

NOTICE
Decision filed 02/21/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 160153-U

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).

NO. 5-16-0153

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

REIMER DEVELOPMENT, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Shelby County.
)	
v.)	No. 15-LM-25
)	
JUDITH L. REIMER, d/b/a JUDY REIMER)	
RENTALS,)	Honorable
)	Martin W. Siemer,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court appropriately determined the sufficiency of plaintiff's five-day notice and the reasonableness of late rental fees concerning plaintiff's forcible entry and detainer action against defendant.

¶ 2 **BACKGROUND**

¶ 3 This appeal stems from a lease dispute regarding unpaid rent. Plaintiff, Reimer Development, Inc., is an Illinois corporation that owns the Lake Shelbyville Mobile Home and RV Park (Park) located in Shelby County, Illinois. Plaintiff leases lots in the Park to be used as sites for mobile homes.

¶ 4 On July 1, 2009, defendant, Judith Reimer, doing business as Judy Reimer Rentals, signed a lease with plaintiff for approximately one-third of the lots located in the Park. The lease provided that the monthly rent per lot was \$100, in addition to late fees, and the lease was to run until July 1, 2013. Regarding the late fees, the lease provided that rent and/or utilities received after the fifth day of the month included a \$25 late charge plus \$5 for each additional day such rent and utilities are late. The lease also indicated tenants assumed liability for costs and legal fees incurred in enforcing the lease.

¶ 5 Plaintiff filed a complaint in forcible entry and detainer against defendant on June 17, 2015. The complaint asserted that in or about April 2012, the parties agreed to increase the base rent of the leased lots from \$100 to \$225. The complaint then alleged defendant paid plaintiff \$225 per month for base rent in April and May of 2012, but failed to pay any rent thereafter. The complaint further asserted defendant was served a notice that indicated the lease would be terminated if payment was not made within five days from the date of receipt, but defendant failed to pay the amount demanded in the notice. Specifically, the complaint alleged "[d]efendant has held possession and enjoyed the benefit of the lease without paying rent to [p]laintiff for the same, and has breached its lease with [plaintiff] by failing to pay rent when due."

¶ 6 In response, defendant filed a motion to dismiss plaintiff's action, which was denied. Defendant subsequently answered plaintiff's complaint and filed affirmative defenses. Plaintiff then filed a motion to strike defendant's affirmative defenses, and the matter was set for a bench trial. After several continuances, the matter was called for a bench trial on February 25, 2016.

¶ 7 At trial, the only issues disputed by the parties were whether the five-day notice was valid and sufficient to support a judgment for plaintiff, and whether the late fees provided for in the lease were valid and enforceable. Plaintiff waived any claim to a modification of the lease increasing the monthly rent from \$100 to \$225. In its order dated March 23, 2016, the court identified two additional issues: (1) whether judgment may be entered as to all of the lots included by plaintiff on the notice and (2) whether plaintiff is entitled to an award of attorney fees.

¶ 8 The court entered judgment in favor of plaintiff regarding the sufficiency of the five-day notice after concluding the language in the notice was consistent with statutory requirements. Regarding the late fees, the court concluded the initial late charge of \$25 per month when payment was not received by the fifth day of the month was permitted, but the \$5 charge for each additional day rent was not received after the fifth day of the month was unreasonable. Accordingly, the court enforced the initial late charge of \$25 per month, but did not enforce the additional \$5 charge.

¶ 9 Further, the court limited its judgment to those lots that appeared on both the lease and five-day notice (16 lots), rather than include all 20 lots listed in the notice, and ordered that defendant pay the reasonable attorney fees incurred by plaintiff. A money judgment was entered in favor of plaintiff and against defendant for past due rent of \$73,600, \$18,400 for late fees, and attorney fees of \$2,475, for a total of \$94,475 plus costs. The time frame used by the trial court in its calculation spanned 46 months, from June 1, 2012, through March 1, 2016.

¶ 10 Defendant timely appeals.

¶ 11

ANALYSIS

¶ 12

I. Five-Day Notice

¶ 13 Defendant's first contention on appeal alleges plaintiff's action for forcible entry and detainer must fail because plaintiff's five-day notice for termination of the lease did not comply with the statutory requirements for notice, thereby rendering it void.

