2016 IL App (1st) 150868-U

FOURTH DIVISION
September 8, 2016

Nos. 1-15-0868 & 1-15-1867 (Consolidated)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PINK FOX, LLC, an Illinois Limited Liability Company,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 M1 702085
	)	
SING CHOK KWOK and QING YUN GUO,	)	Honorable
Defendants-Appellants,	)	Thomas M. Donnelly,
	)	Judge Presiding.
(City Inn, Inc., and Ji Guang Zheng, Defendants).	)	

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

Held: We affirm the trial court's entry of judgment in favor of Pink Fox after a bench trial and its subsequent award of attorney fees.

¶ 1 Defendants Sing Chok Kwok and Qing Yun Guo appeal following a bench trial in which the trial court entered judgment in favor of plaintiff Pink Fox, LLC, for rental arrears regarding a commercial lease. Kwok and Guo also appeal the trial court's subsequent order awarding Pink

Fox attorney fees. This court consolidated the cases on appeal. Kwok and Guo challenge on appeal: (1) the trial court's rulings on motions *in limine* before trial, (2) the trial court's finding that Kwok was a tenant under the lease, (3) the trial court's holding that the guaranty accompanying the lease was supported by consideration, (4) the trial court's award of $188,822.40 in damages to Pink Fox, and (5) the trial court's award of attorney fees and costs to Pink Fox. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Preliminary Proceedings

¶ 4 On January 28, 2014, Pink Fox filed a complaint in forcible entry and detainer against defendants Kwok, Guo, City Inn, Inc., and Ji Guang Zheng for failure to pay rent in January 2014 and thereafter for leased commercial property located in Northlake, Illinois, out of which City Inn operated a Chinese restaurant. Pink Fox requested return of possession of the property and judgment against defendants for the amount of the missed month's rent and associated costs and fees; payment for each month City Inn remained in possession until the property could be re-leased; and deficiencies and costs of re-leasing the premises. Pink Fox also alleged that Zheng, Kwok, and Guo signed a personal guaranty at the time the lease was executed and they were individually liable on that basis. Pink Fox attached to the complaint as an exhibit the lease, which included the guaranty.

¶ 5 Subsequently, Pink Fox filed an amended complaint and also filed a motion for use and occupancy, to which it again attached a copy of the lease and guaranty. Kwok and Guo filed an answer to the amended complaint and a motion for summary judgment, attaching a copy of the lease and guaranty to their motion.

¶ 6 On March 20, 2014, Pink Fox filed a second amended complaint. In this amended version, Pink Fox sought return of possession of the leased premises, past due rent, late fees, real estate taxes and maintenance costs, court costs, monthly payments of $24,393.59 for each month defendants failed to return possession until the premises could be re-leased, other damages associated with repairing and re-letting the premises, and attorney fees. In particular, Pink Fox alleged that City Inn executed a 10-year lease for the property on March 17, 2012. Pink Fox alleged that under the lease, the monthly base rent was $13,000, with annual increases of 2%, and the tenant was also responsible for paying real estate taxes and maintenance costs. Pink Fox alleged that City Inn failed to pay rent for January 2014 in the amount of $24.393.59. Including late fees and other costs associated with collecting the late rent, Pink Fox alleged that City Inn owed $27,689.46, in addition to monthly rent of $24,393.59 for each additional month City Inn remained in possession after January 2014. Pink Fox alleged that the lease was signed on City Inn's behalf by Zheng and Kwok.

¶ 7 Additionally, Pink Fox alleged that Zheng, Kwok, and Guo executed the guaranty at the same time as the lease and as part of the consideration for Pink Fox entering into the lease. Pink Fox alleged that City Inn could not provide a certificate of insurance at the time the lease was executed, but Pink Fox provided keys to the premises because of the guaranty. The guaranty provided, in part:

> "IN CONSIDERATION OF, and as an inducement for the granting, execution and delivery of that certain Lease, covering Premises at WAL-MART/SAM'S CLUB SHOPPING CENTER *** and dated March , 2012 *** between the Landlord herein named *** and the Tenant herein named ***, and in further consideration of the sum of One Dollar ($1.00), and other

> good and valuable consideration paid by the Landlord to the undersigned, the undersigned (hereafter called the 'Guarantor'), hereby guarantees to the Landlord, its successors and assigns, the full and prompt payment of Rent and any and all other sums and charges payable by the Tenants, its successors and assigns under said Lease; and the full performance and observation of all the covenants, terms, conditions and agreements therein ***; and the Guarantor hereby covenants and agrees to and with the Landlord *** in the payment of any such sums, or in the performance of any of the terms, covenants, provisions or conditions contained in said Lease, the Guarantor will forthwith pay such rent to the Landlord *** and any arrears thereof, and will forthwith faithfully perform and fulfill all of such terms, covenants, conditions and provisions and will forthwith pay to the Landlord all damages that may arise in consequence of any default by the Tenant, *** including, without limitation, all reasonable attorneys' fees incurred by the Landlord or caused by any such default and by the enforcement of this Guaranty.
>
> THIS GUARANTY IS AN ABSOLUTE AND UNCONDITIONAL GUARANTY OF PAYMENT AND PERFORMANCE. It shall be enforceable against the Guarantor, its successors and assigns, without the necessity for any suit or proceedings on the Landlord's part of any kind or nature whatsoever against the Tenant ***."

Pink Fox alleged that the guarantors were notified of the non-payment of rent and the terms of the guaranty absolutely and unconditionally guaranteed payment and performance. Pink Fox requested judgment against Kwok, Zheng, and Guo as guarantors.

¶ 8 Additionally, Pink Fox alternatively pleaded that Kwok signed the lease in an individual capacity as he was not an officer or shareholder of City Inn and did not designate any corporate capacity under his signature on the lease, and he was therefore a tenant under the lease and individually liable. Pink Fox similarly pleaded that Zheng was individually liable as a tenant under the lease because he did not designate any corporate position by his signature on the lease. Pink Fox again attached a copy of the lease and guaranty, in addition to other documents.

¶ 9 On March 21, 2014, the trial court granted Pink Fox's motion for use and occupancy and ordered possession returned to Pink Fox. The trial court found Kwok and Guo's motion for summary judgment moot based on the second amended complaint.

¶ 10 On April 22, 2014, Kwok and Guo filed a motion to dismiss under section 2-615 and 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 619 (West 2014)). Kwok and Guo attached a copy of the lease and guaranty to their motion. They argued that the guaranty was void because Pink Fox failed to pay the $1 consideration set forth in the guaranty. Kwok and Guo further asserted that Kwok signed only as a guarantor and Pink Fox's claim that Kwok was a tenant under the lease was barred by the statute of frauds. Zheng and City Inn filed a separate answer to the second amended complaint and moved to join the motion to dismiss.

¶ 11 On May 20, 2014, Pink Fox filed a response to Kwok and Guo's motion, asserting that Kwok and Zheng signed the lease in an individual capacity. Pink Fox further argued that Kwok, Guo, and Zheng signed the guaranty simultaneously with the lease and received consideration when Pink Fox agreed to sign the lease and release Zheng's wife as a fourth guarantor and tender the keys and possession of the premises before obtaining the certificate of insurance. Pink Fox contended that a corporate resolution passed by City Inn did not ratify Kwok's or Zheng's signing of the lease as the resolution was dated April 6, 2012, after the lease was signed, and it only

mentioned Zheng, not Kwok. In support, Pink Fox attached a copy of the guaranty, the second amended complaint, the certificate of liability insurance, the corporate resolution, and affidavits from the president of Pink Fox, Young Won, and Pink Fox's attorney, Won Sun Kim.

¶ 12 On June 6, 2014, the trial court entered an order denying the motion to dismiss. The trial court found that the guaranty and lease were signed contemporaneously, possession of the premises was tendered based on the guaranty, and consideration for the lease was sufficient consideration for the guaranty based on contemporaneous execution. The trial court held that a material question of fact existed regarding in what capacity Zheng and Kwok signed the lease.

