

2018 IL App (1st) 170797-U

No. 1-17-0797

Order filed May 3, 2018

Fourth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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EVA M. MAGNUS TRUST DATED 7/24/2007,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant and Cross-Appellee,	)	Cook County
	)	
v.	)	
	)	
JEROLD ISAACSON and CALVIN ISAACSON,	)	
Individually and as Trustee(s) of the Jordan M. Isaacson	)	
1996 Trust, the Lucas J. Isaacson 1996 Trust, and the	)	No. 15 M3 7597
Madelyn L. Isaacson 1997 Trust; and UNKNOWN	)	
OCCUPANTS,	)	
	)	
Defendants,	)	
	)	
(JEROLD ISAACSON and CALVIN ISAACSON,	)	
Individually and as Trustee(s) of the Jordan M. Isaacson	)	Honorable
1996 Trust, the Lucas J. Isaacson 1996 Trust, and the	)	Thomas D. Roti,
Madelyn L. Isaacson 1997 Trust, Defendants-Appellees	)	Judge presiding.
and Cross-Appellants).	)	

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PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices Gordon and Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held:* We reverse the circuit court's award of damages in favor of plaintiff where the court used a monthly rent rate despite the parties' agreement requiring defendants to pay plaintiff a daily rent rate if they stayed at plaintiff's property past a certain date and the undisputed evidence showed that defendants stayed past that certain date. However, because the circuit court appeared to find that plaintiff was not entitled to late fees and the record on appeal is insufficient to determine why the court ruled in this manner, we affirm the circuit court's denial of late fees.

¶ 2 Plaintiff, Eva M. Magnus Trust Dated 7/24/2007 (Plaintiff), sued defendants, Jerold Isaacson and Calvin Isaacson, Individually and as Trustee(s) of the Jordan M. Isaacson 1996 Trust, the Lucas J. Isaacson 1996 Trust, and the Madelyn L. Isaacson 1997 Trust (Defendants), to enforce a settlement agreement between the parties and to evict defendants from its property for, among other things, failing to pay rent. The circuit court granted summary judgment in favor of plaintiff for some, but not all, of the damages it requested. Plaintiff now appeals, contending that the court erred when it only entered judgment for some, but not all, of the damages it requested. For the reasons that follow, we reverse and remand the matter.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff owned a property located at 3 Fernwood Drive in Barrington Hills, Illinois (the property) that defendants rented, though the record is unclear exactly when they became tenants.

¶ 5 In May 2009, the parties entered into an installment contract for defendants to purchase the property, which was later extended in September 2013. In pertinent part, the contract required defendants to pay plaintiff a total of \$861,353.80 by July 31, 2015. However, the parties became involved in a dispute regarding the enforceability of that contract.

¶ 6 In October 2015, the parties entered into a written settlement agreement in order to resolve their dispute. According to the agreement, the parties intended the agreement to be a

“novation” and replace their prior contract.<sup>1</sup> The agreement provided defendants the option to purchase the property if they paid plaintiff \$29,623.67 in past-due rent by November 30, 2015, and an additional \$861,353.80 by December 4, 2015.

¶ 7 If defendants did not purchase the property, they agreed to pay plaintiff past-due rent of \$29,623.67 on December 4, 2015 and \$7,000 in future monthly rent, beginning on December 4, 2015, and thereafter due on the first of every month. The agreement further required defendants to vacate the property by the “vacate date,” a date to be determined later by plaintiff with certain notice. However, if defendants breached the agreement, plaintiff was allowed to evict defendants immediately subject only to the notice required by law. If the vacate date did not fall on the last day of the month, plaintiff would return to defendants the proportionate amount of rent for the days of the month they did not reside at the property. If, however, defendants failed to vacate the property by the vacate date, defendants would owe plaintiff “rent equal to \$700 per day or portion thereof for each day after the vacate date” they remained at the property.

