patel. After Gladstone rejected the initial offer, Patel then offered $7,500 per month to rent the premises beginning on October 1, 2013. Asghar typed this offer in a letter dated September 23, 2013, and sent the letter to Reese for Gladstone's review. Asghar handwrote

on the letter that "I can pay what I owe plus attorney fees by 9/30/13." Asghar also sent Reese a rental application that Patel completed.

¶ 14 At the close of evidence, Gladstone moved for a finding in its favor arguing that the offered rent was "substantially lower, as much as 30 percent lower," than the base rent amount stated in the executed lease. Gladstone also argued that there was no reference to Patel in the offer letters and "all we had to go on was that Mr. Hussain *** was attempting to renegotiate the lease that he previously entered into. That was not acceptable to us." Guarantors argued Gladstone's failure to mitigate by unreasonably withholding consent to a "sublease" as an affirmative defense.

¶ 15 The trial court entered judgment in favor of guarantors, returned possession of the premises to Gladstone and disallowed a money judgment against guarantors. Gladstone filed a motion to reconsider arguing, in part, that the trial court erred in refusing to award any damages relating to the undisputed breach of the lease. The trial court denied Gladstone's motion and Gladstone timely appealed.

¶ 16 ANALYSIS

¶ 17 Gladstone first contends that the trial court erred in entering judgment in guarantors' favor because the "offer" letters and application were not offers to sublease and did not independently constitute a valid lease agreement. We agree.

¶ 18 Gladstone asserts that our review is *de novo* because we must construe the lease's provisions. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 245 (2010) (A reviewing court may independently construe a contract unrestrained by the trial court's judgment.) Generally, the interpretation of a lease presents a question of law that is subject to *de novo* review. *NutraSweet Co. v. American National Bank & Trust Co. of*

Chicago, 262 Ill. App. 3d 688, 694 (1994). But, here, our review does not entail an interpretation of the lease's "assignment or subletting" provision; instead, we are asked to review the trial court's factual finding that guarantors submitted sublease agreements to Gladstone for its consent, thus triggering Gladstone's obligation not to unreasonably withhold consent. When a party challenges a judgment entered in a bench trial, we defer to the trial court's factual findings unless they are against the manifest weight of the evidence. *Bazydio v. Volant*, 164 Ill. 2d 207, 215 (1995); *Gonzales v. Second Federal Savings & Loan Ass'n*, 2011 IL App (1st) 102297, ¶ 45. A judgment is against the manifest weight of the evidence if the opposite conclusion is apparent from the record or it is unreasonable, arbitrary, or not based on evidence. *Martinez v. River Park Place, LLC*, 2012 IL App (1st) 111478, ¶ 14; *Leith v. Frost*, 387 Ill. App. 3d 430, 434 (2008).

¶ 19 Guarantors claim that they submitted to Gladstone three offers from a prospective subtenant who was ready, willing, and able to step into their shoes for the remainder of the lease term. But their claim finds no support in the record.

¶ 20 Wholly apart from the lack of necessary information in the "offers," there was nothing in the "offers" indicating that the "buyer" was ready, willing and able to step into BBQ King's shoes and assume its obligations under the defaulted lease. What the guarantors proposed was not a *sublease*, but a *new* lease at a lower monthly rental with some person or entity interested in buying their business. Likewise, Patel completed an "application for lease," giving rise to the reasonable presumption that Patel wanted to enter into a new lease and not sublease the premises. Consequently, the record does not support a finding that guarantors tendered a *sublease* agreement to Gladstone for its consent.

¶ 21 Because no sublease was tendered to Gladstone, the sublease provision in the parties' lease (paragraph 31) was not implicated. The sublease provision required BBQ King to obtain Gladstone's written consent to sublease, which Gladstone could not unreasonably withhold. But

Gladstone had no obligation to consider or make any further inquiries regarding an "offer" or agreement that was not a sublease or to negotiate the terms of a new lease on different terms with a new tenant. Accordingly, the trial court erred in invoking paragraph 31 to deny monetary relief to Gladstone because Gladstone was never tendered a sublease to consider and give consent to. Consequently, Gladstone is entitled to monetary damages totaling $59,117.36, consisting of past due rent and fees relating to guarantors' undisputed breach from September 1, 2012 to September 9, 2013.[3]

¶ 22 The only affirmative defense that guarantors offered at trial was that Gladstone unreasonably withheld consent. Although not explicitly argued as such, guarantors' affirmative defense could be more broadly construed as Gladstone's failure to reasonably mitigate damages. While Gladstone's refusal to consider guarantors' "offers" to re-let the premises to a commercially viable tenant at a rental rate lower than that called for in the lease would be relevant on the duty to mitigate issue, it would nonetheless have been guarantors' burden to establish that the tenant they proposed was ready, willing and able to pay the lower rent. *Jack Frost Sales, Inc. v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 933, 944, 947 (1982); *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 1003 (1986); *Reget v. Dempsey-Tegler & Co.*, 70 Ill. App. 2d 32, 37 (1966). But no such proof was presented at trial.

