2017 IL App (1st) 160146-U

SIXTH DIVISION
Order filed: February 3, 2017

No. 1-16-0146

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

4600 W. CHICAGO, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellee,	)	Cook County
	)	
v.	)	No. 15 M1 708384
	)	
GOMEZ TRANSMISSIONS, INC., d/b/a Gomez Recycling, Inc.; and FELIPE GOMEZ,	)	
	)	Honorable
	)	Abbey Fishman Romanek,
Defendants and Counterplaintiffs-Appellants.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court is affirmed in part and vacated in part where: (1) the court erred in denying the defendants' section 2-619 motion to dismiss that portion of the plaintiff's complaint seeking monetary relief for property damage to its premises; (2) the defendants forfeited their contention that the court erred in allowing the plaintiff to cross-examine a witness regarding pending criminal charges; (3) the court's order awarding the plaintiff $68,000 in unpaid rent was not against the manifest weight of the evidence; and (4) the court erred in denying the plaintiff's motion to strike the defendants' second amended counterclaims seeking monetary relief for conversion, trespass to chattels and breach of bailment. We vacate the court's judgment awarding the plaintiff $137,942.30 for property damage and vacate its judgment in the plaintiff's favor on the defendants' counterclaims; we remand the matter to the trial court with instructions.

¶ 2 The plaintiff, 4600 W. Chicago, LLC, filed a two-count complaint against the defendants, Gomez Transmissions, Inc., d/b/a Gomez Recycling, Inc. (Gomez Recycling), and Felipe Gomez, pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq*. (West 2014)), seeking possession of the premises it rented to the defendants, unpaid rent, and monetary relief for property damage. The defendants filed counterclaims alleging conversion, trespass to chattels and breach of bailment. The trial court entered judgment in the plaintiff's favor on its claim for possession, and following a bench trial, awarded the plaintiff $68,000 for unpaid rent and $137,942.30 for property damage to the premises. In addition, the trial court entered judgment in favor of the plaintiff on the defendants' affirmative defenses and counterclaims. Following the denial of their motion for reconsideration, the defendants timely appealed. On appeal, the defendants argue: (1) the trial court erred in denying their section 2-619 motion to dismiss count II of the plaintiff's complaint seeking monetary relief; (2) the court erred when it allowed the plaintiff to cross-examine Gomez about pending criminal charges; (3) the court's damage award was against the manifest weight of the evidence; and (4) the court's finding that the defendants failed to prove their counterclaims was against the manifest weight of the evidence. For the reasons that follow, we affirm in part, vacate in part, and remand with instructions.

¶ 3 The essential facts giving rise to this case are not in dispute. On August 21, 2012, the plaintiff and the defendants entered into an industrial lease (lease) for six units located at 4600 West Chicago Avenue in Chicago. The lease had an initial six-month term of September 1, 2012, through February 28, 2013, with an option to renew which, if exercised, would increase rent and extend the term through May 31, 2013. On May 23, 2013, the parties signed an

amendment to the lease, which extended the lease through May 31, 2014, and allowed the defendants to occupy an additional unit. On June 3, 2014, the parties signed another amendment to the lease extending the lease term through May 31, 2015, and increasing the rent to $17,000 per month.

¶ 4 On April 20, 2015, the plaintiff sent a 10-day notice to the defendants advising them that it was terminating the lease. More specifically, the letter advised the defendants that they: (1) "engaged in the alleged illegal activity of buying stolen catalytic converters" at the premises in violation of section 5 of the lease; (2) "failed to treat, store, transfer or dispose of all transmission fluid" in violation of section 34 of the lease; (3) "left the Premises in disrepair and have damaged structural and electrical components" in violation of section 7 of the lease; (4) caused the building to be "deemed dangerous and hazardous, and to be closed by the City of Chicago"; and (5) failed to pay rent for the month of April 2015 in violation of section 1 of the lease.

¶ 5 On May 4, 2015, the plaintiff filed a two-count complaint against the defendants. The plaintiff alleged that the defendants breached various sections of the lease by, *inter alia*, engaging in criminal activity, causing damage to the premises, and failing to pay rent for the preceding two months. Count I of the complaint was brought pursuant to the Act (735 ILCS 5/9-101 *et seq.* (West 2014)) and sought possession of the premises. Count II of the complaint asserted a claim for breach of contract and sought a money judgment for unpaid rent and property damage.

