

No. 1-16-1097

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--|---|-------------------|
| 1825 NEWPORT, LLC, |) | Appeal from |
| |) | the Circuit Court |
| Plaintiff-Appellee, |) | of Cook County |
| |) | |
| v. |) | 2012 M1 703309 |
| |) | |
| YOLANDA LORENTE, LTD, and YOLANDA LORENTE, |) | Honorable |
| |) | James N. O'Hara, |
| Defendants-Appellants. |) | Judge Presiding |

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Where landlord plaintiff sought unpaid rent from tenant during the period when tenant continued to occupy the leased premises, and where tenant's claim of damages against landlord had been previously settled, tenant's constructive eviction claim did not preclude a summary judgment award in favor of landlord for unpaid rent. Order granting landlord attorney fees is reversed where the fees were not authorized by provision in the parties' contract.

¶ 2 Defendants, Yolanda Lorente, LTD and Yolanda Lorente (collectively Lorente), appeal from the trial court's order entering judgment in favor of Plaintiff, 1825 Newport, LLC (Newport), for unpaid rent and attorney fees.

¶ 3 The record shows that Yolanda Lorente operates Yolanda Lorente, LTD, an Illinois corporation which designs and manufactures silk dresses. In 2011, Lorente was producing her fashions at a 24,000 square foot building located at 1825 West Newport in Chicago. Lorente owned the building until May 19, 2011, at which time Lorente sold it to Newport. The parties then entered into a commercial lease, under which Lorente would continue to occupy the second floor of the building (the leased premises) from May 19, 2011, until May 18, 2012. The parties agreed that Lorente would pay monthly rent of \$5,000, and that the obligation to pay rent would not commence until December 19, 2011.

¶ 4 Newport filed the instant action on February 8, 2012, seeking possession of the leased premises, rent and attorney's fees. In its complaint, Newport alleged that Lorente was unlawfully withholding possession of the leased premises, and that rent was due from December 19, 2011, until the present.

¶ 5 On March 19, 2012, Lorente filed an answer to Newport's complaint, generally denying its allegations and alleging two affirmative defenses—breach of contract, and constructive eviction. In Lorente's answer, and subsequently filed amended answer, Lorente alleged that Newport began construction projects in the building in August 2011, and, on September 14, 2011, began cutting trenches into the concrete first floor with gas powered cutting machines. The construction project caused concrete dust and gas fumes to infiltrate the leased premises through cracks in the second-floor floor boards. Lorente contacted Newport to demand that action be taken to stop the dust from entering the leased premises, but Newport refused. Thereafter, Lorente discovered her work space, including equipment and inventory, coated with "thick greasy concrete dust." Despite Lorente's demands for remedial action, Newport continued the construction project until October 2011. Newport told Lorente that it would clean the leased

premises after the work was done. Newport, however, did not do so, and Lorente's personnel began to clean the leased premises on November 7, 2011. Lorente alleged that despite her cleanup efforts, more than 50% of the leased space remained untenable.

¶ 6 Lorente further stated that when she realized that Newport would not return the leased space to tenantable condition, Lorente began searching for another space to move in January 2012. In February and March 2012, Lorente looked at over 20 potential sites to which to relocate, but she was unable to find a site with suitable size, location, electrical power, build-outs and rent. On April 18, 2012, Lorente signed a commitment to lease space at 4424 North Ravenswood in Chicago, but it took the new landlord five weeks to renovate the space to meet Lorente's needs. Lorente vacated the leased premises and moved into the space at 4424 North Ravenswood in May 2012.

¶ 7 Based on the above alleged facts, Lorente contended that Newport had breached the "quiet enjoyment" provision of the lease contract, and that Lorente had been constructively evicted from the leased premises, thereby terminating Lorente's obligation to pay rent.

¶ 8 On March 26, 2012, Lorente filed a motion to consolidate the instant action with an action for damages she brought on December 30, 2011, against Newport, as well as John Sears, Emmanuel Rigatos, and Aberdeen Construction Company, based on the above alleged facts (damages action). Newport initially opposed the consolidation, but on June 13, 2012, the trial court entered an order granting Lorente's motion to consolidate, noting that "all parties [were] in agreement." Thereafter, both actions proceeded in the trial court.

¶ 9 On March 27, 2012, Newport filed a motion for Use and Occupancy. On May 23, 2012, the trial court denied that motion, but entered an order granting possession of the leased premises to Newport as of May 31, 2012, based on Lorente vacating the leased premises by that date.