¶ 23 Regardless of guarantors' burden to show that they tendered a viable tenant, Gladstone had a statutory duty to "take reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1 (West 2012). The testimony adduced at trial addressed Gladstone's efforts to re-let the premises, but the trial court did not make an express finding regarding the reasonableness of those efforts. Consequently, we remand and direct the trial court

[3] The amount of damages was obtained from Gladstone's "Exhibit B" entered into evidence without objection from guarantors.

to make a finding regarding the reasonableness of Gladstone's efforts to re-let the premises based upon the evidence in the record and to award damages accordingly. *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 292 (1998) (the determination of what constitutes "reasonable measures" is best made by the trier of fact). If the trial court finds that Gladstone's efforts were reasonable, Gladstone is entitled to a monetary judgment for the total amount of damages incurred from September 2012 to the court's entry of judgment in March 2014. On the other hand, if the trial court finds that Gladstone failed to take reasonable measures to re-let, Gladstone's monetary damages for the period of October 2013 to March 2014 may be reduced only by the amount of damages that could have been avoided; Gladstone would nonetheless still be entitled to recover $59,117.36 for the full year from September 2012 to September 2013 that guarantors' breach was undisputed. See *id*. at 293; *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 608 (2009).

¶ 24 CONCLUSION

¶ 25 The trial court erred in invoking the sublease provision to find that Gladstone unreasonably withheld consent because guarantors did not tender a sublease for Gladstone's consideration. Accordingly, we reverse and remand to the circuit court with directions to the court to: (1) vacate its previous judgment in favor of guarantors; (2) enter judgment in favor of Gladstone; (3) grant Gladstone's motion for reconsideration; and (4) enter a finding regarding Gladstone's "reasonable measures" to re-let the premises in mitigation of its damages. The trial court is also directed to award Gladstone: (1) $59,117.36 in damages for guarantors' undisputed breach from September 2012 to September 2013 and (2) damages from October 2013 to March 2014 totaling $56,062.14[4] reduced by the amount of loss, if any, that Gladstone could have

[4] Monetary amount consists of past due rent, interest, fees and attorney fees reduced by guarantors' security deposit as reflected in Gladstone's "Exhibit B."

reasonably avoided in accordance with the trial court's finding on Gladstone's "reasonable measures" efforts.

¶ 26 Reversed and remanded with directions.

¶ 27 Justice Pucinski, dissenting.

¶ 28 First, I agree with my colleagues that Gladstone is entitled to some damages. Our difference is in calculating how much. Second, my colleagues assume that the trial court found that there was an offer for a sublease and find that to be error. However, the order entered by the trial court on March 20, 2014 does not characterize the offer as one for a sublease. The order entered by the trial court on June 5, 2014 after the plaintiff's motion to reconsider does not characterize the offer as one for a sublease. There is no transcript for June 5, 2014 to accompany the written order so we cannot know for certain exactly what the court was thinking and I do not agree that we can assume the trial court decided this was an offered sublease. The court could just as easily have been thinking that this was a new lease offer. Either way, Gladstone had to do something, and the trial court clearly did not believe it did enough.

¶ 29 The trial court heard the witnesses and reviewed the evidence. My colleagues believe BBQ King offered a new tenant. Different parts of the lease determine what happens in each case. In section 31 when a subtenant is offered the lessor has a duty not to unreasonably withhold permission. In section 28 when possession has been terminated the lessor has a duty to use reasonable diligence to relet the premises. I cannot see that Gladstone has met either standard.

¶ 30 The plaintiffs sought a rent arrearage of $50,386.35 plus reasonable attorney fees and expenses to the date of the filing of their complaint. By the time they had provided their exhibits and testimony at trial they were asking for $115,179.51 to March 1, 2014.

¶ 31 The defendants provided two alternative affirmative defenses: 1) that they provided in good faith a subtenant, permission for which the lessor unreasonably withheld ; or, 2) that they submitted a *bona fide* new tenant which the lessor did not pursue resulting in a failure to use reasonable diligence to relet the premises and mitigate damages.