¶ 14 Initially, plaintiff indicates defendant fails to cite any case law or statute in support of this argument. By failing to cite any relevant authority, plaintiff argues defendant has waived this issue pursuant to Supreme Court Rule 341(e)(7). Ill. S. Ct. R. 341(e)(7) (eff. Oct. 1, 2001). Although we could, in light of the violation of Rule 341(e)(7), consider defendant's argument waived, we instead exercise our discretion and address this issue on the merits. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 493, 771 N.E.2d 357, 364 (2002).

¶ 15 Section 9-209 of the Illinois Code of Civil Procedure (Code) on forcible entry and detainer provides, in relevant part:

"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." 735 ILCS 5/9-209 (West 2008).

¶ 16 In this case, it is undisputed that a five-day notice was delivered to defendant which provides defendant's unpaid rent "is due no later than FIVE (5) days from the date you receive this demand." The notice further provides:

"IF PAYMENT IS NOT MADE BY YOU WITHIN FIVE (5) DAYS FROM THE DATE YOU RECEIVE THIS DEMAND, YOUR LEASE WILL BE TERMINATED. ONLY FULL PAYMENT OF THE RENT DEMANDED HEREIN WITHIN THE FIVE-DAY PERIOD WILL PREVENT THE LANDLORD FROM TERMINATING THIS LEASE."

¶ 17 On appeal, defendant alleges the five-day notice did not afford her the statutorily required time period for payment. Specifically, defendant points to the language of the statute which provides the lease will be terminated unless payment is made "not less than 5 days" after service, and the language of the notice which provides payment is due "no later than FIVE (5) days" from the date of receipt. Defendant asserts the statute requires that five days elapse before the lease may be terminated based on nonpayment, whereas the notice requires payment within five days before the lease may be terminated.

¶ 18 A lease is a type of contract which is generally governed by the rules of contract law. *Nationwide Mutual Fire Insurance Co. v. T&N Master Builder & Renovators*, 2011 IL App (2d) 101143, ¶ 16, 959 N.E.2d 201. A reviewing court's goal in analyzing the terms of a lease is to give effect to the intent of the parties, which must be ascertained from the lease itself where its language is unambiguous. *Faison v. RTFX, Inc.*, 2014 IL App (1st) 121893, ¶ 31, 6 N.E.3d 376. The lease must be construed so that no part of it is rendered meaningless. *Nationwide Mutual Fire Insurance Co.*, 2011 IL App (2d)

101143, ¶ 16, 959 N.E.2d 201. Further, the lease must be considered as a whole and not in isolation. *Nationwide Mutual Fire Insurance Co.*, 2011 IL App (2d) 101143, ¶ 16, 959 N.E.2d 201.

¶ 19 After careful consideration, we find the language of the notice, when read as a whole, is consistent with the requirements of the statute. The notice's language, "no later than FIVE (5) days" and "within the five-day period," is considerably similar to the language of the statute, "not less than 5 days." 735 ILCS 5/9-209 (West 2008). Moreover, the time frame mentioned in the notice, five days, is the minimum requirement set forth in the statute: "unless payment is made within a time mentioned in such notice, not less than 5 days after service thereof, the lease will be terminated." 735 ILCS 5/9-209 (West 2008). We agree with the trial court's explanation that when removing the descriptive language used to specify this statutory minimum ("a time mentioned in such notice, not less than"), the statute essentially provides payment must be made within five days after service. Here, the notice appropriately informed defendant that in order to prevent termination of the lease, full payment of rent must be made within the time frame provided for in the notice (no later than five days from receipt or within five days from receipt). This satisfies the statutory requirement set forth in section 9-209 of the Code. 735 ILCS 5/9-209 (West 2008). Accordingly, we reject defendant's argument.

¶ 20 Defendant further alleges a tenant could anticipate both a 10-day notice and a 5-day notice based on a close reading of the lease. The portion of the lease relied upon by defendant is under the "Lessor's Remedies" section of the lease. In relevant part, this section provides that when rent is overdue, plaintiff may notify defendant in writing that

"unless payment is made within the time specified in the notice, not less than ten (10) days after receipt thereof."