¶ 8 In addition, defendants agreed to pay a \$3,975 invoice from Central Tree Service LLC by November 10, 2015. Defendants also agreed to become liable to plaintiff for its attorney fees in connection with litigation between the parties relating to the agreement and:

“for all amounts due and all further damages to which [plaintiff] may be entitled, all being increased by one percent compounding interest per month or if lower the maximum interest permitted by law. [Defendants] shall pay a late fee of \$200 per instance for any amount not received by the due date.”

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<sup>1</sup> “Novation is the substitution of a new debt or obligation for an existing one, which is thereby extinguished.” *First Midwest Bank v. Thunder Road, Inc.*, 359 Ill. App. 3d 921, 924 (2005).

¶ 9 On December 15, 2015, plaintiff sent defendants a statutory five-day notice of eviction, informing them that they had failed to pay the past-due rent and the rent for December 2015, and they would be evicted if plaintiff did not receive the amounts owed within five days.

¶ 10 On December 28, 2015, plaintiff filed a forcible detainer action against defendants, alleging that they were unlawfully withholding possession of the property and had failed to pay, among other things, rent. Plaintiff stated that it had signed a settlement agreement with defendants, which required defendants to pay past-due rent, future monthly rent and an invoice from Central Tree Service LLC, as well as vacate the premises by the vacate date of December 24, 2015. Plaintiff asserted that defendants had breached that agreement by failing to complete any of the obligations. Based on these alleged breaches, plaintiff demanded possession of the property and claimed that defendants owed \$41,198.97 in addition to future rent, late fees, attorney fees, costs and other amounts accruing under the settlement agreement.

¶ 11 On March 24, 2016, defendants filed an amended answer and affirmative defenses to plaintiff's complaint. In their answer, they denied that the settlement agreement was a valid and binding contract, denied that they were legally obligated to vacate the property, but admitted that the past-due rent, future monthly rent and the invoice from Central Tree Service LLC "may have accrued." Additionally, they admitted to still residing at the property. Defendants also raised three affirmative defenses. First, they argued that the installment contract and settlement agreement were void under the Illinois Dwelling Unit Installment Contract Act (765 ILCS 75/1 *et seq.* (West 2014)) because plaintiff had failed to attach to either document a certificate of compliance stating that the property had been inspected within the past 30 days by an inspector and there were no known dwelling code violations. Second, defendants argued that they had an

equitable right of redemption to the property, and third, that plaintiff was required to use mortgage foreclosure proceedings to obtain any recovery.

¶ 12 The following month, plaintiff filed a combined motion to strike defendants' affirmative defenses, for judgment on the pleadings and for summary judgment. Plaintiff argued that the settlement agreement governed the parties' relationship and defendants had not disputed their failure to pay the amounts required under the agreement. Moreover, plaintiff posited that defendants' affirmative defenses did not apply under the circumstances.

¶ 13 Defendants responded, arguing that plaintiff's motion relied on the false premise that the settlement agreement between the parties was a novation and thus a valid agreement. They asserted that the original installment contract was void as a matter of law and a void agreement cannot be " 'novated.' "

¶ 14 On June 24, 2016, the circuit court entered judgment in favor of plaintiff and entered an order of possession in favor of plaintiff, but stayed the enforcement of the order of possession until July 25, 2016. The court "reserved" ruling on the issue of damages. After defendants had filed an unsuccessful motion to reconsider, they eventually vacated the property on October 17, 2016. Two days later, the court ordered briefing on the issue of damages.

¶ 15 Plaintiff subsequently filed a motion, requesting damages in the amount of \$317,745.59 as "Option A" or \$168,265.06 as "Option B." The damages represented four different categories, and the options did not differ with respect to the first three.

¶ 16 First, plaintiff requested \$4,799.05 for the invoice from Central Tree Service LLC, which included the original invoice amount of \$3,975 plus \$824.05 in late fees. Second, plaintiff requested \$33,942.46 in past-due rent, which included the original amount of \$29,623.97 plus \$4,318.49 in late fees. Third, plaintiff requested \$47,810.68 in attorney fees and costs, which

included an original amount of \$46,197.47 plus late fees of \$1,613.21. As evidence of the attorney fees and costs, plaintiff attached invoices from its attorney. Plaintiff calculated the late fees by adding \$200, the contractually stipulated late fee, to the original amount due and subsequently compounding that amount by one percent every month a payment was due but not paid. The final category encompassed the rent owed by defendants, beginning in December 2015.

