2017 IL App (1st) 170519-U

SIXTH DIVISION
December 1, 2017

No. 1-17-0519

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AFFILIATED REALTY AND MANAGEMENT COMPANY, an Illinois Corporation, as manager and agent of Code 132, LLC, an Illinois Limited Liability Company,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 15 L 9841
INTERNATIONAL BEAUTY SYSTEMS, INC., an Illinois Corporation,	)	Honorable John C. Griffin,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly granted partial summary judgment in favor of the plaintiff landlord. The defendant tenant exercised its option to extend a commercial lease for an additional five-year term and its subsequent default did not extinguish its obligations under the extended lease. We affirm the award of damages resulting from defendant's failure to remove certain improvements to the property and find the circuit court properly admitted evidence related to the remediation of the property.

¶ 2 Plaintiff Affiliated Realty and Management Company (Affiliated) sued its tenant, defendant International Beauty Systems, Inc. (IBS), for breach of the parties' agreement to extend a commercial lease for an additional five-year term. The circuit court found that IBS

exercised its option to extend the lease for five years and subsequently defaulted on its rent obligation when it abandoned the property before the commencement of the extended term. After a trial to determine damages, the court awarded Affiliated an amount consisting of the unpaid rent owed under the extended lease term and the costs Affiliated incurred to remediate the property. IBS challenges the court's partial summary judgment finding and damages awarded for remediation, including its evidentiary ruling regarding the costs to remediate the property. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 1, 2007, IBS leased space in a shopping center in Downers Grove, Illinois, from Affiliated's predecessor in interest. The original lease term ran from June 1, 2007 to August 31, 2012, with an option to extend the lease an additional five years. Section 1.3(D) of the lease stated that "[t]enant shall have the option to extend the Term for one (1) period of five (5) years." Section 3.1(B) governed lease extensions. It stated:

> "Provided that Tenant is not in default hereunder, both at the time of exercise of the option as well as the time of commencement of any Extended Term hereinafter defined and provided that this Lease has not been terminated during the initial Term or a prior Extended Term, Tenant shall have options to extend the term as set forth in section 1.3 of the Abstract of Lease immediately following the then current term and subject to the terms, conditions, covenants and provisions of this Lease ("Extended Term"). Tenant shall exercise its extension rights hereunder in each instance by delivery to Landlord of written notice no earlier than two hundred and seventy (270) days and no later than one hundred and eighty (180) days prior to the expiration of the then current term. Except as

> expressly set forth herein, nothing contained in this Lease shall be construed as granting any rights to extend the Term beyond the Termination Date. In the event Tenant is in default either at the time it exercises its rights to extend or at the intended commencement date of such Extended Term, then all of Tenant's extension rights described in this Section and Section 1.3 of the Abstract of Lease shall terminate automatically."

¶ 5 Article XI of the lease set forth provisions for default and remedies for default. A default under section 11.1 included, among other things, the "[f]ailure of Tenant to pay when due any installment of Rent hereunder or any other sum herein required to be paid by Tenant, and the continuance of such nonpayment for five (5) days" and "[a]bandonment or misuse of the Premises by Tenant." The lease defined abandonment as the "failure by Tenant to open the Premises for business under usual business hours for seven (7) consecutive days" or "Tenant's removal of all or a substantial portion of Tenant's furnishings, equipment, machinery or other property from the Premises."

¶ 6 IBS extended the lease twice pursuant to two written lease amendments. IBS and Affiliated's predecessor executed the first lease amendment to extend the lease through February 28, 2013. The same parties entered into a second lease amendment that extended the lease to July 31, 2015. Except as otherwise modified by either of the amendments, the terms of the original lease remained in full force and effect.

¶ 7 After the second lease amendment, Code 132, LLC purchased the leased premises and informed IBS of the assignment of the lease. Affiliated managed the property for Code 132.

¶ 8 On January 6, 2015, Affiliated sent IBS a letter regarding IBS's option to "extend the term of the Lease and all covenants, terms, and conditions *** from August 1, 2015 through July

31, 2020." The letter stated that IBS could exercise the option by signing and returning the original letter to Affiliated by January 31, 2015. IBS responded affirmatively. It signed and returned the extension letter to Affiliated on January 9, 2015.