¶ 10 On July 17, 2012, Newport filed a Motion for Judgment on the Pleadings pursuant to Section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). In that motion, Newport alleged that Lorente's obligation to pay rent was not dependent on Newport's compliance with its lease covenants, and that Lorente had no viable defense because she did not vacate the leased premises during the lease term.

¶ 11 The trial court denied Newport's Motion for Judgment on the Pleadings on December 14, 2012, finding that there was a genuine issue of material fact as to whether Lorente was constructively evicted from the premises. The court specifically found that:

"because of the nature of Yolanda Lorente's business she vacated the premises in a reasonable amount of time. Additionally, during the time Yolanda Lorente was looking for a new location to operate her business, 50% of her leased space remained untenable and unusable for the purposes for which she leased the space."

¶ 12 On October 28, 2014, the trial court entered an order indicating that Newport and Lorente had chosen to settle all claims Lorente alleged against Newport in her damages action, and those claims were dismissed with prejudice. The trial court retained jurisdiction to enforce the settlement, and both Newport's unpaid rent action and Lorente's action against the other parties proceeded in the trial court.

¶ 13 Thereafter, on December 30, 2014, Newport filed a Motion for Summary Judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2012)). Newport contended that it was entitled to summary judgment because Lorente did not vacate the leased premises during the lease term, and thus, was not entitled to a constructive eviction defense. Newport further argued that even if Lorente had a constructive eviction defense, she would only be

relieved of her obligation to pay rent after she vacated the leased premises. Newport therefore argued that Lorente owed it rent from December 19, 2011 to May 31, 2012, as a matter of law.

¶ 14 In Lorente's response to Newport's Motion for Summary Judgment, filed on February 2, 2015, Lorente contended that a genuine issue of material fact remained as to whether she was constructively evicted, and what portion, if any, of the rent she owed while occupying the leased premises while it was untenable.

¶ 15 On March 3, 2015, Newport replied, stipulating, for purposes of the motion, that Lorente had been constructively evicted. It maintained, however, that even assuming Lorente was constructively evicted, she was obligated to pay rent for the period that she continued to occupy the premises.

¶ 16 On April 28, 2015, the trial court entered an order granting Newport's motion for summary judgment. It agreed that Lorente had been constructively evicted, but concluded that Lorente "had no legal right to withhold rental payments even if she had been constructively evicted unless and until she vacated the premises." Because Lorente remained in possession of the leased premises until she vacated on May 31, 2012, the trial court found Lorente liable for all unpaid rent until that date. Lorente's motion to reconsider was denied on October 13, 2015.

¶ 17 Newport filed a petition for attorney fees on November 3, 2015, requesting \$23,940 in attorney fees based on Lorente's default under the lease. Lorente filed a response on November 19, 2015, arguing that there was no basis for an award of attorney fees, since the only provision in the lease allowing attorney fees required those fees to be "relat[ed] to reletting." Lorente contended that Newport had made no claim that it had tried to relet the property, or that any of the fees it requested were related to reletting. Lorente also argued that the fees were unreasonable.

¶ 18 Newport replied, reducing the amount of attorney fees it requested to \$6,279. It argued that those fees, which were all fees incurred between the time it filed its complaint on February 8, 2012, and the entry of an order for possession on May 23, 2011, were related to reletting because "[i]n order to relet the leased property, Newport must have first obtained possession of the leased premises."

¶ 19 On March 31, 2016, the trial court entered an order granting Newport's petition for attorney fees. Lorente was required to pay \$6,279 in attorney fees, and the court entered a total judgment in the amount of \$33,375.78 in favor of Newport. Lorente filed a notice of appeal on April 26, 2016.

¶ 20 In this appeal, Lorente contends that the trial court erred in granting summary judgment to Newport because material issues of fact remained. Lorente also contends that the trial court's attorney fee award was erroneous.

¶ 21 As an initial matter, this court must address our jurisdiction to hear this appeal. Although neither party raised the issue of a lack of jurisdiction in their briefs, this court has the duty to independently consider our own jurisdiction, and must dismiss an appeal if jurisdiction is wanting. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009) ("A reviewing court must ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue.")