¶ 17 For Option A, plaintiff used the time period from December 1, 2015 until October 17, 2016, the last day defendants remained at the property. For December 1, 2015 until December 24, 2015, the vacate date, plaintiff calculated the amount owed using the \$7,000 of monthly rent on a *pro rata* basis, *i.e.*, \$7,000 divided by 31 multiplied by 24. The total was \$5,419.35. For the remaining period of time, plaintiff used the \$700 daily rent rate, as stipulated in the contract as the rate if defendants failed to vacate the property by the vacate date. Using this figure, from December 25, 2015 until October 17, 2016, the total was \$208,600. Combined, the original amount of rent due totaled \$214,019.35, but with late fees of \$17,174.05, the overall total requested by plaintiff equaled \$231,193.40. With the rent figure added to the amounts from the first three categories, plaintiff requested damages of \$317,745.59 under Option A.

¶ 18 For Option B, plaintiff used only the monthly rent rate of \$7,000, spanning December 1, 2015 until October 17, 2016, or 11 months, which totaled \$77,000 in rent. With late fees of \$4,712.86, the overall total requested by plaintiff equaled \$81,712.86. With this rent figure added

to the amounts from the first three categories, plaintiff requested damages of \$168,265.06 under Option B.<sup>2</sup>

¶ 19 Relevant to both options, plaintiff stated that the “[attorney] fees, costs, and late fees (1% per month) continue to be incurred and accrue until paid” as well as “[a]ll these figures omit issues existing on or discovered after [October] 17 and assume judgment entered in December 2016.” To better illustrate plaintiff’s calculation, below is the calculation it presented to the court in its motion for damages:

¶ 20 Plaintiff included a proposed order for the circuit court, which had an empty space for a monetary figure of damages. Following that line, the proposed order stated that “[a]dded to the judgment amount will be Plaintiff’s further attorney fees and costs (such as in supplementary proceedings or in collection), and plus interest of 1% per month.”

¶ 21 Defendants did not file any documents on the issue of damages.

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<sup>2</sup> Although plaintiff requested damages under Option B of \$168,265.06, the correct amount should have been \$168,265.05, representing the summation of \$4,799.05, \$33,942.46, \$47,810.68 and \$81,712.86.

¶ 22 On February 24, 2017, the circuit court held a hearing on the issue of damages and entered a written order using plaintiff's proposed order. The court found that the parties' settlement agreement was valid and enforceable in its entirety and entered judgment in favor of plaintiff for "\$144,265.06 total inclusive of fees and costs." The court also struck the proposed order's statement that: "Added to the judgment amount will be Plaintiff's further attorney fees and costs (such as in supplementary proceedings or in collection), and plus interest of 1% per month." The court's order did not expound on its reasons for selecting the amount of damages, and there is no transcript or bystander's report (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)) from the hearing included in the record on appeal.

¶ 23 On March 22, 2017, plaintiff filed a notice of appeal, claiming that the circuit court erred in awarding only \$144,265.06 in damages. Five days later, defendants cross-appealed, claiming that the court erred in entering the order of possession and its subsequent judgment, finding the settlement agreement enforceable and awarding plaintiff damages.

¶ 24

## II. ANALYSIS

¶ 25 Before addressing the merits of plaintiff's appeal, we briefly address defendants' cross-appeal. Defendants have not filed any briefs in their cross-appeal as the cross-appellants, and they have not filed a brief as the appellees in plaintiff's appeal. In light of this, we find that defendants have failed to pursue their cross-appeal and accordingly have abandoned it. See *Senior Housing, Inc. v. Nakawatase, Rutkowski, Wyns & Yi, Inc.*, 192 Ill. App. 3d 766, 770 (1989) ("Generally, an appeal will be considered as abandoned where the appellant fails to prosecute the appeal or does some act inconsistent with its prosecution."). We will therefore not consider the merits of defendants' cross-appeal.