¶ 9 A few months later, though, IBS changed course. On July 29, 2015, it sent Affiliated a "Notice of Termination of Option to Renew." IBS informed Affiliated that it had removed its furnishings and equipment from the property and failed to open its business for a period in excess of seven days, which resulted in an abandonment of the property under the terms of the lease. IBS claimed that it was in the process of winding up its operations due to a severe decline in its business. IBS asserted that its abandonment of the premises created a default under the lease, which resulted in an automatic termination of its option to extend the lease beyond July 31, 2015. IBS stopped paying monthly rent to Affiliated after July 31, 2015.

¶ 10 On August 13, 2015, Affiliated provided written notice to IBS of its default under the lease. Affiliated terminated both the lease and the option to extend. Affiliated sought immediate possession of the premises and stated that the termination of the lease operated to accelerate the entire balance of rent and additional charges due over the entire lease term through July 31, 2020. Affiliated demanded immediate payment of rent totaling $239,573.04.

¶ 11 In addition, Affiliated's notice stated that, under section 3.3 of the lease, "tenant shall remove from the premises all furniture, furnishings, signs and equipment then installed as directed by the landlord." Affiliated stated that the failure to remove those items and make necessary repairs "will require your company to reimburse Affiliated Realty for any expenses it incurs for the removal of same."

¶ 12 On September 16, 2015, after IBS did not pay the amount due, Affiliated filed a single-count breach of contract action against IBS. Affiliated sought the accelerated rent that would

have been due through July 31, 2020 as damages, plus interest, costs, and reasonable attorney fees. Affiliated also sought reimbursement for damages in connection with the enforcement of its rights and remedies under the lease.

¶ 13 On June 13, 2016, Affiliated moved for summary judgment. The circuit court granted the motion in part, finding that, when IBS exercised its option to extend the lease on January 9, 2015, its obligations under the lease also extended through July 31, 2020. The court found, however, that genuine issues of material fact remained regarding the amount of damages.

¶ 14 The case proceeded to trial to determine damages. IBS objected to the admission of invoices from third-party contractors Affiliated hired to return the property to tenantable condition. The court admitted this evidence as business records under Illinois Rule of Evidence 803(24), more commonly known as the "bills rule." The court entered judgment in favor of Affiliated in the amount of $78,353.96, consisting of unpaid rent and other expenses for the extended rent term and expenses incurred by Affiliated to remediate the property, less a credit for IBS's security deposit. The court also granted Affiliated's petition for fees and costs totaling $40,818.30. This appeal followed.

¶ 15 ANALYSIS

¶ 16 On appeal, IBS challenges both the circuit court's interpretation of the option to extend the lease and the award of damages to Affiliated. We address these issues in turn.

¶ 17 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to try a question of fact but to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 416-17

(2008). To determine whether a genuine issue of material fact exists, a court construes the pleadings liberally in favor of the nonmoving party. *Id*. at 417. Summary judgment should not be granted unless the movant's right to judgment is free and clear from doubt. *Mitchell v. Special Education Joint Agreement School District No. 208*, 386 Ill. App. 3d 106, 111 (2008). We review a trial court's entry of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 IBS's first contention is based on its interpretation of a condition precedent to the exercise of the option to extend. IBS argues that it did not satisfy the condition precedent necessary to trigger the option because it defaulted before the extended term commenced. IBS also contends the court erred in finding that its default only terminated its rights under the option but not its obligations.

¶ 19 "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008); see also *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) ("A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent."). A contract must be construed as a whole, viewing each part in light of the others. *Id.* (citing *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 122–23 (1983)).

¶ 20 According to IBS, the plain language of section 3.1(B) of the lease states that the option to extend is not effective until the intended commencement date of the extended term occurs without a default by the tenant. We disagree.

¶ 21 IBS's interpretation ignores the notice provision included in section 3.1(B), which provides that the tenant "*shall*" exercise its extension rights by written notice no earlier than 270 days and no later than 180 days prior to the expiration of the then current term. IBS's suggested interpretation of the option would render that written notice requirement meaningless; namely, it would allow a tenant to exercise the option to extend the lease at any time before the expiration of the termination date so long as the tenant is not in default. "A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011). We reject IBS's argument because interpreting the first sentence of section 3.1(B) in the way IBS suggests would nullify the mandatory language of the written notice provision in the same section.