¶ 13 On June 30, 2014, Kwok and Guo filed their answer and affirmative defenses to the second amended complaint. They raised the following affirmative defenses: (1) the guaranty was void for failure of Pink Fox to pay $1 in consideration; (2) Kwok and Guo were not in privity with Pink Fox as they were not tenants and were not proper parties to the lawsuit; (3) Pink Fox materially breached the lease in failing to seek a reduction in real estate property taxes; (4) Pink Fox materially breached the lease in failing to cooperate with defendants in changing the signage of the premises; (5) the lease provision that tenant was responsible for 100% of the costs related to maintenance was unconscionable; and (6) Pink Fox failed to mitigate damages. City Inn and Zheng also filed their answer and affirmative defenses.

¶ 14 On October 20, 2014, the trial court entered a case management order providing that defendants were to file any germane counterclaims or affirmative defenses by November 10, 2014, and provided:

> "[n]either plaintiff nor defendant need file a responsive pleading/answer. See 735 ILCS 5/9-106; Samek v. Newman, 164 Ill. App. 3d 967 (1st Dist. 1987)

('general denial' allowed under Forcible Act may be asserted by presenting evidence at trial)."

¶ 15 In addition, the order directed the parties to tender all copies of any documents they intended to use at trial by November 10, 2014, and it set the trial date for December 15, 2014. City Inn and Zheng filed amended affirmative defenses on November 10, 2014.

¶ 16 On November 10, 2014, Pink Fox's attorney, Won Sun Kim, filed a motion to withdraw and requested an extension of time to tender the documents. On November 21, 2014, the trial court entered an order granting the motion and granting the new attorney, David J. Zagar, leave to substitute. The court gave the parties "28 days to tender copies of all documents intended to be used at trial" and set a new trial date.

¶ 17 On February 23, 2015, two days before trial, Pink Fox filed a response to the affirmative defenses. With respect to Kwok and Guo's affirmative defenses, Pink Fox asserted that (1) the guaranty was not void and that Pink Fox did in fact tender possession of the property on condition that they sign the guaranty; (2) that they were in privity and personally liable under the guaranty; (3) that Pink Fox did not fail to seek a reduction in real estate taxes in violation of the lease; (4) that it did not fail to cooperate with defendants in changing the signage for the premises in violation of the lease; (5) that the lease was not unconscionable based on the provision making defendants responsible for maintenance expenses of the premises; (6) that Pink Fox did not fail to mitigate damages by attempting to lease or sell the property and conduct repairs.

¶ 18 Pink Fox filed another response to the affirmative defenses on February 24, 2015. It asserted that (1) it tendered possession of the premises on condition that they sign the guaranty and the guaranty was executed contemporaneously with the lease, which constituted sufficient

consideration; (2) the parties were in privity, the guaranty preserved personal liability against Kwok and Guo, City Inn was a sham corporation used by defendants to avoid liability, and Kwok failed to designate any corporate capacity next to his signature on the lease and was liable as a tenant; (3) that the lease did not require Pink Fox to seek a tax reduction, only to cooperate with tenant in seeking a reduction, and Pink Fox did not violate the lease and did not promise to try to reduce the taxes; (4) that it did not violate the lease or fail to cooperate in changing the signage, as Kwok did not cooperate with Pink Fox in showing him the plans to change the sign; (5) that the lease was not unconscionable because it only provided that tenants were responsible for maintenance costs related to the leased space, not the entire shopping center complex; and (6) that Pink Fox has not failed to mitigate damages and that it has in fact taken steps to sell or re-lease the property continuously and conduct repairs since defendants vacated.

¶ 19 B. Motions *in Limine*

¶ 20 A bench trial occurred on February 25 and 27, 2015. Immediately before trial, the trial court heard several motions *in limine*. Copies of the motions are not included in the record, but the record contains the report of proceedings regarding the parties' arguments over the motions. In particular, the parties discussed Kwok and Guo's motion *in limine* to admit the allegations set forth in their affirmative defenses due to Pink Fox's failure to timely file a reply. The parties noted that Kwok and Guo were arguing that their first, third, and fourth affirmative defenses should be deemed admitted, *i.e.*, Pink Fox's failure to pay $1 in consideration, Pink Fox's failure to reduce property taxes, and Pink Fox's failure to cooperate in changing the signage. Kwok and Guo conceded that they had not filed a motion to have their affirmative defenses deemed admitted. Pink Fox's counsel argued that he was unaware that Pink Fox's prior attorney had not responded to them and asked for leave to allow its late response. Pink Fox's counsel indicated

that he was given Kwok and Guo's motions *in limine* only minutes before trial and the late reply should be allowed in the interests of justice. In addition, Pink Fox asserted that the first affirmative defense was not proper because it went to allegations in the complaint and was part of the cause of action.

¶ 21 The trial court observed that defendants would not be prejudiced by allowing the late reply because "these issues have been the issues in detention [*sic*] throughout the course of the litigation so it wouldn't seem there would be any surprise." The court indicated that it must construe the Code liberally. It noted that Kwok and Guo never made a motion for judgment on the pleadings, which was essentially what Kwok and Guo were asking the court to do on the day of trial. It held that "sitting on your rights and then springing something on the day of trial *** makes the Court reluctant to act in a draconian fashion towards one side." The court allowed Pink Fox to file the response *instanter*. The trial court also found that the first affirmative defense regarding the $1 consideration was not a proper affirmative defense as it was an element of plaintiff's cause of action and the court struck this as an affirmative defense.

¶ 22 Kwok and Guo next argued their motion *in limine* to bar Pink Fox's exhibits because the documents were not tendered within the 28-day time period set forth in the trial court's previous order. They asserted that Pink Fox first provided its trial documents two days before trial. Kwok and Guo indicated that they already had some documents in their possession, but they were missing numbers 9 through 12 and 19 through 22 from plaintiff's exhibit list. The court observed that some of the documents were deposition transcripts, which were not admissible into evidence. It noted that exhibit 9 was an email between the parties regarding payment of the real estate tax, which counsel for Kwok and Guo indicated his clients had not given him. Another exhibit was a five-day notice letter, which was unnecessary evidence because possession had

been surrendered months before trial. Similarly, Pink Fox noted that it did not need to use exhibit 11, which was a demand for payment. The court indicated that it could take judicial notice of another exhibit, which was a motion for default that had been filed in the court. However, the trial court ruled that it would bar an email about the real estate tax bill, a letter to defendants regarding real estate tax reduction, and the real estate tax bill from 2014 printed from the Cook County's website. Thus, the trial court granted the motion in part and denied it in part.

¶ 23 C. Bench Trial

¶ 24 Young Won, the owner and president of Pink Fox, testified that his company is a restaurant building management business. He testified that Zheng applied to lease a restaurant space at 139 West North Avenue in Northlake, Illinois in January or February of 2012, and there were many people interested in renting the property. Zheng, Kwok, and Guo met with him at the rental property. Won's attorney Kim handled lease negotiations, which occurred in person and by email and telephone. They began negotiations in January 2012 and executed the lease on March 17, 2012. Won testified that he investigated their background before entering into the lease and obtained credit reports, financial statements, and tax records from Kwok and Zheng.

¶ 25 When the lease was signed, Won received $39,000 as a security deposit of three months' rent; $30,000 in lieu of requiring a fourth guarantor; and $20,000 for leasing equipment, for a total of $89,000. In return, Won gave defendants keys to the property. Zheng and Kwok provided several checks to cover these amounts when the lease was signed. Won later used this money to pay the mortgage, taxes, maintenance costs, and attorney fees, when defendants failed to pay rent for 14 months.

¶ 26 Won testified that Zheng, Kwok, and Guo were guarantors of the lease. Won had three people sign the guaranty because "[t]wo people are tenants and one is the notary." Won testified

that they were "the people who actually operate the business." Won testified that there were supposed to be four guarantors on the lease, but one of them, Zheng's wife, was removed before the lease was signed because she decided to give $30,000 instead. Won testified that he did not give defendants $1 in cash as set forth in the guaranty. He testified that he gave "them comparable or appropriate compensation." Won testified that receiving an insurance certificate was very important, he did not initially receive one when the lease was executed, but defendants later provided him with one.

¶ 27 Won testified that under the lease, the base rent was $13,000 per month. The monthly base rent would increase 2% annually. His attorney calculated rent increases and real estate taxes and would inform tenants of the amounts due. Won testified that he tried "several times" to reduce the property tax bill on the property; the monthly tax bill for the property from April 2012 was approximately $11,000, and was approximately the same in 2013 and 2014. He testified that defendants stopped paying rent beginning in January 2014. At the time, the monthly rent amount, including taxes, was approximately $24,500. He testified that after defendants vacated the property, it remained vacant even at the time of trial and he continued to pay taxes on it.