¶ 22 As our supreme court has repeatedly observed, this court only has jurisdiction over final orders, unless specifically authorized by supreme court rules. *Hawes v. Luhr Brothers, Inc.*, 212 Ill. 2d 93, 106 (2004). To be final and appealable, a judgment must terminate the litigation between the parties on the merits of the cause so that, if affirmed, the trial court need only execute the judgment. *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987). A final order terminates

the litigation between the parties or disposes of the rights of the parties upon the entire issue or some definite part. Ill. S. Ct. R. 303(a) (eff. June 8, 2008); *Kellerman*, 119 Ill. 2d at 115. Illinois Supreme Court Rule 304(a) allows an appeal to be taken from a final judgment as to one or more, but less than all, of the claims in an action if the trial court makes an express finding that there is no just reason to delay enforcement or appeal of the judgment. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 23 As described above, this case was consolidated with Lorente’s separate action for damages. However, the record was unclear as to whether a final judgment had been entered as to all parties and all claims, and the trial court’s judgment did not contain an express Rule 304(a) finding. Accordingly, this court requested clarification from the parties as to this court’s jurisdiction. Lorente initially indicated that the parties agreed that this court had jurisdiction. After repeating this court’s request, Lorente responded that the cases, although consolidated, remained separate, and therefore the trial court’s orders were “final and appealable judgments” in the instant action.

¶ 24 Section 2–1006 of the Procedure Code (735 ILCS 5/2–1006 (West 2010)) permits a court to consolidate cases as long as a substantial right is not prejudiced. Distinct forms of consolidation exist, two of which are potentially relevant to the case at bar. One form “concerns several actions involving an inquiry into the same event in its general aspects and is limited to a joint trial, with separate docket entries, verdicts[,] and judgments.” *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1996). In the second form of consolidation, “several actions actually merge into one action, * * * thereby losing their identity, [and] they are disposed of as one suit.” *Nationwide*, 285 Ill. App. 3d at 532.

¶ 25 A determination of which form of consolidation is applicable in this case is central to our jurisdictional inquiry. If the actions were consolidated under the first form, the order entering judgment and attorney fees to Newport would have terminated the litigation between the parties in the instant action. It would thus be final and appealable, and a Rule 304(a) finding would not be required. *Nationwide*, 285 Ill. App. 3d at 532. If, however, the actions were consolidated under the second form, the trial court's order would not be final and appealable where other claims related to Lorente's damages action continued in the trial court, and a Rule 304(a) finding would be required. *Nationwide*, 285 Ill. App. 3d at 532.

¶ 26 In order to determine whether other actions remained pending in the trial court, and to ascertain our jurisdiction, this court was forced to examine, and take judicial notice of, matters of record in consolidated Case No. 1-16-1495, relating to Lorente's damages action. See *People v. Davis*, 65 Ill. 2d 157, 161 (1976) ("Taking judicial notice of matters of record in other cases in the same court is simply an application of the increasingly recognized principle that matters susceptible of judicial notice include facts 'capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.' [citation]").

¶ 27 Although this case does not fall neatly into either form of consolidation, we conclude that it is more akin to the first type, in which the cases maintain their separate identities. The record shows that Lorente's action against Newport and other parties was filed before Newport filed its claim for unpaid rent. Lorente's complaint, which it attached to its motion to consolidate in this action, alleged, among other claims, breach of contract against Newport. Lorente specifically alleged that it had "suffered the loss of use of this space *** having a value under the Lease of \$5,000 per month." In its motion to consolidate, Lorente argued that both cases "involv[ed] the same facts" and "relate[d] to the same questions of law and fact[.]" Newport responded, opposing

the motion, and Lorente replied, requesting that the court enter an order "consolidating these cases *** together, but with separate docket entries, verdicts and judgments." The trial court granted Lorente's motion.

¶ 28 Thereafter, the parties used separate designations for documents relating to the two cases. For filings related to Lorente's 2011 action, the parties used "Case No 11 L 14042" while filings related to the instant case were referenced by "Case No 11 L 14042 (12 M1 703309 consolidated into)". However, orders entered by the trial court bore reference only to case number 11 L 14042.

¶ 29 Moreover, the record of Lorente's consolidated action shows that her breach of contract claim, as well as all other claims Lorente alleged against Newport, were settled and dismissed with prejudice on October 28, 2014. Because Lorente's claims against Newport were resolved prior to the trial court granting summary judgment for Newport on April 28, 2015, the trial court's order entering summary judgment was final and appealable upon the resolution of Newport's petition for attorney fees. We thus have jurisdiction to entertain this appeal.

¶ 30 That said, we caution counsel to always carefully consider jurisdiction—particularly in a consolidated case such as this one—and to include all necessary documents in the record on appeal. This court should not have been required to search the record in this case, as well as the record in the related, consolidated case, to ascertain our jurisdiction.