¶ 22 Furthermore, IBS's agreement to exercise its option to extend the lease on January 9, 2015, evidenced a purposeful intent to comply with the written notice provision. IBS's interpretation of section 3.1(B) would allow it to revoke an exercised option to extend, at any time, without adverse consequences.

¶ 23 Significantly, IBS was entirely in control of triggering the condition precedent upon which it bases its assertion that the timely-exercised option was ineffective. IBS decided to abandon the property and stay closed for business. IBS also decided to inform Affiliated of its defaults two days before the expiration of the lease. IBS's decision to wait until two days before the lease expired affected Affiliated's ability to find a replacement tenant and mitigate any damages. The record in this case supports the conclusion that IBS agreed to extend the lease and then, when its business plummeted, attempted to escape its obligations under the lease through the extension period.

¶ 24 IBS, the party which had control over the satisfaction of the condition precedent, cannot cause the condition to not occur and then rely upon that non-occurrence as a basis to avoid its obligations. Indeed, "[w]hen a contract is contingent upon satisfaction of a condition, and the other party has discretionary power over that condition, it is in most circumstances quite reasonable to expect that party to take affirmative steps to see that the condition is satisfied." *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 672 (2007).

¶ 25 Here, IBS's actions in abandoning the property, staying closed for business for more than seven days, and notifying Affiliated of its default two days before the expiration of the lease are the opposite of "reasonable efforts" to fulfill the condition precedent. In short, IBS cannot benefit from its own breach of contract. *Resolution Trust Corp. v. Holtzman,* 248 Ill. App. 3d 105, 112 (1993) (the duty of good faith and fair dealing arises where one party to a contract is given broad discretion in performance and "requires the party vested with contractual discretion to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties"). IBS actively took steps to prevent the fulfillment of a condition precedent and, therefore, we find that it has given up its ability to assert the condition precedent in section 3.1(B) of the lease was not satisfied. *Midwest Builder Distributing*, 383 Ill. App. 3d at 672; see also *Smith v. Vernon,* 6 Ill. App. 3d 434, 437–38 (1972).

¶ 26 When IBS extended the lease through July 31, 2020, it also extended its obligations under the lease. *J.B. Stein & Co. v. Sandberg*, 95 Ill. App. 3d 19, 25 (1981) (the lessee's exercise of the option was to extend and continue the lease originally entered into by the parties). We find the circuit court properly granted partial summary judgment in favor of Affiliated on the issue of liability.

¶ 27 We next review IBS's challenges to the damages award. In a breach of contract action, damages are imposed to "place the plaintiff in the same position as if the contract had been performed." *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 30. "Where an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence." *1472 North Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. A trial court's award of damages is against the manifest weight of the evidence where the opposite conclusion is clear, or where the court's decision is "unreasonable, arbitrary, or not based on evidence." *Id.* "An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages." *Id*.

¶ 28 Further, " '[t]he admission of evidence is within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused.' " *Calloway v. Bovis Lend Lease, Inc*., 2013 IL App (1st) 112746, ¶ 82 (quoting *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993)). We have found that "an abuse of discretion occurs when the court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would adopt the court's view." *Calloway*, 2013 IL App (1st) 112746, ¶ 82.

¶ 29 IBS argues the circuit court awarded damages to Affiliated which were not permitted by the lease. The court awarded Affiliated $16,269.83 for IBS's failure to remove certain equipment and fixtures. IBS contends Affiliated is not entitled to recover any damages associated with the removal of improvements or alterations made by IBS because the only notice Affiliated provided to IBS was given after the option to extend the lease had terminated and the lease had expired.

¶ 30 Again, IBS cannot benefit from its breach of the lease. IBS's contention is premised upon its earlier argument that it did not satisfy the condition precedent and, therefore, the lease terminated on July 31, 2015. However, we have found that IBS's obligations under the original lease continued through July 31, 2020.

¶ 31 Furthermore, IBS provided notice of its defaults only two days before the expiration of the lease. Section 3.3 of the lease states that "[u]pon any termination of this Lease, whether by lapse of time, cancellation pursuant to an election provided for herein, forfeiture, or otherwise, Tenant shall immediately surrender possession of the Premises and all buildings and improvements on the same to Landlord in good and tenable repair." Affiliated's August 13, 2015 letter to IBS acknowledged IBS's defaults and requested possession, rent payment through July 31, 2020, and removal of an itemized list of improvements under section 3.3 of the lease. Section 3.3(B) further provided that IBS agreed to reimburse Affiliated "for any expense of removal in the event Tenant shall fail to remove such property if and when directed."