¶ 32 The plaintiffs during the trial and in their filings repeatedly assert that they had only two documents from BBQ King, and ignored the "Application for Lease" submitted by Kamlesh Patel. In fact, in their closing argument the attorneys for Gladstone stated that "we have not received a valid lease offer from any other person to relet the property" when in fact Reese testified that he received the "Application for Lease" as an agent of Gladstone in October 2013 and gave it to Lesniak.

¶ 33 BBQ King's owner, Asghar, wrote one handwritten letter to Gladstone which did not name or identify the proposed new tenant/buyer of his restaurant so I agree that the first handwritten letter cannot solve BBQ King's problems.

¶ 34 Then, Asghar sent a second, typed letter stating he had a proposed buyer of his restaurant. He did not name the proposed buyer, but he provided Gladstone with the "Application for Lease" document, which he obtained from lessor's agent, John Reese. The submitted "Application for Lease" signed by Kamlesh Patel included Patel's social security number and a $40 check for a credit check. The "Application for Lease" itself does not require the attachment of any financial documents; it does not require any documentation of previous business experience. In short the application for lease is a simple one page document on which Gladstone received the applicant's social security number along with a $40 check for the credit check.

¶ 35 Reese gave Asghar the one page "Application for Lease." Neither the application nor the lease itself outlines what is expected of the lessee when proposing a new tenant or sub-leasee.

Neither document requires the applicant, or the actual tenant proposing the applicant, to provide anything that would flesh out how ready, willing and able the new tenant is. The majority makes a point of saying that BBQ King did not submit a ready, willing and able new tenant, but the fact is neither the lease nor the application ask any questions other than the application asking for the name, address, current employment, social security number and a $40 credit check fee. From that any reasonable person would assume that Gladstone preferred to do a credit check on their own, and would ask for more documentation if they wanted it.

¶ 36 BBQ King was out of business. It was trying to sell the business -- presumably the fixtures it had installed, along with restaurant accoutrements like dishes, cooking gear, etc. – and hoped that Gladstone would take the deal. While Gladstone could have interpreted the offer as one for a sublease, they could also interpret the offer as one for a new lease. The document is titled: "Application for Lease," which, I think could go either way. In any case Gladstone did not take any steps to determine how business worthy the applicant, Patel, was as either a subtenant or a new lessee.

¶ 37 I note that at no time did Asghar offer to make up the monthly difference between the rent that his buyer was offering ($7500/month total) and what the lease called for ($8300/month total at the time) which makes the argument that this was an application for a *new* lease more convincing. But even if the trial court did characterize the new tenants as proposed sub-tenants, and even if that was error, the fact is that the lessor did nothing to pursue the lead Asghar gave them and then waited at least four months to start showing the property.

¶ 38 Further, although there is testimony that they showed the property, which was clearly built out as a restaurant, at least several times, it is unclear if they showed it to different people each time or to the same people several times. The testimony was clear that they showed it for use as an insurance office for which it was obviously unsuited. And there is conflicting

testimony about whether there were any signs indicating the property was available for rent. In addition, Lesniak testified that although her office was next to the restaurant and that she knew the restaurant was "closed" in July 2013, she did not begin to show it as available until December 2013. From July to December, the lessor did nothing, and during that time, in October 2013, Asghar provided the "Application for Lease" from Patel which could have started in October 2013. There was conflicting testimony from Reese and Lesniak about whether Reese told Lesniak about the offer from Patel. The trial court apparently believed Reese.

¶ 39 The trial court judge heard all the evidence and testimony. She believed that Gladstone did not do everything they could to reasonably mitigate their damages. They had a bird in hand with the promise to pay $7500 a month total rent plus a written offer from BBQ King to pay everything they owed to date. According to testimony this was "reasonable" in a "bad economy." Instead of taking the deal, Gladstone did not call Patel, did not meet with him, did not ask for more information, and did not try to negotiate.

¶ 40 In *Gold Management Inc. v. Evening Tides Waterbeds, Inc.*, 213 Ill. App 3d 355 (1991), a tenant going under provided the landlord with the names and contact information for proposed subtenants. The landlord rejected the offer, but that was after doing the credit checks, getting the financial information and during negotiations.