¶ 6 On May 14, 2015, the defendants moved to dismiss count II of the plaintiff's complaint pursuant to section 2-619(a)(1) and (a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(1), (a)(9) (West 2014)), on grounds that the plaintiff's breach-of-contract claim, which sought monetary relief for unpaid rent and property damage, was not germane to the forcible

entry proceeding as required by the Act. See 735 ILCS 5/9-106 (West 2014). In response, the plaintiff argued that its breach-of-contract claim should not be dismissed because section 9-209 of the Act allows a plaintiff to join a claim for unpaid rent with its claim for possession. The plaintiff also argued that its claim seeking monetary relief for property damage is germane to the issue of possession because it establishes that the defendants breached section 7 of the lease.

¶ 7 On June 25, 2015, following a hearing, the trial court entered a written order denying the defendants' motion to dismiss count II of the plaintiff's complaint.

¶ 8 Thereafter, the defendants filed an answer, affirmative defenses and counterclaims. Although none of these pleadings are in the record on appeal, the record contains the plaintiff's motion to strike the defendants' affirmative defenses and counterclaims. The plaintiff's motion reveals that the defendants asserted four affirmative defenses, entitled "illegal lockout"; "interference with possession"; "constructive eviction"; and "waiver of rent[.]" Common to all of the affirmative defenses, the defendants alleged that the plaintiff illegally locked them out of the premises and deprived them of access to their property. The defendants also filed counterclaims for conversion, trespass to chattels, interference with possession, and illegal lockout, in which they sought money damages based on the same allegations set forth in their affirmative defenses.

¶ 9 The plaintiff filed a motion to strike the defendants' affirmative defenses and counterclaims, arguing that the City of Chicago (City) Department of Buildings, issued an "emergency vacate order" (vacate order) which required several of the plaintiff's tenants, including the defendants, to immediately vacate the premises. The vacate order, which was attached to the plaintiff's motion, is dated April 2, 2015, and identifies numerous code violations and structural defects that rendered the premises "dangerous, hazardous and unsafe." For example, the vacate order noted the presence of "many containers of uncontrolled flammable

substances at the interior and exterior of the property, mainly at Gomez recycling" and observed that flammable waste materials such as gas, oil, grease, and transmission fluid were pooling in "depressions and cavities" in the uneven parking lot. The vacate order also identified problems with the building's roof, electrical system, and masonry. Because the building posed an immediate danger to the tenants and occupants of the premises and constituted an imminent threat to the public at large, the City's Buildings Commissioner ordered that the premises "immediately be made vacant, and remain vacant, and that entry be denied except licensed and bonded contractors." The plaintiff argued that, based upon the vacate order, the City was responsible for depriving the defendants of their right to access the premises.

¶ 10 On July 20, 2015, the trial court entered an order, granting the plaintiff's motion and striking "each of the defendants' affirmative defenses and counterclaims," but granting the defendants leave to file "new affirmative defenses or counterclaims."

¶ 11 On July 24, 2015, the defendants filed amended affirmative defenses and counterclaims. As affirmative defenses, the defendants asserted "impossibility of performance" and "commercial frustration" based upon the vacate order which prevented them from entering the premises to remove their property. The defendants also filed counterclaims for conversion, trespass to chattels, and breach of bailment for being deprived of their property.

¶ 12 On July 28, 2015, the matter proceeded to a bench trial. Before opening statements, the parties informed the court that the defendants had vacated the premises and possession was no longer an issue in the case. Accordingly, the court entered judgment in the plaintiff's favor on count I of the complaint. The plaintiff also moved to strike the defendants' amended affirmative defenses and counterclaims, arguing that, *inter alia*, the court previously struck the defendants' counterclaims for conversion and trespass to chattels and that the defendants failed to allege

sufficient facts to state a cause of action for breach of bailment. The court granted the plaintiff's motion and struck the defendants' amended affirmative defenses and counterclaims "without prejudice."

¶ 13 The matter then proceeded to a bench trial on count II of the plaintiff's complaint alleging breach of contract and seeking monetary relief for unpaid rent and property damage to the premises.[1]

¶ 14 During trial, Daniel Tina, the manager of 4600 W. Chicago, LLC, testified that the company owns the building at 4600 West Chicago Avenue and that he leased seven units to the defendants who were in the business of recycling scrap metal. He stated that the defendants failed to pay four consecutive months of rent, beginning April 2015. He identified a tenant ledger which showed that, as of July 6, 2015, the defendants owed $68,000 in rent and $3,400 in late fees. Tina also testified regarding damage that the defendants caused to the building's masonry and electrical system, as well as the presence of flammable waste materials—namely, oil, grease, and transmission fluid—that were pooling on the ground.