¶ 31 We turn to the first issue raised in this appeal—whether the trial court properly granted summary judgment in favor of Newport. Lorente contends that there were material issues of fact which precluded the trial court's entry of summary judgment, namely, whether she vacated the leased premises within a reasonable period of time, and how much of the leased premises was untenable.

¶ 32 Newport responds that these issues do not preclude summary judgment. Newport points out that its “own briefs stipulated that a constructive eviction occurred *** and thus conceded that Lorente vacated the Leased Premises within a reasonable period of time.” Newport contends, however, that summary judgment was appropriate, because Newport “only sought rent for the period of time which Lorente occupied the Leased Premises.”

¶ 33 A lessee's obligation to pay rent under the terms of a lease may be discharged upon constructive, as well as actual, eviction. Constructive eviction is something of a serious and substantial character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises. *American National Bank & Trust Co. v. Sound City, U.S.A., Inc.*, 67 Ill. App. 3d 599, 601 (1979). When a landlord commits a breach that would justify the tenant's abandoning the premises, the tenant is allowed a reasonable time to vacate. *Shaker & Associates, Inc.*, 315 Ill. App. 3d at 135, citing *Automobile Supply Co. v. Scene-in-Action, Corp.*, 340 Ill. 196, 203 (1930). A tenant who does not vacate within a reasonable time, however, is considered to have waived the landlord's breach. *Id.*, citing *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 149 (1988). Whether the time between the landlord's breach and the tenant's abandonment of the premises is reasonable is generally a question of fact, and various factors are considered, including the tenant's reliance upon promises by the landlord to repair and the time required to find a new location. *Id.*

¶ 34 In this case, Lorente did not pay any rent to Newport from the time her obligation began in December 2011, but she did not actually leave the leased premises until after the lease term concluded. Constructive eviction relieves the tenant from the responsibility to pay rent, but only after the tenant vacates the premises. *Id.* “There can be no constructive eviction without the vacating of the premises.” *Id.*, citing *Dell'Armi*, 172 Ill. App. 3d at 148–49. Although it is true

that a tenant is allowed a reasonable time to vacate (*Automobile Supply Co.*, 340 Ill. at 203), the tenant is not relieved of its obligation to pay rent so long as it continues to occupy the leased premises (*City of Chicago v. American National Bank*, 86 Ill. App. 3d 960, 963 (1980), citing *Zion Industries, Inc. v. Loy*, 46 Ill. App. 3d 902, 908 (1977); cf. *Lipkin v. Burnstine*, 18 Ill. App. 2d 509, 518 (1958)). As a result, any affirmative defense based on constructive eviction would apply only to the period after Lorente vacated the building. Because Newport only sought rent for the time when Lorente continued to occupy the leased premises, the trial court correctly entered summary judgment on this issue.

¶ 35 We also reject Lorente's contention that the rental recovery should have been limited only to the tenantable space that she occupied. This court addressed a similar issue in *Zion Industries, Inc.*, 46 Ill. App. 3d 902, in which a landlord brought an action against a commercial tenant for unpaid rent. The tenant contended that it was not responsible for the unpaid rent due to a leaky roof, which caused between 50% and two-thirds of his floor space to be unusable. *Id.* at 906. The tenant argued that the failure to make adequate repairs amounted to a constructive eviction, "since [the landlord] allowed a condition to continue which eventually deprived [the tenant] of the effective use and enjoyment of 50% Of [*sic*] more of the leased space." *Id.* at 907. This court found, however, that because the tenant remained in possession of the leased premises, his obligation to pay the agreed rent continued. *Id.* at 908.

¶ 36 We note, however, that a tenant who does not receive the benefit of its lease contract is not without remedy for the time it continued to occupy the space—it may bring a claim for damages resulting from the landlord's breach. By doing so, the tenant may offset the rent it is obligated to pay, either in full or in part, based upon the diminished value of the leased premises. This, essentially, is one of the claims Lorente raised against Newport in her damages action, in

which she contended that she suffered damages from Newport's breach of contract, and that the loss of use of the leased premises was valued at \$5,000 per month. That claim was generally repeated in her affirmative defenses to this unpaid rent action. Although Lorente claims that there were questions of material fact as to whether she was entitled to a full or partial offset of the unpaid rent Newport was seeking, the record shows that Lorente settled that claim, and all other causes of action she had against Newport, on October 28, 2014. Because the trial court had already resolved Lorente's claim against Newport, no questions of material fact remained, and the court properly entered summary judgment for Newport for the unpaid rent.