¶ 26 We now turn to the merits of plaintiff's appeal, where it contends that it is entitled to the damages it requested in its motion for summary judgment of \$317,745.59 because there was no contrary evidence on the issue of damages, and independently, defendants admitted in their amended answer that they had not paid amounts due under the settlement agreement.

¶ 27 As mentioned, defendants have failed to file a brief as the appellees in plaintiff's appeal, but in light of the claimed error, we do not need the aid of an appellees' brief to decide the merits of plaintiff's appeal. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 28 Summary judgment is appropriate only when the pleadings, depositions, and admissions and affidavits on file demonstrate there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2014); *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. This evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Where reasonable persons could draw divergent inferences from undisputed facts, summary judgment should be denied. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Contract construction and interpretation are generally well suited to disposition by summary judgment. *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). Our review of the circuit court's order granting summary judgment is *de novo*. *Seymour*, 2015 IL 118432, ¶ 42.

¶ 29 Initially, we note that the record is less than clear for our review, which presents certain challenges in reviewing plaintiff's contention that it is entitled to damages of \$317,745.59. At the February 24, 2017, hearing, the circuit court entered a written order, which was adopted from plaintiff's proposed order, that merely stated: "Judgment for the Plaintiff and against the Defendants is hereby entered in the following amount: \$144,265.06 total inclusive of fees and

costs.” And despite the court holding a hearing on the issue of damages, there is no transcript of the hearing or bystander’s report of the proceeding (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)) included in the record on appeal. Generally, the burden to provide a sufficient record on appeal is on the appellant, here, as the issue on appeal relates to increasing the damages award, plaintiff. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001). And any doubts that arise from an insufficient record will be resolved against the appellant. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 30 With that being said, part of the circuit court’s damages calculation is clear. The court’s award of \$144,265.06 in damages equaled plaintiff’s damages under Option B, including the late fees, minus \$24,000. Option A and Option B differed based on which rent rate was used in the calculation: in Option A, a daily rent rate of \$700, whereas in Option B, a monthly rent rate of \$7,000. The parties’ settlement agreement, which the court found enforceable in its entirety, expressly stated that, if defendants remained at the property beyond the vacate date, they would owe \$700 per day in rent. Given this express provision, we are unsure why plaintiff gave the court Option B, but it did. However, it does not follow that the court should have chosen Option B and ignored the express terms of the settlement agreement. “Where the words of the contract are clear, the contract should be enforced as written.” *Highland Supply Corp. v. Illinois Power Co.*, 2012 IL App (5th) 110014, ¶ 28. As the circuit court found the settlement agreement valid and it was undisputed when defendants vacated the property (October 17, 2016) and when the actual vacate date was (December 24, 2015), there was no reason for the court to depart from the terms of the settlement agreement and award damages using the \$7,000 monthly rent rate rather than the contractually stipulated \$700 daily rent rate. Thus, we find plaintiff is entitled to rent calculated using the daily rent rate of \$700, or a total of \$214,019.35.

¶ 31 However, we cannot find that plaintiff is entitled to the late fees associated with the rent or the other three categories of damages. As discussed, the circuit court’s written order stated that the \$144,265.06 of damages was “inclusive of fees and costs,” and this amount, as mentioned, equaled plaintiff’s damages under Option B, including the late fees, minus \$24,000. But without an explanation in the written order or a record of the hearing, it is unclear exactly why the court subtracted \$24,000. The cumulative amount of the late fees under Option A equaled \$23,929.80, which raises the possibility that the court did not believe plaintiff was entitled to these late fees. But because the court utilized Option B’s damages *inclusive* of the late fees, it would be contradictory to then deduct late fees elsewhere. It is unlikely that the court would find late fees appropriate for one category of damages but not the other three.