¶ 15 On cross-examination, Tina admitted that he changed the locks to the premises and welded some of the doors shut. He explained that he changed the locks pursuant to an "emergency vacate order" he received from the City, which ordered several of his tenants to vacate the premises. Although Tina acknowledged that he was the only person who had keys to the premises, he stated that, whenever the City instructed him to do so, he always granted the defendants access to the premises. Tina also clarified that he welded some of the doors shut and hired a private security company to prevent theft and protect the defendants' personal property.

[1] Although the trial court struck the defendants' amended counterclaims, the court nevertheless allowed the defendants to present evidence at trial in support of their claims for conversion, trespass to chattels, and breach of bailment.

¶ 16 The plaintiff presented the testimony of Robert Stephens, an inspector with the City's Fire Prevention Bureau; Lindsay Baker, an assistant corporation counsel in the City's Department of Law; and William Bugajski, an assistant director for the City's Department of Buildings. Stephens, Baker and Bugajski testified about the various code violations at the premises and confirmed that, as a result of the vacate order, the defendants were required to vacate the premises. They explained, however, that the defendants could obtain temporary, supervised access to the premises to remove their property, but they had to get approval from the City and schedule a time with the City's inspectors.

¶ 17 The plaintiff also presented the testimony of Don Gors who provided environmental clean-up cost estimates to remove hazardous materials from the premises, and Cornel Tina who testified regarding the cost to repair the building's electrical system.

¶ 18 After the plaintiff rested its case-in-chief, the defendants called Antonio Alfaro as a witness. Alfaro stated that he worked at Gomez Recycling and his responsibilities included "documentation" and estimating the value of materials that were brought into the shop for recycling. Alfaro testified in detail regarding the efforts he made to remove the materials and property from the premises. He explained that he had to obtain approval from the City prior to each visit, had to schedule a time to meet Tina and the City inspectors at the premises, and had to work within a two-hour time frame. Alfaro testified that, on April 23, 2015, he and a crew of 20 individuals went to the premises to remove the defendants' property but the City's inspectors and police department did not allow them to enter "because there were too many people." He conceded, however, that Tina unlocked the doors and, after talking with the inspectors, Alfaro and a limited number of individuals were allowed to enter the premises. He stated that, during the month of July, he and a crew of 10 workers spent 10 days cleaning the premises. Alfaro also

testified that some of the doors were welded shut and he estimated that several tons of scrap metal was missing from the premises.

¶ 19 Felipe Gomez, the president of Gomez Recycling, testified that rent was not paid to the plaintiff in April 2015 because the Illinois Attorney General sent a letter advising him to withhold rent. The letter, which was admitted into evidence at trial, states that the State of Illinois filed a "citation to discover assets to a third party" and that Gomez was "required by law to withhold [his] rent payment for the upcoming month" as it is possible that he would be ordered to turn over his withheld rent payment to the State to satisfy a judgment debt the plaintiff owes to it. The letter also states that Gomez could be held liable for the amount he pays to the plaintiff should he choose to pay rent. Gomez disputed Daniel Tina's testimony that he damaged the building's masonry and electrical components and denied Tina's assertion that hazardous material was pooling on the ground. Gomez corroborated Alfaro's testimony regarding their efforts to clean the premises and confirmed that several tons of scrap metal was missing from the premises.

¶ 20 The defense presented the testimony of Frank Fuscaldo, a supervisor in the Department of Buildings' Gang and Drug Task Force, who testified consistently with Stephens, Baker and Bugajski regarding the various code violations at the premises. The defense also called Israel Rivera and Larry Langford as witnesses who testified that they sold scrap metal to Gomez Recycling and that, on May 2, 2015, they observed a "box truck" enter and exit the premises several times.

¶ 21 In rebuttal, the plaintiff introduced an affidavit from Assistant Attorney General Evan McGinley, stating that the State of Illinois obtained a $20,000 judgment against the plaintiff and, because the plaintiff initially failed to satisfy the judgment, his office served Gomez with a

"Third Party Citation to Discover Assets" which sought a turnover of rental payments owed to the plaintiff. According to the affidavit, on May 12, 2015, the State and the plaintiff entered into a payment plan to satisfy the judgment and, as a consequence, his office did not take any action to obtain a turnover order. McGinley also averred that he filed a motion to dismiss the third-party citation, which the court granted in August 2015.