¶ 41 In *Jack Frost Sales v. Harris Trust and Savings Bank,* 104 Ill. App. 3d 933 (1982), the tenant sought to assign the lease rather than sublease and the landlord refused. The tenant complained that the refusal was wrongful. We held that there was no evidence that the proposed assignee was financially responsible. But at least there was a meeting, and financial information was asked for and provided. The terms of a possible agreement were discussed. The attorney for the landlord told the attorney for the prospective assignees what information he needed.

¶ 42 In *Fishman v. Fox River Commons Shopping Center, LLC*, 2012 IL App (2d) 120281-U the landlord demanded financial information and got some of it but did not get all of it. The logic in the case is persuasive. We found specifically that Fox River did not ask for "additional information" and did not mention insufficient financial information when it rejected the assignment of the lease and found that the trial court's rulings that Fox River acted unreasonably in rejecting the assignments "are not against the manifest weight of the evidence." There were discussions, disclosures, requests for information, and negotiations.

¶ 43 In *Reget v. Dempsey-Tegler & Co*, 70 Ill. App. 2d 32 (1966), the landlord sought unpaid rent after the tenant vacated the premises and the tenant sought a set off claiming that the landlord refused to accept an offered subtenant and therefore failed to mitigate. After an exchange of information, an investigation into the proposed subtenant's business practices, and some discussions, the landlord refused permission because of the financial condition of the subtenant and the purpose for which the premises would be used. The trial court found for the landlord. We affirmed. But again, there was a pattern of conduct which made it clear that the landlord took the offer seriously and did its work to decide whether or not to accept the proposed subtenant.

¶ 44 In *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995 (1986), the tenant abandoned the premises and the landlord sought unpaid rent. The tenant claimed the landlord could have mitigated damages by accepting a proposed assignment of the lease. The trial court held for the tenant and we affirmed. There were discussions, information about the proposed new tenant's business background and finances, an SBA loan in place and other negotiations. The deal fell apart. But again, this case demonstrates that the landlord took the offer seriously and did its work. Once the tenant proposed the new assignee, the landlord dealt with the attorneys for the assignee to get information.

¶ 45 In *Shreeji Krupa, Incorporated v. Leonardi Enterprises*, 299 Fed. Appx 573 (2008), the tenant proposed the assignment of his lease to a new tenant. The landlord sent the proposed new tenant an application and ran a credit check. The landlord asked for additional information. There were multiple letters back and forth. In the end, the original tenant signed the assignment but the new proposed tenant did not. On that basis the court found that the landlord's refusal to accept the assignment was justified.

¶ 46 Even the majority's own case, *St. George* shows that the landlord made a significant effort to mitigate its damages, on top of the commercial lease clauses which created a specific formula for mitigation. "In addition to this contractual mitigation, the Trial Court record is filled with other evidence of the landlord's efforts to find a replacement tenant for the space abandoned by MBC 6½ years before the end of the 10-year Lease. St. George and the subsequent Building owner, EAR, made substantial - and ultimately successful - efforts to re-rent the space abandoned by the Defendants. As detailed at pages 12-15 of the Opening Brief, these efforts included: listings in the Metro Guide and Black's Office Guide; mailings to tenant brokers of Building brochures and announcements of lease transactions in the Building; entertainment of tenant brokers; several detailed written proposals to Corboy regarding renting space on the 20th floor of the Building, including the Premises; and more than 15 detailed written proposals to rent the Premises sent to at least 11 other prospective tenants (by EAR, the subsequent owner)." *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd., 296 Ill. App. 3d 285 (1998),* Reply Brief of Appellants. In *St. George* the original tenant did not offer a prospective new tenant for consideration, so the fact pattern is not exactly on point.

¶ 47 Clearly in situations where the tenant does submit a new tenant, either for sublease, assignment or new lease, the lessor has taken some action to find out enough about the new tenant to decide whether or not to accept the substitution. Here Gladstone took the Application

for Lease, and the $40 check, but did not do a credit check, did not interview the new tenant, did not get financials, did not discuss alternatives or negotiate.

¶ 48 In these "ready willing and able" cases it is clear that if the original tenant does provide the lead, the landlord has to run at least explore it. Today's business practice makes it reasonable and practical for the landlord to do the credit check, ask for the financial documents it wants to review, request business experience documentation, negotiate, etc. How the tenant can be expected to do all of that especially when the lease does not itemize what information is necessary, nor, in this case, did the "Application for Lease" is not clear from the cases, from the statute or even, from common sense.

¶ 49 I cannot see how not even trying to work with a substitute tenant for a comparable restaurant business and then not showing the premises for four months is enough.