¶ 28 Zheng testified that he was president of City Inn and he signed the lease on behalf of City Inn to rent the premises in Northlake. Zheng signed the guaranty of the lease on the same date, March 17, 2012. Zheng testified that he signed the guaranty because Won "promised a dollar and also he would try to reduce the property tax." Zheng testified that Won made these promises orally and Zheng "couldn't read the lease very well, so I do not know if they were included in the lease." Zheng testified that he never received $1 or a reduction in real estate taxes. He affirmed that he would not have signed the guaranty without the $1 in consideration. He affirmed that he never waived his right to it. He affirmed that the guarantee was a separate transaction from the

lease. Zheng acknowledged the corporate resolution by City Inn, which recited that Zheng, "the president of the corporation *** [is] hereby authorized to sign on behalf of City Inn, Incorporated, the lease between Pink Fox, LLC, *** and Zheng, Ji Guang." The resolution was passed at a meeting of the board of directors held on April 6, 2012.

¶ 29 Kwok testified that he is married to Guo. Kwok testified that he was not an officer, director, shareholder, owner, or boss of City Inn, and his relationship with City Inn during March 2012 through January 2014 was one of "[f]riendship." He testified that City Inn belonged to his friend, Zheng. Kwok went to City Inn to "help out." Kwok affirmed that he signed the lease, but denied that he did so as a tenant. He testified that he signed the lease in order to "help out my friend." Kwok acknowledged his signature on page 21 of the lease, below where it stated, "tenant," and that his initials are on the bottom of every page of the lease. Kwok testified that Won promised to reduce the property taxes, but he failed to do this. Kwok affirmed that he helped operate the business and he paid part of the security deposit. He provided a check for $4,500 and also borrowed funds from his sister and a friend. He affirmed that he signed as a guarantor, but he testified that he never received the $1 in consideration. Kwok affirmed that he took over the restaurant in March 2013. He answered in the affirmative when asked if he did so because he "knew that you were the sponsor *** on the agreement and you had liability[.]"

¶ 30 The parties stipulated that Guo would testify that she never received $1 under the guaranty. The parties presented closing arguments.

¶ 31 The trial court held that City Inn's corporate resolution showed that the parties contemplated that Zheng signed the lease as an agent for City Inn. Regarding Kwok, the trial court held that the lease was ambiguous "because there's no corporate capacity" designated by the signatures in the lease and the trial court could thus consider extrinsic evidence. The trial

court found that Kwok was "in this for friendship. He's not signing in any corporate capacity. It seems clear from the extrinsic evidence that he's signed not as any agent of the corporation. In fact, he signed it individually." The fact that he later ran City Inn occurred in March 2013, long after the lease was signed.

¶ 32 The trial court also found that the lease and guaranty were entered into contemporaneously, that they were unambiguous regarding the consideration involved in the guaranty, and that there was no provision requiring Pink Fox to reduce real estate taxes. The court held that the leasehold constituted consideration. The court stated that the fact that $1 was not exchanged for the guaranty was not controlling, as recital of nominal consideration was a formality of the contract and the intent of the parties was clear from the document. The court found Zheng's testimony regarding the $1 unpersuasive and was the result of leading by his attorney, and Zheng's rationale for signing the guaranty was irrelevant. The court further held that the evidence did not support defendants' contention that the lease and guaranty were "separate deals," as they were "interlocking," the guaranty was an exhibit to the lease, and the documents themselves "contemplate[] that these are one and the same." The court observed that there was no credible evidence of separate negotiations. Further, it was clear the lease was "drawn up with the knowledge that there are only going to be three guarantors," instead of four, and that there was "an additional 30,000 in security deposit" inserted into the lease in lieu of a fourth guarantor to reflect this arrangement.

¶ 33 Regarding damages, the trial court found insufficient evidence to award damages relating to real estate taxes or maintenance costs. The trial court held that failure to mitigate damages was an affirmative defense for which plaintiff did not bear the burden of proof and there was no evidence other than Won's testimony that he tried to re-let the property. Concerning unpaid rent,

Pink Fox argued that defendants owed two months' rent at the increased rate of $13,260, and 12 months at the next increased rate of $13,525.20, for a total of $188,822.48. The trial court found that Zheng was liable only under the guaranty and not as a tenant or lessee. As to Kwok, the court held that he was liable as a tenant and signatory to the lease and as a guarantor under the guaranty. As to Guo, the court held that she was liable only as a guarantor. The trial court entered judgment for Pink Fox in the amount of $188,822.40 to that effect.

¶ 34 On March 24, 2015, Pink Fox filed a petition for attorney fees and costs pursuant to paragraph 29.15 of the lease. It requested attorney fees and costs for the services of its initial attorney, Kim, and attached her affidavit, billing statements, receipts totaling $16,236.57. It also requested attorney fees for substitute counsel Zagar, who conducted the trial, and attached Zagar's affidavit and billing statements in the amount of $6,112.50.

¶ 35 The trial court entered an order on June 5, 2015, granting Pink Fox's petition for attorney fees for the amounts requested and entered judgment to that effect against City Inn, Zheng, Kwok, and Guo, jointly and severally. The parties stipulated to an agreed statement of facts regarding the June 5, 2015, hearing on the petition for attorney fees. The stipulation indicated that Pink Fox's previous attorney Kim was not present at the hearing and that Kwok and Guo asserted that the court should not grant the petition as to Kim because she was not present to testify in support of her affidavit and billing statements.

¶ 36 Kwok and Guo filed a notice of appeal from the February 27, 2015, order and from the June 5, 2015, order awarding attorney fees. This court consolidated the two cases on appeal.

¶ 37 II. ANALYSIS

¶ 38 A. Record on Appeal

¶ 39 Initially, we address Pink Fox's contention that Kwok and Guo failed to provide this court with copies of the motions *in limine* upon which two of their appellate claims are based, and that they have therefore failed to provide the court with a sufficiently complete record on appeal.

¶ 40 As the appellants, Kwok and Guo, have "the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). "[I]n the absence of such a record on appeal, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis." *Id.* This court "will resolve any doubts arising from the incompleteness of the record against the appellant." *Id.* (citing *Foutch*, 99 Ill. 2d at 392).

¶ 41 Although the motions *in limine* are not included in the lower court record in this case, the report of proceedings contains the transcript of the parties' arguments and the trial court's rulings on the motions. We agree with Kwok and Guo that the transcript of the proceedings is sufficiently detailed to permit review of their contentions regarding two of the motions *in limine*. To the extent any doubts arise due to not having a complete record, we will construe them against appellants. *Midstate Siding*, 204 Ill. 2d at 319.

¶ 42 B. Motions *in Limine*

¶ 43 "As part of its inherent power to admit or exclude evidence, a circuit court has broad discretion to grant or deny motions *in limine*." *Koehler v. Packer Group, Inc*, 2016 IL App (1st) 142767, ¶ 124. This court will only disturb a circuit court's ruling if there was "a clear abuse of discretion." *Id.* " 'An abuse of discretion will be found only where the circuit court's decision is

arbitrary, fanciful, or unreasonable or where no reasonable person would take the circuit court's view.' " *Id.* (quoting *People v. Ursery,* 364 Ill. App. 3d 680, 686 (2006)).

¶ 44 i. Motion *in Limine* to Bar Pink Fox's Exhibits

¶ 45 Kwok and Guo first challenge the trial court's decision to deny in part their motion *in limine* to bar all of Pink Fox's exhibits at trial.

¶ 46 In the trial court, Kwok and Guo argued that all Pink Fox's exhibits should be barred because Pink Fox failed to provide the documents it intended to use at trial until two days before trial (February 23, 2015), in violation of the trial court's November 21, 2014, which directed that the "parties are given 28 days to tender copies of all documents intended to be used at trial." As such, Pink Fox should have tendered the documents by December 19, 2014.