¶ 22 During the course of the bench trial, which spanned over the course of three nonconsecutive days in July, August, and September 2015, the defendants filed their second amended affirmative defenses and counterclaims. Although the pleading is not in the record, the plaintiff's motion to strike, which is in the record, reflects that the defendants asserted the following affirmative defenses: "constructive eviction"; "holdover tenants"; "failure to mitigate damages"; "failure to make structural repairs"; and "accord and satisfaction." The defendants also filed counterclaims for conversion and trespass to chattels. In its motion to strike, the plaintiff argued that the court's previous dismissal of the defendants' counterclaims for conversion and trespass to chattels "constitutes law of the case" and, alternatively, the evidence presented at trial rebuts the defendants' claim that the plaintiff stole or temporarily deprived the defendants of their personal property.

¶ 23 On September 11, 2015, after both parties rested, the trial court heard the plaintiff's argument in support of its motion to strike the defendants' second amended affirmative defenses and counterclaims. Noting the procedural posture of the case and that the plaintiff's argument sounded like a closing statement, the court denied the plaintiff's motion to strike. After the parties presented their closing arguments, the court took the matter under advisement.

¶ 24 On September 18, 2015, the trial court entered judgment in the plaintiff's favor on count II of its complaint, awarding it $68,000 for four months of unpaid rent and $137,942.30 for

damage to the premises. The court also entered judgment in the plaintiff's favor on the defendants' counterclaims and affirmative defenses.

¶ 25 On October 14, 2015, the defendants filed a motion to reconsider, arguing that the trial court erred in denying their motion to dismiss count II of the complaint. The defendants also challenged the trial court's evidentiary rulings during the trial and asserted that its judgment in the plaintiff's favor was against the manifest weight of the evidence. On January 8, 2016, the court denied the defendants' motion to reconsider and this appeal followed.

¶ 26 The defendants' first contention on appeal is that the trial court erred in denying their section 2-619 motion to dismiss count II of the plaintiff's complaint which sought monetary relief for unpaid rent and property damage to the premises.

¶ 27 Generally, the denial of a motion to dismiss is not a final and appealable order. *Cabinet Service Tile, Inc. v. Schroeder*, 255 Ill. App. 3d 865, 868 (1993). However, "[a]n appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023 (2009). Here, the denial of the motion to dismiss constitutes a previous interlocutory order leading to the final judgment because, had the trial court granted the motion to dismiss, the subsequent orders would not have been entered. See *CitiMortgage, Inc. v. Hoeft*, 2015 IL App (1st) 150459, ¶ 13. Therefore, we can properly review the denial of the defendants' section 2-619 motion to dismiss.

¶ 28 A section 2-619 motion admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim. *Capeheart v. Terrell*, 2013 IL App (1st) 122517, ¶ 11. In reviewing a motion to dismiss under section 2-619, the court is obligated to construe the pleadings and supporting documents in the light most favorable to the nonmoving party, and to accept as true all well-pleaded facts in the plaintiff's complaint. *Porter*

v. Decatur Memorial Hospital, 227 Ill. 2d 343, 352 (2008). We review the denial of a section 2-619 motion to dismiss *de novo*. *Id.*

¶ 29 In this case, the defendants argue that count II of the complaint, which sought monetary relief for unpaid rent and property damage, was not authorized under the Act. More specifically, they assert that proceedings under the Act are limited to the issue of possession, and therefore, the plaintiff's claims for unpaid rent and property damage were not germane to the forcible entry and detainer action. The issue of whether the plaintiff may seek monetary relief for unpaid rent and property damage to the premises presents a question of law that we review *de novo*, as it requires us to construe various provisions of the Act. *Spanish Court Two Condominium Ass'n v. Carlson*, 2014 IL 115342, ¶ 13.

¶ 30 The purpose of the Act (735 ILCS 5/9-101 *et seq.* (West 2014)) is to provide a speedy remedy to allow a person who is entitled to the possession of certain property to be restored to possession. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. "It is 'a limited proceeding, focusing on the central issue of possession.' [Citation.]" *Campana Redevelopment, LLC v. Ashland Group, LLC*, 2013 IL App (2d) 120988, ¶ 13. Accordingly, because a forcible entry and detainer action is a special statutory proceeding that is in derogation of the common law, recovery is confined to cases that clearly fall within its provision. *Central Terrace Co-Operative v. Martin*, 211 Ill. App. 3d 130, 132 (1991).

