

2018 IL App (2d) 180012-U  
No. 2-18-0012  
Order filed September 21, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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GELC, LLC,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17-SC-2491
	)	
FRONTIER CAMBRIDGE, LLC,	)	Honorable
	)	Daniel L. Jasica
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* Gino's East forfeited argument over the issue of damages. Nevertheless, the trial court's determination that Gino's East failed to prove damages was not against the manifest weight of the evidence. Therefore, we affirmed.

¶ 2 This appeal arises from the circuit court's finding against plaintiff GELC, LLC (Gino's East or Gino's) on its claim against defendant Frontier Cambridge, LLC (Frontier) for violation of the parties' lease agreement. In particular, Gino's East alleged that certain charges for water and sewer expenses were in breach of the lease. Following a trial, the circuit court found that Gino's East failed to prove damages and that it was nonetheless barred from recovery by the voluntary payment doctrine. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 Gino's East operates a pizza restaurant at 820 South Milwaukee in Libertyville, Illinois. Gino's is located within the Cambridge Plaza shopping center, which is owned by Frontier. Cambridge Plaza has 18 tenant units, including the unit occupied by Gino's. Gino's entered into a lease with Frontier for its commercial restaurant space on October 31, 2013, and the lease runs through December 31, 2025.

¶ 5 The lease provides in pertinent part as follows. Gino's East is to make monthly payments to Frontier for rent and for common area maintenance (CAM) expenses. Article 5 of the lease governs common areas and facilities. Section 5.1 of the lease provides that common areas at the shopping center are exclusive of those spaces leased to tenants and are operated and maintained by Frontier. Section 5.3 provides that tenants pay, in addition to rent, a monthly charge to cover a *pro rata* share of Frontier's costs for operating and maintaining the installations and facilities within the common areas. The CAM charges include, "[w]ithout limiting the generality of the foregoing," lighting, cleaning, snow and ice removal, sanitary control, gardening and landscaping services, and management fees.

¶ 6 Gino's East filed a complaint against Frontier on May 10, 2017, for breach of its lease agreement. Gino's alleged that pursuant to article 6 of the lease, it was to pay for water and sewage usage directly to the Village of Libertyville. Gino's alleged that water and sewer charges were metered separately from CAM costs and that they were not to be included in its CAM costs.

¶ 7 The complaint continued that from 2013 to 2016, Frontier sent Gino's East water and sewer bills, and Gino's informed Frontier that such costs were improperly billed to it and were not reimbursable to the landlord under the lease. On September 12, 2016, Frontier's counsel sent a letter to Gino's threatening to terminate the lease if certain water and sewer charges, billed as

CAM charges, were not paid. Gino's paid the charges. Gino's alleged that Frontier improperly collected \$9,498.44 from Gino's in water and sewer CAM charges from 2013 to 2016, and Frontier did not reimburse it for these costs.

¶ 8 The case proceeded to trial on August 30, 2017, and the lease was admitted into evidence. Gino's East argued in opening that Frontier breached its commercial lease by overbilling it \$9,498.44 for water and sewer CAM charges attributable to the other 17 tenants at the shopping center. Frontier argued that the lease provided for CAM charges to be paid by all tenants at the shopping center, including Gino's East. It urged the court to enforce the terms of the lease as written, and it alluded to its closing argument that Gino's claim was barred by the voluntary payment doctrine.

¶ 9 Gino's East first called Kenneth Weidner, and he testified as follows. Weidner was the sole owner of Gino's East. Gino's East had a separate water meter at the shopping center, and Gino's paid its water bills directly to the Village of Libertyville. Weidner identified the water and sewer bills that he paid to Libertyville from 2013 through 2016. The address on the water and sewer bills was 820 South Milwaukee Avenue, which was the location of Gino's East's unit. He discovered in 2016 that Gino's unit was the only tenant unit with its own water meter at the shopping center.

¶ 10 Weidner also identified water and sewer bills from the Village of Libertyville related to two separate water meters located at the shopping center. The two additional water meters served tenant units at the shopping center other than Gino's unit, and the addresses associated with those meters were 856 South Milwaukee Avenue and 838 South Milwaukee Avenue. He did not believe that he was responsible for paying other tenants' water and sewer utility bills at the shopping center, and he did not believe that CAM charges should include water and sewer

bills. Referring to Gino's lease, he stated that there was no mention of water charges included in the CAM provisions.