¶ 21 We cannot say this clause sets forth a longer notice period. Although this portion of the lease states "not less than ten (10) days," there is no reference as to what will happen or whether the lease will be terminated if payment is not made within 10 days. In contrast, the notice specifically provides that the lease will be terminated if payment is not made within five days of receipt. Although defendant correctly notes that the parties may negotiate more lenient terms than the statute's minimum requirement of five days, this clause is insufficient to support a finding that the parties agreed to expand the statutory minimum for notice regarding termination of a lease. For these reasons, we reject defendant's argument.

¶ 22

II. Late Fees

¶ 23 Defendant next contends the trial court's award of late fees to plaintiff was an unenforceable penalty not permitted in Illinois. Our review of the trial court's order partially granting plaintiff's request for past due fees involves only a question of law. *Hidden Grove Condominium Ass'n v. Crooks*, 318 Ill. App. 3d 945, 946, 744 N.E.2d 305, 306 (2001). Accordingly, we apply a *de novo* standard of review. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 946, 744 N.E.2d at 306.

¶ 24 A lease may provide that a late charge can be added to the rent where rent is not paid on or within a given number of days from the due date. *Collins v. Hurst*, 316 Ill. App. 3d 171, 174, 736 N.E.2d 600, 604 (2000). A lease may also provide that interest is due on unpaid rent payments. *Collins*, 316 Ill. App. 3d at 174, 736 N.E.2d at 604. A

reasonable late charge provision in a lease should be enforced. *Collins*, 316 Ill. App. 3d at 174, 736 N.E.2d at 604.

¶ 25 Generally, a plaintiff is entitled to recover damages under a contract theory only to the extent provided by the terms of the written instrument. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 947, 744 N.E.2d at 307. However, a provision fixing damages will not be upheld if its purpose is merely to secure performance of the agreement. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 947, 744 N.E.2d at 307. An agreement setting damages in advance of a breach is an unenforceable penalty unless: (1) the fixed amount is a reasonable forecast of just compensation of the harm caused by the breach; and (2) the harm caused is difficult or impossible to estimate. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 947, 744 N.E.2d at 307.

¶ 26 Here, the lease provides that "[r]ent and or utilities received after the 5th day of the month shall include a **\$25.00** late charge plus **\$5.00** for each additional day such rent and utilities are late." Relying on *Hidden Grove Condominium Ass'n*, the trial court enforced the initial monthly late charge of \$25 after concluding it was a reasonable forecast of just compensation of the harm caused by the breach of late payment. However, the court found that the imposition of the \$5 late charge for each additional day after the fifth day of the month was unreasonable, and did not enforce it.

¶ 27 On appeal, the parties do not dispute the trial court's decision regarding the unreasonableness of the \$5 late charge for each additional day after the fifth of the month. The only issue in dispute is whether the trial court's imposition of the initial monthly late

charge of \$25 is valid and enforceable. We turn to *Hidden Grove Condominium Ass'n* for guidance in helping reach our decision.

¶ 28 *Hidden Grove Condominium Ass'n* involved a condominium association that sought to impose a late charge of \$25 per month for each month the payment of an assessment fee was late and for each month thereafter until the assessment was paid. On review, the Third District appellate court found that the initial late charge of \$25 was reasonable as an estimate of expenses and administrative costs in pursuing the late assessment fee as well as lost income on the fee. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 947, 744 N.E.2d at 307. However, the court found that the "piling on of an additional \$25 per month for each month the assessment fee goes unpaid is unreasonable," as the compounding nature of such a charge must be assumed to be an attempt to secure timely payment of the assessment fee. *Hidden Grove Condominium Ass'n*, 318 Ill. App. 3d at 947, 744 N.E.2d at 307. In sum, the court determined the one-time fee was reasonable, but the cumulative late charge was unreasonable.

¶ 29 Similar to *Hidden Grove Condominium Ass'n*, we find the one-time late charge of \$25 per month for rent not received by the fifth day of the month is reasonable. There is no cumulative or "piling on" aspect associated with this charge, and it can be viewed as a reasonable forecast of just compensation of the harm caused by the breach of late payment. For these reasons, we reject defendant's argument.

¶ 30 CONCLUSION

¶ 31 We find the trial court properly concluded the five-day notice was valid and sufficient to support a judgment for plaintiff. We further find the trial court appropriately

assessed the reasonableness of the late fees requested by plaintiff. Accordingly, we affirm the judgment of the circuit court of Shelby County.

¶ 32 Affirmed.