¶ 31 Under section 9-209 of the Act, a landlord may pursue both a claim for possession *and* unpaid rent in a forcible entry and detainer complaint. *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶ 49; *Campana Redevelopment*, 2013 IL App (2d) 120988, ¶ 14. Section 9-209 states, in pertinent part, as follows:

"A landlord or his or her agent may, any time after rent is due, demand

> payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than 5 days after service thereof, the lease will be terminated. If the tenant does not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand. *A claim for rent may be joined in the complaint *** and a judgment obtained for the amount of rent found due, in any action or proceeding brought, in an action of forcible entry and detainer for the possession of the leased premises, under this Section*." (Emphasis added.) 735 ILCS 5/9-209 (West 2014).

Likewise, section 9-106 of the Act plainly states that a claim for rent may be joined in a forcible entry and detainer complaint. See 735 ILCS 5/9-106 (West 2014) ("a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due").

¶ 32 As noted above, count II of the plaintiff's complaint sought monetary relief for unpaid rent and property damage. As to the plaintiff's claim for unpaid rent, the plain and ordinary language of sections 9-209 and 9-106 of the Act authorize the plaintiff to couple the unpaid-rent claim with its claim for possession as pled in count I of the complaint. The defendants' interpretation, which implies that rent may never be recovered under the Act, would impermissibly render the parts of sections 9-209 and 9-106 allowing for the recovery of rent superfluous. See *Prazen v. Shoop,* 2013 IL 115035, ¶ 21 (in construing a statute, "[e]ach word, clause and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous"). As a result, the trial court did not err when it denied that portion of

the defendants' motion to dismiss count II of the plaintiff's complaint seeking damages for unpaid rent.

¶ 33 Regarding the plaintiff's claim for property damage, the plaintiff asserts that the trial court properly denied the motion to dismiss because the claim is "germane" to the issue of possession. Section 9-106 of the Act provides:

> "The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. Except as otherwise provided in Section 9-120 [(dealing with leased premises used in furtherance of a criminal offense)], *no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise*. However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due." (Emphasis added.) 735 ILCS 5/9-106 (West 2014).

¶ 34 "Claims that are germane to the issue of possession generally fall into one of four categories: (1) claims asserting a paramount right to possession; (2) claims denying a breach of the agreement on which the plaintiff bases the right to possession; (3) claims challenging the validity or enforceability of the agreement; and (4) claims questioning the plaintiff's motivation for bringing the action." *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 862 (2004).

¶ 35 Relying on our supreme court's definition of "germane" as "closely allied *** closely related, closely connected" (*Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 256 (1970)), the plaintiff argues that property damage was directly related to the issue of possession because it establishes that the defendants breached section 7 of the lease. While that may be true, the Act plainly states that a plaintiff may couple a claim for unpaid rent with its claim for possession; it does not allow

the plaintiff to seek monetary relief for damage sustained to its premises. We acknowledge that damage to the premises is probative to the factual question of whether the premises were in a state of disrepair and, to that extent, would be probative to whether there was a breach of section 7 of the lease. We stress, however, that damage to the premises has no relevance to the issue of possession other than by serving as a factual predicate for the conclusion that there was a breach. The plain language of the Act only permits a landlord to couple a claim of unpaid rent with its complaint for possession; it does not authorize the plaintiff to seek monetary relief for damage sustained to its property. See *Campana Redevelopment*, 2013 IL App (2d) 120988, ¶ 20 (vacating the trial court's award of unamortized improvement costs where the costs were not part of past-due rent); see also *Suttles v. Vogel*, 160 Ill. App. 3d 464, 481 (1987), *rev'd on other grounds*, 126 Ill. 2d 186 (1988) (the right to litigate rent due is the only exception to the rule that only possession and matters "germane to the distinctive purpose of the action" may be litigated in a forcible entry and detainer action); *Miller v. Daley*, 131 Ill. App. 3d 959, 961 (1985) (question concerning the property damage and alleged mental distress could not have been litigated during forcible entry and detainer action due to statutory preclusion).

¶ 36 Since the plaintiff may only recover past-due rent under the Act, we conclude, therefore, that the trial court erred in denying the defendants' motion to dismiss that portion of count II of the plaintiff's complaint seeking monetary relief for property damage, without prejudice to the plaintiff's right to file a separate action against the defendants for damage. Accordingly, we vacate that portion of the trial court's judgment against the defendants which awarded the plaintiff $137,942.30 for the damage to its property. Further, in the exercise of our power under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we strike from count II of the plaintiff's complaint the monetary claim for damage to the rental premises, without prejudice to

the plaintiff's right to bring a separate action against the defendants for such damage. We wish to be clear; our decision to strike the plaintiff's claim for damage to its property is not an adjudication on the merits of the claim. See Ill. S. Ct. R. 273 (eff. Oct. 14, 2005).