¶ 47 The trial court granted in part and denied in part the motion *in limine*. The court noted that the November 21 order was entered at the same time as Pink Fox's previous counsel withdrew and new counsel substituted in. The trial court focused on whether Kwok and Guo already had any of the documents in their possession. Kwok and Guo stated that they were missing document numbers 9 through 12 and 19 through 22. The trial court held that one of those proposed exhibits was a deposition transcript which was inadmissible into evidence anyway; one document was a five-day notice, which was unnecessary evidence because possession had been surrendered; one document was a demand for payment letter, which Pink Fox's counsel stated was not needed at trial; and one document was a motion filed in the trial court of which the court took judicial notice. The trial court barred admission of an email regarding real estate taxes, a letter to defendants regarding real estate taxes, and a real estate tax bill, because they had not been provided to defendants and were not already in their possession. The trial court noted that it must "make sure that things are fair. They have a right to get documents in advance of trial."

¶ 48 On appeal, Kwok and Guo claim that the trial court abused its discretion in not granting their motion as to all of Pink Fox's documents, but they do not discuss any specific document in particular. In their reply brief, Kwok and Guo take particular issue with the lease and attached guaranty, which was admitted as plaintiff's exhibit 4 at trial. We note that the other exhibits admitted at trial included the personal financial statements of Zheng and Kwok, copies of the checks tendered to Pink Fox for the lease at the time of execution, the certificate of liability insurance, and the corporate resolution.

¶ 49 Pursuant to Illinois Supreme Court Rule 219(c), a trial court may impose "such orders as are just" for violation of the discovery rules or "any order entered under these rules." Ill. S. Ct. R. 219(c) (eff. Jul. 1, 2002). "[T]he imposition of sanctions for failure to comply with discovery rules and orders, and decisions regarding what type of sanction to impose, are matters within the broad discretion of the trial court." *Kubicheck v. Traina,* 2013 IL App (3d) 110157, ¶ 30. "We may reverse a trial court's imposition of a particular sanction only when the record establishes a clear abuse of discretion." *Id.*

¶ 50 Under the circumstances presented, we conclude that the trial court did not abuse its discretion in ruling on the motion *in limine*. *Koehler,* 2016 IL App (1st) 142767, ¶ 124. The record supports that the trial court reasonably exercised its discretion in barring some documents while allowing others based on whether the defendants already had the documents in their possession. The trial court also barred documents which could not be introduced into evidence and documents which were not necessary to establishing Pink Fox's claims at trial.

¶ 51 With regard to the lease and attached guaranty, Kwok and Guo contend that they did not have a chance to review the "specific lease" that Pink Fox intended to use at trial. However, Kwok and Guo concede that in their answer to the second amended complaint, they admitted that

a copy of the lease (which contains the guaranty as an attached exhibit) was attached to the second amended complaint. We further note that Kwok and Guo attached the lease and guaranty to their motion to dismiss. They have not alleged that there were any other versions of the lease or guaranty, other than the version that was provided by Pink Fox with its complaint, attached to Kwok and Guo's motion to dismiss, and admitted at trial. They had a copy of the lease and guaranty in their possession long before the day of trial. Moreover, they do not allege that they were surprised by any of its provisions. Indeed, the focus of this case since its inception has been the lease and the guaranty. Accordingly, the trial court's decision was not arbitrary or unreasonable where defendants already had possession of the exact documents to be used at trial since the inception of the case and did not dispute their existence or authenticity. *Kubicheck,* 2013 IL App (3d) 110157, ¶ 30. Kwok and Guo have not established any surprise or prejudice. There is no indication from the record that Pink Fox was acting in bad faith. *Id.* ¶ 31.

¶ 52 With regard to Pink Fox's other documents that were admitted into evidence at trial, we note that Kwok and Guo do not discuss these documents on appeal. Moreover, it appears they were documents of which Kwok and Guo already had possession before trial, such as the personal financial statements of Zheng and Kwok which were presumably produced by their attorney during lease negotiations, copies of the checks tendered to Pink Fox for the lease at the time of execution, the certificate of liability insurance tendered by defendants to Pink Fox for the premises, and the corporate resolution ratifying Zheng's signing of the lease.

¶ 53 ii. Motion *in Limine* Regarding Failure to Reply to Affirmative Defenses

¶ 54 We next address Kwok and Guo's argument that the trial court abused its discretion in denying its motion *in limine* to deem admitted the facts alleged in their affirmative defenses because Pink Fox failed to file a timely response.

¶ 55 Section 2–602 of the Code of Civil Procedure provides that if a defendant pleads a new matter in its answer, "a reply shall be filed by the plaintiff." 735 ILCS 5/2–602 (West 2012). The reply must be filed within 21 days after the last day allowed for filing the answer. Ill. S. Ct. R. 182(a) (eff. Jan.1, 1967). "Under Illinois law, a party's failure to reply to an affirmative defense constitutes an admission of the facts alleged therein." *Pancoe v. Singh*, 376 Ill. App. 3d 900, 908 (2007). However, "a failure to reply merely amounts to an admission of truth of new factual matter and does not amount to an admission that such new matter constitutes a valid legal defense." *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574, 586 (1985). When the complaint itself negates the affirmative defense, no reply is necessary. *Central Illinois Public Service Co. v. Molinarolo*, 223 Ill. App. 3d 471, 473 (1992); *State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill. App. 3d 242, 246 (1991) ("if the complaint itself negates the affirmative defense, no reply is necessary").

¶ 56 Additionally, the Code provides that "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." (735 ILCS 5/2-1007 (West 2012). In general, the Code should be liberally construed in order to resolve cases speedily and according to their substantive merits. *Capital Development Board, for Use of P.J. Gallas Electrical Contractors, Inc. v. G.A. Rafel & Co., Inc.*, 143 Ill. App. 3d 553, 558 (1986). More specifically, this court "should liberally construe the rule excusing the filing of a reply to an affirmative defense." *Haskins*, 215 Ill. App. 3d at 246.

¶ 57 In the present case, Kwok and Guo filed their affirmative defenses on June 30, 2014. Pink Fox does not dispute that it failed to timely file a response within 21 days. It filed a response on February 23, 2015, and on February 24, 2015. In arguing the motion *in limine* before trial,

counsel for Pink Fox stated that the previous attorney provided him with deficient documents and he did not know that the previous attorney had failed to file a response to the affirmative defenses. Pink Fox's counsel argued that it did in fact file a response and requested leave to allow its late filing. Defendants indicated that they were requesting the court to deem as admitted the first, third, and fourth affirmative defenses, *i.e.*, that Pink Fox failed to pay the $1 in consideration, that Pink Fox failed to seek a reduction in real estate taxes as was required by the lease; and that Pink Fox failed to cooperate in changing the signage. Pink Fox argued this would be highly prejudicial, it received the motion *in limine* "minutes before trial," and a liberal construction of the Code and the interests of justice favored denial of the motion.

¶ 58 The trial court held that the $1 in consideration argument was not a proper affirmative defense because consideration constituted an element of Pink Fox's cause of action, so it struck that defense. The trial court indicated that good cause may exist if the plaintiff believed no reply was necessary because the affirmative defenses were conclusory. The court found that Kwok and Guo would not be prejudiced because the issues had been in contention throughout the entire case and there was no surprise. In allowing Pink Fox's response to be filed *instanter*, the trial court stated that Kwok and Guo failed to previously file a motion for judgment on the pleadings, which was essentially what they were asking the court to do on the day of trial, and it held that "sitting on your rights and then springing something on the day of trial *** makes the Court reluctant to act in a draconian fashion towards one side."

¶ 59 Kwok and Guo assert on appeal that the trial court's ruling was an abuse of discretion. Kwok and Guo focus in particular on their second and sixth affirmative defenses, that is, that Pink Fox lacked privity of contract with them because they were not tenants under the lease and that Pink Fox failed to mitigate damages, although they note that their argument is not limited to

those matters. Kwok and Guo argue that Pink Fox failed to offer any argument as to why these defenses did not warrant a response. We observe, however, that the parties never discussed these two specific affirmative defenses below because Kwok and Guo's arguments on its motion *in limine* focused solely on other affirmative defenses, *i.e.*, the first, third and fourth ones—regarding the $1 consideration, reduction in real estate taxes, and changing the signage of the premises.