¶ 32 The continuation of IBS's obligations under the lease required it to comply with section 3.3, which it did not do after it defaulted. There is an adequate basis in the record to support the circuit court's determination of damages. We find the court properly awarded damages to Affiliated consisting of sums incurred by Affiliated to remove furnishings and improvements and return the property to tenantable condition.

¶ 33 IBS next argues the court improperly allowed uncorroborated and unverified business records belonging to third-party contractors not before the court to be entered into evidence to support Affiliated's damages claim.

¶ 34 In connection with Affiliated's request for reimbursement for expenses incurred to remediate the property and return it to tenantable condition, Affiliated introduced invoices

reflecting the work performed by third-party contractors and the sums Affiliated paid to those contractors. IBS filed a motion *in limine* and objected to the admission of the invoices and testimony regarding the same on the basis of hearsay. The circuit court admitted the evidence based upon the "bills rule" and also stated that the invoices were business records.

¶ 35 Under the Illinois Rules of Evidence, " 'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). The business record exception to the hearsay rule allows evidence of:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or otherwise qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness ***." Ill. R. Evid. 803(6) (eff. Jan. 1, 2011).

Further, Rule 803(24), commonly known as the "bills rule," allows "[a] receipt or paid bill as prima facie evidence of the fact of payment and as prima facie evidence that the charge was reasonable." Ill. R. Evid. 803(24) (eff. Jan. 1, 2011).

¶ 36 At trial, John Boveri, Affiliated's property manager, testified regarding the condition of the property after IBS vacated and the work completed to return the property to tenantable condition. Boveri directed the repairs to be made to the space and oversaw the process.

Affiliated subcontracted the remediation work. Boveri testified regarding exhibit 10, an adding machine ribbon tape of invoices and documents reflecting a balance of $16,269.83 owed to the third-party contractors who remediated the premises. Affiliated stamped each invoice when it was received and paid. Boveri testified as to each and every invoice, the work identified therein, and the necessity for such work. He received the invoices in the course of the work being performed. Affiliated kept the invoices in the ordinary course of its business. Affiliated made payments to the third-party contractors in reliance upon those invoices. Boveri testified as to the timeframe when the work was being performed. The dates on the invoices corresponded to the same timeframe, which demonstrated that the invoices were prepared within a reasonable time of the work being performed. IBS's cross-examination of Boveri focused on the failure of the invoices to list the address where the work was being performed and whether Boveri was familiar with the condition of the property at the commencement of the lease.

¶ 37 Illinois Supreme Court Rule 236 provides that "[a]ny writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter." Ill. S. Ct. R. 236 (eff. Aug. 1, 1992). Rule 236 also states that "[a]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." *Id*. See also *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006).

¶ 38 "Once a witness has established the foundational requirements of a business record, '[t]he records themselves should be introduced.' " *Troyan*, 367 Ill. App. 3d at 733 (quoting ***Smith v. Williams***, 34 Ill. App. 3d 677, 680 (1975)). "Business records should only be barred from admission if they are irrelevant, prejudicial or for some other legally appropriate reason." *Troyan*, 367 Ill. App. 3d at 733.

¶ 39 Here, Affiliated's presentation of the invoices as business records without the testimony of the third-party contractors only goes to the weight, but not admissibility of the evidence. Ill. S. Ct. R. 236 (eff. Aug. 1, 1992); *Troyan*, 367 Ill. App. 3d at 733. Through Boveri's testimony, Affiliated provided sufficient foundational evidence of the compilation of invoices related to the remediation repairs. The paid bills constituted prima facie evidence of the fact of payment and that the charges were reasonable. Ill. R. Evid. 803(24) (eff. Jan. 1, 2011). IBS has not established sufficient prejudice to warrant an abuse of discretion finding. We find the circuit court properly admitted the invoices.

¶ 40 Finally, IBS argues this court should enter summary judgment in its favor on the basis that it was actually the prevailing party for purposes of determining attorney fees. As we have affirmed the circuit court's partial summary judgment in favor of Affiliated and rejected IBS's arguments regarding damages and the admissibility of evidence, there is no basis upon which we could find that IBS is a prevailing party for purposes of determining attorney fees.

¶ 41 We affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.