¶ 37 Next, the defendants argue that the trial court committed reversible error when it (1) admitted a "masonry proposal" from A.L.B. Construction to repair the damage to the premises, and (2) allowed the plaintiff's attorney to question Gomez on cross-examination about criminal charges pending against him.

¶ 38 As to the masonry proposal, the plaintiff offered the document into evidence in support of its property-damage claim. Given our holding vacating that portion of the judgment against the defendants for damage to the rental premises and stricking that claim from count II of the complaint, we need not address the issue of whether the trial court erred in admitting the proposal to repair damage to the premises.

¶ 39 Regarding the defendants' contention that the trial court erred when it allowed the plaintiff's attorney to cross-examine Gomez about pending criminal charges, the plaintiff asserts that the defendants forfeited the issue for appeal by failing to raise it at trial. We agree with the plaintiff.

¶ 40 To preserve an issue for appeal, a defendant must object to the error at trial. *Thornton v. Garcini*, 237 Ill. 2d 100, 106 (2010). In this case, the following colloquy occurred when plaintiff's counsel questioned Gomez on cross-examination regarding his credibility:

> "Q. Have you ever been charged with a crime?
>
> A. No.
>
> Q. Are you familiar with the case that's pending where you have been charged with a felony?

A. We are working the eviction.

* * *

Q. Have you ever been charged with a felony?

A. Only about this.

Q. So you have been. The answer is yes, right, yes?

A. Before, no, just—

Q. Why can't you answer my questions? I have asked you a question.

MR. VILLALOBOS: Judge, I object if he is going to argue about—he is trying to testify. He can't even finish testifying.

THE COURT: All right. That's enough from both of you."

¶ 41 Here, defense counsel's only objection was that the plaintiff's attorney was arguing with Gomez and would not allow him to finish testifying. Clearly, the ground asserted at trial has nothing to do with the ground the defendants now assert on appeal. See *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009) ("A specific objection at trial forfeits all grounds not specified."). Moreover, not only did defense counsel fail to object on the grounds now asserted on appeal, the record reveals that he elicited the allegedly objectionable information on direct examination when he questioned Gomez about whether he "sold stolen parts," and elicited more on re-direct when he asked Gomez how he pled to the criminal charges. In so doing, the defendants placed the evidence at issue under the doctrine of invited error. That is, a defendant may not proceed in one manner and then later contend on appeal that the course of action was in error. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (under the invited-error doctrine, "a party cannot complain of error which that party induced the court to make or to which that party consented"). Therefore, we find that the defendants forfeited the issue for appeal.

¶ 42 We next address the defendants' contention that the trial court's award of damages was against the manifest weight of the evidence. Given our resolution of the plaintiff's claim for damage to its property, we need not address the defendants' claims of error as to the evidence presented at trial in support of those damages. Rather, we limit our analysis to the question of whether the trial court's award of $68,000 in unpaid rent was against the manifest weight of the evidence.

¶ 43 "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.' [Citation.]" *Id.* The trial judge's role is to weigh the evidence and make findings of fact; on appeal, this court "may 'not substitute its judgment for that of the trier of fact.' [Citation.]" *Id.* The role of a reviewing court is not to reweigh the evidence, but only to determine whether the evidence of record supports the trial court's judgment. *Wendy & William Spatz Charitable Foundation v. 2263 N. Lincoln Corp.*, 2013 IL App (1st) 122076, ¶ 27.

¶ 44 In this case, the trial court's finding that the plaintiff was entitled to $68,000 for unpaid rent is not against the manifest weight of the evidence. Tina testified that the defendants stopped paying rent in April 2015, and that, as of July 6, 2015, the defendants' owed $68,000 in rent plus $3,400 in late fees. His testimony regarding the amount owed is supported by the second amendment to the lease which states that the rent is $17,000 per month. The testimony of Alfaro and Gomez also established that the defendants vacated the premises on July 24, 2015. Thus, the

evidence at trial supports the trial court's finding that the plaintiff is entitled to four months' rent at $17,000 per month.