¶ 60 In the trial court and on appeal, the parties rely principally on *Kyrch v. Birnbaum*, 66 Ill. App. 3d 469, 471 (1978), and *Capital Development*, 143 Ill. App. 3d at 558. In *Kyrch*, the parties engaged in discovery for more than a year before the defendants filed an answer and then moved for judgment on the pleadings on the day set for trial, without any prior notice to the plaintiff. *Kyrch*, 66 Ill. App. 3d at 471. The plaintiff believed a reply was not necessary because the affirmative defenses were conclusory and did not include any new matter. *Id*. The court held that the defendants' failure to promptly move for a judgment on the pleadings after the time for filing a response lapsed "did nothing to dispel this misconception." *Id.* "Because a motion for judgment on the pleadings tests the sufficiency of the pleadings themselves [citation], it is normally presented prior to any discovery." *Id.* The appellate court concluded that the "ends of justice require[d]" that the plaintiff should have been allowed to file a reply *instanter*. *Id.* The court reasoned that the trial court's ruling went to the merits of the case and denied the plaintiff an opportunity to present its case to the court, and that courts "have zealously guarded the right of a party to a day in court with counsel where it has been conscientiously sought." (Internal quotation marks omitted.) *Id.* at 472.

¶ 61 Similarly, in *Capital Development*, 143 Ill. App. 3d at 558, the trial court denied the defendant's motion for judgment on the pleadings and allowed the plaintiff to file a response to

the affirmative defenses at the conclusion of the trial. The appellate court found no abuse of discretion, observing that section 2-1007 of the Code provides discretion to grant additional time "[o]n good cause shown" and that the Code should be liberally construed. *Id.* The court held that good cause was established because a motion for judgment on the pleadings is usually presented before discovery to test the sufficiency of the pleadings alone, the defendant had filed the motion at trial and without prior notice, and that the plaintiff "apparently believed that it did not have to file a reply because defendant had not properly pleaded his affirmative defense of waiver." *Id.*

¶ 62 Here, we find the trial court did not abuse its discretion in allowing Pink Fox to file its response to the affirmative defenses two days before trial and an amended response one day before trial. As in *Kyrch*, Kwok and Guo here failed to promptly file a motion for judgment on the pleadings once Pink Fox's time for filing a reply lapsed. Kwok and Guo filed the motion *in limine* asking the trial court to deem their affirmative defenses admitted right before trial and without prior warning to Pink Fox, essentially asking the trial court to grant a judgment on the pleadings. *Kyrch*, 66 Ill. App. 3d at 471; *Capital Development*, 143 Ill. App. 3d at 558. The trial court appropriately construed the Code liberally in order to promptly resolve the dispute based on the substantive rights of the parties. The trial court aptly observed that the defendants were effectively "sitting on your rights and then springing someone on the day of trial" and that it did not want to act in such a "draconian fashion" towards plaintiff. The record supports that Pink Fox's failure to file a reply was the product of mere inadvertence. Its trial counsel was unaware that the prior counsel had failed to file a response to the affirmative defenses.

¶ 63 As the trial court also observed, Kwok and Guo were not prejudiced or surprised by the trial court's decision to allow the late response because the same issues had been in contention throughout the case. The trial court liberally construed “the rule excusing the filing of a reply to

an affirmative defense," (*Haskins*, 215 Ill. App. 3d at 246,) and we find no abuse of discretion in that regard.

¶ 64 In addition, with regard to Kwok and Guo's second affirmative defense, we note that it merely alleged in a conclusory fashion that they were "not in privity with Plaintiff as they are not tenants under the contract" and that they "are not appropriate parties to this action." This assertion was already contradicted by Pink Fox's second amended complaint in which it asserted that Kwok was liable personally as a signatory to the guaranty of the lease and as a tenant under the lease because he signed the lease in an individual capacity. Further, Pink Fox contended that Guo was personally liable as a signatory to the guaranty. Thus, this affirmative defense was merely a denial of the allegations in Pink Fox's complaint and did not constitute a new matter. Thus, Pink Fox was not required to file a reply. *Housing Authority of Franklin County v. Moore*, 5 Ill. App. 3d 883, 889 (1972); *Haskins*, 215 Ill. App. at 246.

¶ 65 Moreover, although neither party points this out, we note that the record contains two case management orders entered by the trial court on February 18, 2014, and October 20, 2014, which provided that defendants were to file any germane counterclaims or affirmative defenses within 14 days (for the February 18 order) and November 10, 2014 (for the October 20 order), and further provided that: "[n]either plaintiff nor defendant need file a responsive pleading/answer. See 735 ILCS 5/9-106; Samek v. Newman, 164 Ill. App. 3d 967 (1st Dist. 1987) ('general denial' allowed under Forcible Act may be asserted by presenting evidence at trial)." Based on these orders, it is possible that Pink Fox's prior attorney was under the impression that no response was necessary.

¶ 66 C. Trial Court's Finding that Kwok is a Tenant Under the Lease

¶ 67 Kwok next argues that the trial court erroneously concluded that the lease was ambiguous and that Kwok was a tenant under the lease.

¶ 68 "The standard of review of a trial court's judgment after a bench trial is whether that judgment is against the manifest weight of the evidence." *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 84. "A finding is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." (Internal quotation marks omitted.) *Id.* The trial judge's role is to weigh the evidence and make findings of fact; on appeal, this court "may 'not substitute [our] judgment for that of the trier of fact.' " (Internal quotation marks omitted.) *Id.* (quoting *Falcon v. Thomas*, 258 Ill. App. 3d 900, 909 (1994)). Additionally, this court may " 'affirm the judgment of the trial court on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct.' " (Internal quotation marks omitted.) *Id.*

¶ 69 The rules for interpreting a lease are the same as those for interpreting a contract. *NutraSweet Co. v. American National Bank & Trust Company of Chicago*, 262 Ill. App. 3d 688, 694 (1994). "[C]ontract language and interpretation present a question of law that a reviewing court examines *de novo*." *Battaglia v. 736 N. Clark Corp.*, 2015 IL App (1st) 142437, ¶ 41 (construction of language in a lease is a question of law reviewed *de novo*). Where there is no ambiguity, the court construes the contract according to its plain language, not the parties' subjective understandings. *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 194 Ill.App.3d. 744, 748 (1990). "A contract is ambiguous if it is capable of being understood in more senses than one or is reasonably susceptible of more than one meaning." *84 Lumber Co. v.*

Denni Construction Company, Inc., 212 Ill. App. 3d 441, 443 (1991). "When the terms of a written contract are certain and unambiguous, extrinsic evidence is inadmissible because the instrument itself is the sole determinant of the parties' intentions." *Id.* If the court finds the contract ambiguous, extrinsic evidence is allowed to ascertain "the true meaning of the contract." *Id.*

¶ 70 In the present case, the trial court found the execution of the lease ambiguous because there was no corporate capacity designated by Kwok's signature on the lease. Based on extrinsic evidence that Kwok signed the lease out of friendship and he was not an agent of the corporation, the court held he was individually liable as a tenant.

¶ 71 On appeal, Kwok asserts that the lease language was not ambiguous and clearly indicated that City Inn was the only tenant. They point out that paragraph 1(a) and (b) of the lease stated "LANDLORD: PINK FOX LLC" and "TENANT: CITY INN." Kwok and Guo argue that the lease lists them as guarantors on the second page and that the lease always refers to the "tenant" in the singular form. Kwok and Guo also argue that even if the lease was ambiguous, it must nevertheless be construed against the lessor.

¶ 72 Although the first paragraph of the lease indicated that the tenant was City Inn, other provisions are not as clear. "Where the language in the body of the document conflicts with the apparent representation by the officer's signature, an issue of fact as to the agent's intent arises." (Internal quotations omitted.) *Central Illinois Public Service Corp. v. Molinarolo*, 223 Ill. App. 3d 471, 476 (1992) (quoting *Wottowa Insurance Agency, Inc. v. Bock*, 104 Ill. 2d 311, 316 (1984)).

¶ 73 In the opening paragraph of the lease, it stated that "City Inn *** 'hereinafter referred to as the 'Tenant', " was entering into the lease with Pink Fox. In paragraph 1(b), there is a heading

entitled "TENANT:" and it listed "City Inn," along with an address and "Attn: Mr. Sing Chok Kwok." Paragraph 29.2 of the lease defined "Tenant" to "mean each and every person, partnership or corporation who is mentioned as a Tenant herein or who executes this Lease as Tenant."