¶ 37 Lorente next challenges the trial court's award of attorney fees to Newport. Lorente contends that the lease contains no provision for attorney fees, other than those "Relating to Re-Letting." Lorente contends that the attorney fees awarded to Newport were not related to reletting, and therefore, were not authorized by the parties' contract. Newport responds that the attorney fees awarded to it were for work done from the time the eviction lawsuit was filed until an order for possession of the leased premises was entered. Because Newport was required to first obtain possession of the leased premises in order to relet it, it contends that the trial court did not abuse its discretion in ordering Lorente to pay those attorney fees.

¶ 38 In general, Illinois follows the "American Rule," under which each party must bear its own attorney fees. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572 (2000). However, Illinois courts will award attorney fees when the parties contracted for the award of fees or when such an award is authorized by statute. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 86.

¶ 39 We first address the applicable standard of review. Newport contends that the standard of review is an abuse of discretion, and that Lorente has not met that standard.

¶ 40 Generally, a trial court has broad discretion to award attorney fees and its decision will not be disturbed on appeal absent an abuse of that discretion. *In re Estate of Callahan*, 144 Ill. 2d 32, 43-44 (1991); *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 225 (2007). However, in cases in which a party contests the trial court's authority to award attorney fees under the terms of a lease, our standard of review is twofold. *Id.* First, to the extent that the trial court interpreted the terms of the lease, our review is *de novo*. *Id.* Second, where the trial court applied the terms of the contract to the facts, our review is based on an abuse of discretion standard. *Id.* at 226. A court must strictly construe a contractual provision providing for attorney fees to determine the parties' intent (*Mirar Development, Inc.*, 308 Ill. App. 3d 483, 488 (1999)), which requires construing the provision “ ‘to mean nothing more—but also nothing less—than the letter of the text’ ” (*Bjork v. Draper*, 381 Ill. App. 3d 528, 544 (2008) (quoting *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004))). Construction of an attorney fee provision in a contract is a question of law, which we review *de novo*. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005).

¶ 41 Section 17 of the lease between the parties provides as follows:

"If the Landlord elects to reenter as herein provided, or should it take possession pursuant to any notice provided for by law, it may either terminate this Lease or may, from time to time, without terminating this lease, relet the Leased Premises or any part thereof, for such term or terms and at such rental and rentals and upon such other terms and conditions as the Landlord in Landlord's own discretion may deem advisable. Should rentals received from such reletting during any month be less than that agreed to be paid during the month by the Tenant hereunder, the Tenants shall pay such deficiency to the Landlord monthly. The Tenant shall also

pay to the Landlords, as soon as ascertained, the costs and expenses incurred by the Landlord, including reasonable attorneys fees relating to such reletting."

¶ 42 The attorney fees awarded in this case were all fees incurred by Newport from the time the eviction lawsuit was filed until the order for possession of the leased premises was entered. Newport contends that this award was appropriate, and that the fees related to reletting, because it was required to first obtain possession of the leased premises in order to relet it.

¶ 43 Strictly construing the above provision leads us to the conclusion that the attorney fees at issue were not recoverable under the lease. The provision at issue differentiates between Newport's recovering possession of the leased premises, and reletting it ("If the Landlord *** take[s] possession ***, it may *** relet the Leased Premises"). The provision, however, only allows for shifting of attorney fees "relating to such reletting." It does not indicate that fees may be obtained for acquiring possession. See *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 516 (2002) (where contract allows fee-shifting to "enforce" a lease, it does not apply in declaratory judgment actions, because declaring rights is not the same as enforcing obligations). Newport's proposed interpretation strains the plain language of the provision.

¶ 44 Moreover, there is nothing in the record to show that the requested attorney fees were related to reletting, or that Newport attempted to relet the leased premises at all. In fact, the record shows that Lorente vacated the leased premises in May 2012, after the conclusion of the lease term. Newport sought, and ultimately was awarded, unpaid rent against Lorente for the entire term of the lease. In these circumstances, it would not be reasonable to interpret any of Newport's attorney fees to be related to reletting. We thus reverse the trial court's order awarding attorney fees to Newport.

1-16-1097

¶ 45 For the foregoing reasons, we affirm the trial court's judgment for unpaid rent in favor of Newport, and reverse its award of attorney fees.

¶ 46 Affirmed in part and reversed in part; attorney fees vacated.