¶ 45 Nevertheless, the defendants maintain that the plaintiff is not entitled to April or May rent because the Attorney General issued a "Third-Party Citation to Discover Assets," which required Gomez to withhold rent. While it is true that Gomez was served with a citation to discover assets and ordered to withhold April rent, it did not require him to withhold May rent. Additionally, the evidence presented at trial established that the citation to discover assets was dismissed and the State of Illinois never sought a turnover order. Once the citation to discover assets was dismissed, Gomez was no longer required to withhold rent and the defendants should have submitted their rent payments to the plaintiff. We also note that the trial court acknowledged that the defendants were required to withhold rent and, as a consequence, it declined to award the plaintiff $3,400 in late fees.

¶ 46 The defendants also assert that the plaintiff is not entitled to June and July rent as they made numerous attempts to vacate the premises but were unable to do so because the plaintiff changed the locks pursuant to the City's vacate order. We are not persuaded.

¶ 47 While it is true that the City's vacate order restricted the defendants' access, Tina testified that they were allowed to enter the premises with prior approval from the City and that, whenever the City instructed him to allow the defendants into the premises, he always gave them access. Tina's testimony was corroborated by the testimony of Alfaro, who stated that he and his crew went to the premises on multiple occasions in June and July to remove their property. Although Alfaro testified that he was denied permission to enter the premises on one occasion in April, he acknowledged that the City's inspectors and police, not the plaintiff, barred him from entering. Based upon Tina's testimony that the defendants were given access to the premises

each time they obtained permission from the City, the trial court's finding that the defendants were not prevented from vacating the premises is not against the manifest weight of the evidence. Because the defendants' property remained at the premises, we cannot find that the trial court erred in awarding the plaintiff rent from the date the lease expired, May 31, 2015, to the date they vacated the premises, July 24, 2015. See *Zion Industries, Inc. v. Loy*, 46 Ill. App. 3d 902, 907 (1977) ("liability for rent will continue so long as possession of the premises is continued"); see also *A.O. Smith Corp. v. Kaufman Grain Co.*, 231 Ill. App. 3d 390, 398-99 (1992) (tenants who remain in possession after their lease expires become tenants at sufferance and their obligation to pay rent is not suspended).

¶ 48 We also reject the defendants' argument that their obligation to pay April and May rent was "absolve[d]" because the plaintiff failed "to ensure that the structure of the property was sound." The defendants fail to develop their argument, cite no relevant authority, and devote less than a half page of their 25-page brief in support of their argument. The defendants have forfeited this argument on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived.").

¶ 49 Forfeiture aside, we note that a commercial landlord has no common law duty to repair the premises. *Zion Industries*, 46 Ill. App. 3d at 915. We also note that section 7 of the lease expressly states that the "[t]enant shall make all necessary repairs and renewals upon [the] Premises and replace any broken components of the building ***." And, even if the lease agreement provided that the landlord shall make repairs to the premises, its failure to do so does not discharge the tenants duty to pay rent. *Id.* at 906 (a commercial landlord's failure to repair does not discharge a tenant's duty to pay rent); see also *Poulos v. Reda*, 165 Ill. App. 3d 793, 798-99 (1987).

¶ 50 In sum, the trial court's finding that the plaintiff is entitled to $68,000 in unpaid rent is not against the manifest weight of the evidence.

¶ 51 Finally, the defendants argue that the trial court erred when it "dismiss[ed]" their second amended counterclaims for conversion, trespass to chattels, and breach of bailment. They contend that the evidence presented at trial established that several tons of scrap metal and raw materials valued "in excess of $10,000" was stolen from the premises and "such evidence *** warrants a new trial ***." The plaintiff responds by arguing that the trial court "properly determined that [the] defendants' counterclaim[s] were not germane to the issues in the case and properly dismissed [them]." The plaintiff also points out the "irony" in the defendants' contention that the court erred in "dismissing" their counterclaims because their counterclaims, like the plaintiff's claim for property damage, seek monetary relief and are "not tied in any way to the issue of possession."

¶ 52 At the outset, we note that the trial court never "dismissed" the defendants' second amended counterclaims. Rather, the record makes clear that the court denied the plaintiff's motion to strike the second amended counterclaims. And, contrary to the plaintiff's assertion on appeal, the issue of whether the counterclaims were germane to the proceeding was never raised by the plaintiff and the question was never passed upon by the trial court. In denying the plaintiff's motion to strike, the court explained as follows:

> "THE COURT: All right. Based on where we are in this case today, which is the evidence is now closed, I am going to go ahead and let [the defendants] file [the second amended affirmative defenses and counterclaims]. As far as I'm concerned, you have argued really your closing argument against them. I'm not going to stop you from arguing further, but you have argued against

> them, and I'm going to let them argue when it's their turn to argue, but we can—so I'm going to allow you now—
>
> So basically I'm going to allow him to file this stuff ***."