¶ 74 On the signature page of the lease, page 21, it states: "IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the day and year first above set forth." Under the label "TENANT," Kwok's signature appears:

"TENANT:

[Kwok's signature]

By: _____

Print Name: SING C. KWOK

Title: _____"

¶ 75 The spaces near "By" and "Title" are blank. Kwok did not designate any corporate capacity in which he signed the lease. By way of contrast, under the label "LANDLORD," it is clear that Won signed the document for Pink Fox in the corporate capacity of "Member":

"LANDLORD:

PINK FOX LLC, an Illinois Limited Liability Company

By: [Won's signature]

Print Name: Young Won

Title: Member"

¶ 76 In light of these lease provisions and the lease signature evidence, the trial court did not err in finding the lease ambiguous with respect to whether Kwok executed it in an individual capacity or on behalf of City Inn. Accordingly, the trial court properly looked to extrinsic

evidence in determining whether Kwok was a tenant under the lease and individually liable on that basis. *84 Lumber Co.,* 212 Ill. App. 3d at 443.

¶ 77 The trial court relied on *Carollo v. Irwin*, 2011 IL App (1st) 102765, in determining that Kwok was individually liable under the lease. In *Carollo*, the court explained:

> "The common law rule is that where an agent signs [a] contract in his own name and the contract nowhere mentions the existence of agency or the identity of the principal, the agent is personally liable and parol evidence is not admissible to rebut the presumption of the agent's personal liability. [Citation.] A corporate officer who signs his name on a contract, without more, is individually liable on the contract. [Citation.]
>
> On the other hand, when an agent signs a document and indicates next to his signature his corporation affiliation, then, absent evidence of contrary intent in the document, the agent is not personally bound. [Citation.] Directors or other officers of corporations are not liable for the debts contracted in the name of, and on behalf of, the corporation and which are binding upon it unless they are expressly made liable by statute or unless they also contract on their own behalf. [Citation.] *** However, an unauthorized agent purporting to enter into a contract for a principal is personally liable." *Carollo*, 2011 IL App (1st) 102765, ¶¶ 50-51.

¶ 78 In *Carollo*, the individual who signed the contract clearly and appropriately "indicated he was signing the articles of agreement on behalf of" the limited liability company (LLC) and therefore would have been insulated from liability, but for the fact that the LLC was ultimately never formed and never adopted and ratified the action. *Id.* ¶ 52. *Id.* However, the individual

ultimately was not held liable in *Carollo* because of a statutory protection afforded members or managers of unformed LLCs; an officer of a corporation would not have enjoyed such protections under the same circumstances. *Id.* ¶ 53.

¶ 79 *Carollo* is instructive in the present case. Unlike the individual in *Carollo*, Kwok failed to clearly indicate that he was signing the lease on behalf of City Inn. He did not indicate that he was signing as an agent, director, or in any other corporate capacity. There was no evidence that City Inn subsequently approved his action through a corporate resolution, unlike Zheng. Indeed, Kwok's trial testimony further supported that he did not sign the lease in any official corporate capacity. He testified that he signed the lease out of friendship and he was not an officer, director, or shareholder of City Inn. The trial court allowed extrinsic evidence as to what capacity Kwok signed the lease, and the evidence showed that he did so out of friendship. That Kwok later ran the business starting in March 2013 did not change the capacity in which Kwok signed in March 2012. Because Kwok did not execute the lease in the capacity of an agent or officer of the corporation City Inn, he executed it in an individual capacity. He therefore fell within the definition of "tenant" under the lease. The fact that Kwok also separately signed the guaranty of the lease and was one of the guarantors does not preclude the trial court's finding that he was also individually liable on the lease as a tenant. "An officer who signs his name, without more, is individually liable on the contract." *84 Lumber*, 212 Ill. App. 3d at 443.

¶ 80 We are not persuaded by Kwok's argument that the lease should be construed against Pink Fox. Paragraph 29.30 of the lease provides that the parties "specifically acknowledge and agree that the terms of this Lease have been mutually negotiated and the parties hereby specifically waive the rule or principle of contract construction which provides that any ambiguity to any term or provision of a contract will be interpreted or resolved against the party

which drafted such term of provision." Accordingly, we will abide by the plain language of the parties' agreement to forgo this principle of contract construction.

¶ 81 In their reply brief, Kwok relies on paragraph 23.1 in asserting that any signatory of the lease necessarily signed under corporate capacity. Paragraph 23.1 provides:

> "If Tenant is not an individual or sole proprietorship, each individual executing this Lease on behalf of Tenant represents and warrants that he is duly authorized to execute and deliver this Lease on behalf of said entity in accordance with a duly adopted resolution of the board of directors of said entity ***."

¶ 82 This provision does not support Kwok's assertion that any individual who signed the lease necessarily signed as an agent of City Inn. This provision did not provide Kwok with authority to act as City Inn’s agent. Rather, it serves as a representation by a person signing as a corporate agent that the person does in fact have the proper authority to sign on behalf of the corporation.

¶ 83 D. Consideration Supporting the Guaranty

¶ 84 Next, Kwok and Guo challenge the trial court's determination that there was sufficient consideration supporting the guaranty based on its finding that the lease and guaranty were signed contemporaneously and were not separately negotiated. They assert that Pink Fox provided no consideration to Kwok or Guo because it never paid $1 to the guarantors and the leasehold interest went to and benefited City Inn, not Kwok and Guo.

¶ 85 As stated, *supra*, we review the trial court's findings following a bench trial to determine whether they are against the manifest weight of the evidence. *Bank of America*, 2015 IL App (1st) 132551, ¶ 84.

¶ 86 In the instant case, the trial court relied on *L.D.S., LLC v. Southern Cross Food, Ltd.*, 2011 IL App (1st) 102379, in concluding that the lease and guaranty were executed contemporaneously. The court in *L.D.S.* held that "[i]f a guaranty is executed after the underlying obligation was entered into, new consideration is generally needed for the guaranty. [Citation.] However, if a guaranty is executed contemporaneously with the original contract, the consideration for the original contract is sufficient consideration for the guaranty and no new consideration is required for the guaranty." *Id.*, ¶ 44.

¶ 87 In *L.D.S.*, the plaintiff alleged that the guaranty was supported by consideration because the lease and guaranty were executed contemporaneously as part of a single transaction, despite the lapse of six days between when they were signed. The appellate court found sufficient evidence of contemporaneous execution to avoid dismissal where the negotiations and interactions continued following execution of the lease and included obtaining keys, sending the security deposit, discussing signage and the guaranty, and then signing the guaranty. *L.D.S.*, 2011 IL App (1st) 102379, ¶ 47. Additionally, the guaranty was entitled "Rider Attached to the Lease" and specifically referred to the lease. *Id.*

¶ 88 The *L.D.S.* court analogized the circumstances to *Vaughn v. Commissary Realty, Inc.*, 30 Ill. App. 2d 296, 300 (1961), where the defendant asserted at the bench trial that the guaranty was void for lack of consideration. Despite the nine-day gap between the signing of the lease and the guaranty in *Vaughn*, the appellate court found the guaranty was executed contemporaneously with the lease based on evidence that the preamble of the guaranty indicated that it was executed as part of the lease transaction, the guaranty was needed because the defendant was not liable under the lease for any default in rental payment by the assignees, and the defendant regularly

included guaranty agreements in leasing properties. *Vaughn*, 30 Ill. App. 2d at 300. The *Vaughn* court found no evidence of separate negotiations for the guaranty. *Id.* at 302-03.

¶ 89 Here, the guaranty was listed as an exhibit to the lease on page two, paragraph 1.3 of the lease, entitled "enumeration of exhibits." The guaranty was attached to the lease as exhibit H, and it was entitled "Guaranty of Lease." As previously noted, the guaranty recited, part:

> "IN CONSIDERATION OF, and as an inducement for the granting, execution and delivery of that certain Lease, covering Premises at WAL-MART/SAM'S CLUB SHOPPING CENTER ***, and dated March ___, 2012***, between, the Landlord herein named *** and the Tenant herein named ***, and in further consideration of the sum of One Dollar ($1.00), and other good and valuable consideration paid by the Landlord to the undersigned, the undersigned (hereafter called the 'Guarantor') hereby guarantees to the Landlord, *** the full and prompt payment of Rent and the full performance and observance of all the covenants, terms, conditions, and agreements therein provided to be performed and observed by the Tenant***."