¶ 32 The late fees associated with the damages were calculated by adding \$200, the contractually stipulated “late fee,” to the original amount due under each category and subsequently compounding that amount by one percent every month a payment was due but not paid. A provision requiring fees on late payments is permissible in a contract. See *Collins v. Hurst*, 316 Ill. App. 3d 171, 174 (2000). As long as the fees are reasonable and the parties have agreed to their payment, such a provision should be enforced. *Id.* Similarly, under certain circumstances, a provision requiring compound interest as a penalty for a late payment is permissible in a contract. *Weigel Broadcasting Co. v. Smith*, 289 Ill. App. 3d 602, 612 (1996). Although Illinois law does not favor the award of compound interest (*id.*), “parties to contracts may make their own stipulation as to the rate of interest” subject to the limitations imposed by law. *Wheeling Trust & Savings Bank v. Citizens National Bank of Downers Grove*, 142 Ill. App. 3d 333, 337 (1986).

¶ 33 It is possible that the circuit court subtracted \$24,000 based on a finding that the late fees were unreasonable and/or the compound interest was barred by statute. We note that, under section 4(1) of Interest Act (815 ILCS 205/4(1) (West 2014)), “in all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest, shall be taken and paid upon every \$100 of money loaned or in any manner due and owing from any person to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.” The settlement agreement required compound interest at a rate of 1 percent per month for payments not made on time, which on an annual basis would equal 12 percent, but due to the effect of compounding, the effective interest rate would be closer to 13 percent. It is possible that the court found this interest rate usurious, although the agreement provided for this possibility by substituting in the “maximum interest permitted by law” if 1 percent per month was deemed unlawful. But again, deducting close to the cumulative amount of late fees under Option A would be inherently inconsistent with awarding damages using the monthly rent rate under Option B and including the late fees in that calculation. Unfortunately, without a record of the hearing, we do not know with certainty how the court calculated the damages award and why.

¶ 34 As best as we can discern from this record, the circuit court intended its award of damages to *not* include the contractual late fees, but accidentally included them when it awarded damages using the monthly rent rate under Option B. In fact, in describing the court’s damages award in its brief, plaintiff states that the “court awarded only \$144,265.06” based on using the monthly rent rate and “an additional reduction of \$24,000, which equates to the contractual late fees.” Critically, because the record on appeal is insufficient to determine with certainty whether this was the case, we must resolve these doubts against the appellant, here plaintiff (see *Corral*,

217 Ill. 2d at 157), whose burden it was to provide a sufficiently complete record to support its claimed error. See *Webster*, 195 Ill. 2d at 432. Consequently, we find that plaintiff is not entitled to the late fees associated with his requested damages.

¶ 35 In sum, we find that plaintiff should have received the damages he requested under Option A, but only based on the original amounts, not increased by the late fees. Therefore, plaintiff is entitled to \$3,975 for the invoice from Central Tree Service LLC, \$29,623.97 for the past-due rent, \$46,197.47 for the attorney fees and costs, and \$214,019.35 for the rent beginning in December 2015. Plaintiff's overall damages award should be \$293,815.79.

¶ 36 Lastly, plaintiff argues that we should remand the matter to the circuit court so that it can assess against defendants the "additional attorney fees incurred after October 19, 2017" and the interest accrued after the court's judgment. Although plaintiff uses the date October 19, 2017, it is clear from the record that it means October 19, 2016, the last date stated on its attorney's invoices.

¶ 37 In Illinois, the prevailing party generally bears the costs of litigation unless provided for otherwise in a statute or by agreement between the parties. *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 119. The court may award attorney fees "so long as they are reasonable." *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (2007). As such, the decision of whether to award such fees is a matter within the court's discretion. *Hjerpe v. Thoma*, 2017 IL App (4th) 160844, ¶ 28.

¶ 38 As already discussed, according to the settlement agreement, defendants agreed to be liable for plaintiff's attorney fees and the accrued interest. Therefore, we agree that we must remand the matter to the circuit court to determine if such additional attorney fees and interest are warranted and, if so, the proper amount of that additional award. Upon remand, the circuit

No. 1-17-0797

court should add these additional damages, if warranted, to the \$293,815.79 of damages to which plaintiff is already entitled.

¶ 39

### III. CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and remanded with direction.

¶ 41 Reversed and remanded with direction.