As such, because the plaintiff failed to raise the issue of whether the defendants' counterclaims are germane to the forcible entry and detainer proceeding in the trial court, it has forfeited its contention on appeal.

¶ 53 The general rule is that the theory upon which a case is presented in the trial court cannot be changed on review, and that an issue not presented to or considered by the trial court cannot be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). However, this general rule is not rigid and inflexible. Indeed, "waiver is an admonition to the parties rather than a limitation on this court's jurisdiction, and *** it may be relaxed in order to maintain a uniform body of precedent, or where the interests of justice so require." *Texaco-Cities Services Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 279 (1998); see also *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39, 59 (2009) (addressing whether the trial court lacked statutory authority under section 9-209 of the Act to remove the plaintiff from the premises despite the parties' failure to fully address the question).

¶ 54 In this case, we choose not to apply the rule of forfeiture. We find that the interests of justice require us to consider whether the trial court erred in denying the plaintiff's motion to strike the defendants' second amended counterclaims. Our determination in this regard is based on a purely legal question—namely, whether the defendants' second amended counterclaims are germane to the distinctive purpose of the forcible entry and detainer proceeding—and our failure to address this question would result in an inconsistent holding.

¶ 55 As discussed above, "[a] forcible entry and detainer proceeding is a summary statutory

action to adjudicate possession rights and should not be burdened by other matters unrelated to the issue of possession." *People ex rel. Department of Transportation v. Walliser*, 258 Ill. App. 3d 782, 788 (1994). Under section 9-106 of the Act, matters not germane to the distinctive purpose of the forcible entry and detainer proceeding shall not be introduced by joinder, counterclaim or otherwise. 735 ILCS 5/9-106 (West 2014). "Germane" has been held to mean "closely allied," "closely related," "closely connected" or "appropriate." *Rosewood Corp.*, 46 Ill. 2d at 256. Where a counterclaim does not dispute possession but instead seeks monetary damages, it is not germane to the issue of possession. *Sawyier v. Young*, 198 Ill. App. 3d 1047, 1053 (1990).

¶ 56 In this case, the defendants' counterclaims for conversion, trespass to chattels and breach of bailment are based upon allegations that several tons of scrap metal was stolen from the premises and that the defendants were temporarily deprived of their property when the plaintiff changed the locks and welded the doors to the premises shut. These counterclaims do not dispute the plaintiff's right to possess the premises, but instead seek monetary damages for being deprived of their personal property. The counterclaims, therefore, are not germane to the issue of possession and, therefore, should not have be joined in this forcible entry and detainer action. See *Sawyier*, 198 Ill. App. 3d at 1053-54 (counterclaim seeking monetary damages for the plaintiffs' alleged breach of a real estate contract and "various torts" was not germane to the proceeding); *Walliser*, 258 Ill. App. 3d at 788 ("Claims seeking monetary damages and not possession are not germane to the distinctive purposes of a forcible entry and detainer proceeding.").

¶ 57 Because the defendants' counterclaims are not germane to the issue of possession, the trial court erred in failing to grant the plaintiff's motion to strike the second amended

counterclaims and subsequently entering judgment thereon in favor of the plaintiff. As a consequence, for the same reason we vacated the trial court's property-damage award, we also vacate the court's judgment entered in the plaintiff's favor on the defendants' counterclaims, and in the exercise of our power under Illinois Supreme Court Rule 366(a)(5), we strike the defendants' counterclaims, without prejudice to the defendants' right to bring a separate action against the plaintiff for damages claimed therein. We again wish to make it clear that our decision to strike the defendants' counterclaims is not an adjudication on the merits of the claims.

¶ 58 For the forgoing reasons, we: affirm the judgment entered in the plaintiff's favor on its claim for past-due rent; vacate the judgment entered in the plaintiff's favor on its claim for property damage; strike the plaintiff's claim for property damage from count II, without prejudice; vacate the judgment entered in the plaintiff's favor on the defendants' counterclaims; and strike the defendants' counterclaims, without prejudice.

¶ 59 Affirmed in part, vacated in part, and claims stricken.