¶ 90 Further, paragraph 4.4 of the lease required delivery of the executed guaranty simultaneously with the execution of the lease. Paragraph 4.4 stated:

> "Lease Guaranty; Security Deposit. Simultaneous with execution of this Lease, Tenant shall deliver to Landlord an executed lease guaranty in the form attached hereto as Exhibit H and Tenant shall either pay to Landlord the Security Deposit ***."

¶ 91 The trial court found the guaranty was executed contemporaneously with the lease and the leasehold constituted consideration for the guaranty. The court found Pink Fox's failure to

give the guarantors $1 was not controlling, as recital of nominal consideration was a formality of the contract and the intent of the parties was clear from the documents, *i.e.*, that the guaranty was provided as part of the lease, it was an exhibit to the lease, and consideration was the leasehold given to defendants. The court did not find Zheng's testimony that he executed the guaranty in exchange for the $1 in consideration to be credible and noted that his attorney used leading questions to elicit this testimony. The trial court observed that the lease and guaranty were interlocking in referring to each other, the guaranty was an exhibit to the lease, and there was no evidence of separate negotiations. It also found the lease was drafted "with the knowledge that there are only going to be three guarantors," instead of four, and therefore the provisions called for an additional $30,000 security deposit, in addition to three months' rent. The trial court held that the evidence did not support defendants' contention that the lease and guaranty were "separate deals."

¶ 92 We conclude that the trial court's determination was not "against the manifest weight of the evidence." *Bank of America*, 2015 IL App (1st) 132551, ¶ 84. Unlike in both *L.D.S.* and *Vaughn*, there was no lapse of time between the execution of the lease and the guaranty, as they were signed on the same day, March 17, 2012. This is even more convincing evidence that they were executed contemporaneously than was present in *L.D.S.* and *Vaughn*, where six days and nine days elapsed, respectively, between signing the leases and the guarantees. Moreover, the guaranty was an exhibit to the lease and both the lease and the guaranty referred to each other. Paragraph 4.4 of the lease specifically required the guaranty to be delivered simultaneously with the execution of the lease. The guaranty was entitled, "Guaranty of Lease." The guaranty specifically recited that the guaranty was being provided "in consideration of, and as an inducement for the granting" of the leasehold.

¶ 93 In addition, there was no evidence that the lease and guaranty were negotiated separately. In fact, the opposite is true. Won testified that he wanted four guarantors in order to lease the premises, but one of the potential guarantors decided to provide Won with $30,000 in lieu of signing as a guarantor. This arrangement was incorporated into the lease and guaranty. Won's willingness to lease the premises was contingent upon being provided with the guaranty. As such, we disagree with Kwok and Guo's argument that Won testified that he negotiated separately for the guaranty. We also defer to the trial court's assessment of the witnesses' credibility in testifying at the bench trial. *Bank of America*, 2015 IL App (1st) 132551, ¶ 84.

¶ 94 Kwok and Guo assert that separate negotiations occurred for the guaranty based on the fact that Pink Fox failed to answer their affirmative defenses and thereby admitted the allegation that the parties "specifically negotiated this additional consideration." As we previously found, however, the trial court properly allowed Pink Fox to file its late response to the affirmative defenses.

¶ 95 Kwok and Guo also urge that the guaranty was not supported by consideration because the leasehold interest went to City Inn, and not Kwok and Guo. We note that they fail to cite any legal authority to support this argument. "[B]are contentions that fail to cite any authority do not merit consideration on appeal." *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25. See Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008) (the party's argument "shall contain the contentions of the [party] * * * with citation of the authorities and pages of the record relied on.)

¶ 96 Moreover, "[i]n order to establish a guarantee contract, the guarantor need not receive separate or additional consideration since he is bound by the consideration moving to the primary obligor." *McHenry State Bank v. Y & A Trucking, Inc.*, 117 Ill. App. 3d 629, 632 (1983). "The Illinois cases have followed (the) rule *** that where the agreement of guaranty is executed

contemporaneously with the original note or obligation, the consideration for the note or obligation furnishes sufficient consideration for the agreement of guaranty." (Internal quotation marks omitted.) *Continental National Bank of Ft. Worth v. Schiller*, 89 Ill. App. 3d 216, 219 (1980).

> "If the promise of the guarantor is shown to have been given as part of a transaction or arrangement which created the guaranteed debt or obligation, it is not essential to a recovery on the promise of guaranty that the promise shall have been supported by consideration other than that of the principal debt-that is, one and the same consideration may suffice for both contracts where the contract of guaranty has been entered into at the time of creation of the principal obligation." (Internal quotation marks omitted.) *Id*.

¶ 97 Thus, separate consideration running to Kwok and Guo was not required, as the guaranty and lease were executed contemporaneously and consideration for the lease furnished sufficient consideration for the guaranty. Accordingly, we conclude that the trial court's determination that the guaranty and lease were executed contemporaneously was not manifestly erroneous. *Bank of America*, 2015 IL App (1st) 132551, ¶ 84. Consideration supporting the lease was "sufficient consideration for the guaranty and no new consideration is required for the guaranty." *L.D.S.*, 2011 IL App (1st) 102379, ¶ 44.

¶ 98 E. Money Damages Calculation

¶ 99 Kwok and Guo also challenge on appeal the trial court's award of damages. They contend that Pink Fox offered no evidence at trial regarding calculation of damages, *i.e.*, what months of rent were unpaid. They also argue that, in failing to reply to their affirmative defenses, Pink Fox thereby admitted that it failed to mitigate damages.

¶ 100 "A trial court's assessment of damages will not be disturbed unless it is against the manifest weight of the evidence. [Citation.] A damage award is against the manifest weight of the evidence if the trial court ignores the evidence or the measure of damages is erroneous as a matter of law." *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 318 Ill. App. 3d 648, 658 (2000). In a breach of contract claim, damages serve to place the nonbreaching party in the position it would have been in had the contract been performed, but not provide a windfall. *Walker v. Ridgeview Const. Co., Inc.*, 316 Ill. App. 3d 592, 596 (2000).

¶ 101 At trial, Won testified that defendants stopped paying any rent beginning in January 2014, through the time of trial, which was a period of 14 months. He testified that under the lease provisions, the base rent was $13,000 per month, and this monthly base rent would increase 2% per year. The lease also called for taxes and maintenance expenses to be added to the monthly base rent amount. Won testified that the monthly amount at the time the lease was first breached, including maintenance and taxes, was approximately $24,500. He testified that after defendants vacated the property, it remained vacant even at the time of trial and he continued to pay the mortgage and taxes on the premises.

¶ 102 Pink Fox's counsel discussed damages in his closing argument and the trial court questioned him about the amounts. The trial court did not find sufficient evidence with respect to the maintenance costs and property taxes and determined that it would not award any damages for taxes or maintenance. Pink Fox's counsel argued that the defendants owed two months' rent at the first increase rate of $13,260, and then 12 months' rent at the second increased rate of $13,525.20, and this resulted in a total amount of damages of $188,822.40.

¶ 103 Won's testimony and Pink Fox's arguments were consistent with the provisions of the lease. Paragraph 1.1(j) provided that the monthly base rental amount was $13,000, with an

"[a]nnual increase of 2% of the base rent." Counsel's calculations were straight forward calculations based on the trial evidence. A 2% increase from $13,000 is $13,260. Two months' rent at this rate is $26,520. A 2% increase from the $13,260 rate is $13,525.20, and 12 months' rent at this rate is $162,302.40. Together, these two amounts come to a total of $188,822.40. the trial court's assessment of damages was not against the manifest weight of the evidence. *Amalgamated Bank of Chicago,* 318 Ill. App. 3d at 658.

¶ 104 With regard to Kwok and Guo's assertion that Pink Fox failed to timely respond to their affirmative defense of failure to mitigate, we have already found that the trial court properly allowed the late filing of the response, and thus Pink Fox did not admit that it failed to mitigate. We further note that failure to mitigate damages is an affirmative defense for which Kwok and Guo bore the burden of proof at trial (*Decatur Cemetery Land Co. v. Bumgarner*, 7 Ill. App. 3d 10, 13 (1972)), but they did not present any evidence at trial regarding failure to mitigate.

¶ 105 F. Attorney Fees

¶ 106 In their final claim on appeal, Kwok and Guo contend that the trial court abused its discretion in awarding attorney fees to Pink Fox against all defendants. They contend that paragraph 29.15 of the lease provides that the prevailing party at trial shall receive costs and reasonable attorney fees from "the other," in the singular. They contend that the trial court therefore could not award attorney fees against all defendants and that Kwok and Guo were not parties to the lease. They also argue that the trial court should not have awarded attorney fees for services rendered by Pink Fox's initial attorney, Kim, because she was not present at the hearing on the petition for attorney fees.

¶ 107 Generally, we review a trial court’s award of attorney fees for an abuse of discretion in determining whether the amount was reasonable and whether the trial court correctly applied the

facts of the case to the applicable law or contract terms. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 262 (2002); *Peleton Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 226 (2007). To the extent that the trial court's decision involved construction or interpretation of the parties' agreement as a matter of law, the standard of review is *de novo*. *Guerrant*, 334 Ill. App. 3d at 263.

¶ 108 Pink Fox's petition requested attorney fees and costs pursuant to paragraph 29.15 of the lease for the services of its initial pretrial attorney Kim and the attorney who conducted the trial, Zagar. It provided detailed billing statements and time sheets from the attorneys, along with their affidavits. Following a hearing, the trial court granted the petition for the amounts requested, $16,236.57 for Kim's services and $6,112.50 for Zagar's services. It entered the judgment against City Inn, Zheng, Kwok, and Guo, jointly and severally.

¶ 109 Paragraph 29.15 of the lease provides:

> "Legal Expenses. If either party is requested to bring or maintain any action *** , or otherwise refers to this Lease to an attorney for the enforcement of any of the covenants, terms or conditions of this Lease, the prevailing party in such action shall, in addition to all other payments required herein, receive from the other, all the costs incurred by the prevailing party including reasonable attorneys' fees and such costs and reasonable attorneys' fees which the prevailing party incurred in, and in preparation for, such action, arbitration, trial, appeal, review and/or proceeding in bankruptcy court."

¶ 110 In light of our conclusion above that Kwok signed the lease in an individual capacity as a tenant, we similarly conclude that he can be held liable for attorney fees under the above provision as "the other" party. However, Guo was not held individually liable under the lease, nor did Pink Fox raise that particular claim against Guo. Rather, Guo's liability was premised on

liability as a guarantor under the guaranty. As such, she was not a party to the lease and did not fall within the definition of "the other" in the above attorney fee provision.

¶ 111 Pink Fox also contends that Kwok and Guo are both liable for attorney fees and costs pursuant to the language in the guaranty. In response, Kwok and Guo assert that Pink Fox forfeited this argument by failing to raise it below.

¶ 112 "Issues not raised at trial are waived and cannot be argued for the first time on appeal." *Amalgamated Bank of Chicago*, 318 Ill. App. 3d at 658. However, this rule is not applicable to appellee Pink Fox. "The plaintiff-appellee may raise for the first time on appeal any legal issue to defend her judgment for which there was a factual basis in the trial court." *Tuftee v. Kane County*, 76 Ill. App. 3d 128, 134 (1979). See *Mueller v. Elm Park Hotel Co.*, 391 Ill. 391, 399 (1945) (the appellee "may raise any questions properly presented by the record to sustain the judgment of the trial court, even though those questions were not raised or argued in the Appellate Court. He may sustain the judgment of the trial court upon any ground justified by the record, regardless of the fact that such questions were not presented to and passed upon by the Appellate Court"); *La Salle National Bank v. Village. of Grayslake*, 29 Ill. 2d 489, 492 (1963) ("where a litigant obtains the relief he has sought, he may rely upon any ground appearing in the record to support his judgment"); *Harris Trust & Savings Bank v. Joanna-W. Mills Co.*, 53 Ill. App. 3d 542, 554 (1977) (appellee entitled to "urge any point on appeal in support of its judgment" where it was not ruled on by the trial court but the facts relating to the argument were before the court). As previously noted, we may affirm the trial court's judgment on any basis in the record, even if the trial court relied on other grounds. *Bank of America*, 2015 IL App (1st) 132551, ¶ 84.

¶ 113 The guaranty provided, in relevant part, that the guarantors "will forthwith pay to the Landlord all damages that may arise in consequence of any default by the Tenant, its successors or assigns under said Lease, including, without limitation, all reasonable attorneys' fees incurred by the Landlord or caused by any such default and by the enforcement of this Guaranty." Accordingly, under the plain language of the guaranty, the guarantors are liable to pay reasonable attorney fees incurred by Pink Fox in pursuing rent payments owed under the terms of the lease and in enforcing the guaranty against the guarantors. Thus, Kwok and Guo are personally liable under the guaranty for the attorney fees incurred.

¶ 114 Lastly, we address Kwok and Guo's challenge to the attorney fees relating to Kim. We first observe that Kwok and Guo argue briefly that Kim "failed to appear at the hearing" on Pink Fox's petition for attorney fees. However, they do not further advance this argument by actually asserting that they were deprived of an opportunity to cross-examine Kim regarding the attorney fees requested by Pink Fox attributable to Kim. Moreover, they also fail to cite any legal authority to support this argument. Accordingly, Kwok and Guo have, therefore, waived this argument. *American Service Insurance Co. v. China Ocean Shipping Company (Americas) Inc.*, 402 Ill. App. 3d 513, 531 (2010) (appellant waived arguments regarding trial court's award of fees when it failed to cite authority in support of its arguments).

¶ 115 We recognize the general rule of law that "[t]he reasonableness of fees is a matter of proof and the party sought to be charged therewith should be afforded an evidentiary hearing and ample opportunity to cross-examine as to the reasonableness of the amounts claimed and to present evidence in rebuttal." *6334 N. Sheridan Condominium Ass'n v. Ruehle*, 157 Ill. App. 3d 829, 834 (1987). See *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 1056–59 (2007) (noting there was a "conflict of authority as to the issue" of whether an evidentiary hearing on a petition

for attorney fees is required in Illinois, and noting that a hearing should generally be held in protracted litigation involving complex issues and multiple attorneys and the fees awarded seem excessive). *Cf. Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 113 (observing that "trial courts faced with fee petitions need not conduct evidentiary hearings as a matter of course. We do not read *Trossman* as requiring a hearing in every case." The court found that "a fee petition warrants an evidentiary hearing only when the response of the party to be charged with paying the award raises issues of fact that cannot be resolved without further evidence." *Id.* It explained that a hearing is generally not required "because the petition itself should contain information supporting the rate requested" and a trial court's "decision regarding what hourly rate should apply is rarely guided by credibility determinations made during an evidentiary hearing." ¶ 114.).

¶ 116 As noted, a hearing on the fee petition occurred here, and therefore Kwok and Guo were not deprived of such a hearing. As we also noted, on appeal, Kwok and Guo do not assert that they were deprived of an opportunity to cross-examine any witnesses at the hearing, present evidence in rebuttal, or otherwise test the reasonableness of the amounts Pink Fox claimed as attorney fees. They do not claim that the fees associated with Kim were inaccurate. It does not appear from the record available that Kwok and Guo raised any issues of fact or presented any counter evidence to show that the requested fees were unreasonable or inaccurate, and they do not raise any such issues on appeal. Pink Fox provided ample evidence to support the amount of attorney fees attributed to both Kim and Zagar. Indeed, Pink Fox attached detailed time sheets and documents from Kim itemizing the costs and fees, and also attached an affidavit from Kim regarding the amounts charged. Kwok and Guo have failed to explain why they believe the

amount awarded was inaccurate or unsupported by the record. Based on this record, we find no abuse of discretion. *Guerrant,* 334 Ill. App. 3d at 262.

¶ 117 III. CONCLUSION

¶ 118 For the reasons stated, we affirm the trial court's entry of judgment in favor of Pink Fox following the bench trial and its subsequent order awarding Pink Fox attorney fees.

¶ 119 Affirmed.