¶ 11 Weidner began writing letters to Frontier once he identified that he was paying water bills to both Frontier and Libertyville. He did not identify the water bill "discrepancy" in 2014, but by 2015, "the light bulb started going off." He wrote to Frontier that there was "a goof" in the lease and that he was being double billed. He did not believe that water should be a part of the CAM charges, and he wanted two-and-a-half years' reimbursement. He had wanted to withhold payment after discovering that his CAM charges included water charges, but he worried about eviction and therefore "paid it under protest." Through the close of 2016, he claimed he paid around \$9,500 for the other tenants' water use via improper CAM charges. His *pro rata* share of Frontier's CAM expenses was 11.2%.

¶ 12 The court also examined Weidner. The court asked about Gino's CAM reconciliation bill, which was a bill that Gino's would receive from Frontier at the end of the year. Weidner confirmed that Gino's paid an estimate of its share of CAM expenses to Frontier throughout the year, and Frontier reconciled those payments at the end of the year. When asked whether Gino's CAM reconciliation bill from 2014 related to "all of the [CAM] expenses and all the tax expenses or was it only a water overage?" Weidner answered that it was for the "entire [CAM] bill." The court also asked whether there was some outdoor landscaping with water requirements at the shopping center, and Weidner replied yes. Weidner agreed that his case sought recovery for charges related to water use by other tenants in the shopping center, not water use for the common areas.

¶ 13 Frontier called Michael Massarelli, who owned and operated the Cambridge Plaza shopping center, and he testified as follows. He bought the Cambridge Plaza shopping center in

2011 and had been managing it since then. He had “triple net leases” with his tenants, which he described as passing through his costs to the tenants. The types of costs that he passed through to the tenants included costs for landscaping, snowplowing, and general maintenance and repairs.

¶ 14 Massarelli testified that water and sewer charges were included in CAM charges. He explained that there were two water meters located in the sprinkler room that served all tenants other than Gino’s East. Those two meters tracked water use that included watering the plants in front of every unit, watering grass, hosing sidewalks and the common areas, and running the fire extinguisher system.

¶ 15 Massarelli continued that Frontier paid the water and sewer bills for those two meters every month. Tenants paid a CAM bill every month as part of their rent, and the CAM charges were reconciled at the end of the year. Frontier reconciled the CAM charges by totaling the monthly bills and then billing the tenants for their percentage owed minus the amount they already paid for CAM charges during the year. All tenants paid a share of the common area water and sewer bills. When asked on cross-examination whether he separated water billing for common area water use from other tenants’ use, he responded “[h]ow can I, there’s not a meter for it.”

¶ 16 In closing, Gino’s argued that they were overbilled because sections 5.1 and 5.3 of the lease did not contain any provision for water use as a CAM charge. It was seeking \$9,498 in reimbursement for CAM overcharges from 2013 to 2016 plus attorney fees. The court asked “[w]hat evidence is there that I’m supposed to rely on to conclude how much he’s overpaid?” Gino’s referred to the bills in evidence and argued that it was entitled to its *pro rata* share of the total water and sewer CAM charges for those years. That is, Gino’s was asking for 11.2% of the the “Utilities – Water and sewer” total expense listed on the 2013 through 2016 CAM

reconciliation bills, which it argued came out to \$546 for 2013; \$2,650 for 2014; \$2,853 for 2015; and \$3,331 for 2016.<sup>1</sup>

¶ 17 Frontier responded that the lease provided it authority to charge for CAM maintenance and for utilities supplied by the landlord. Frontier also raised the issue of the voluntary payment doctrine that it alluded to in its opening statement, arguing that Gino's could not recover its voluntary payment that it made with knowledge of the facts, even if the claim for payment was against the terms of the lease.

¶ 18 The court made its conclusions and findings as follows. Gino's East's CAM charges in 2013, 2014, 2015, and 2016 included an amount that related to water and sewer bills for services that were provided to units other than Gino's leased unit. Gino's had its own water meter and paid its water and sewer bills directly to Libertyville. In addition, Gino's paid a monthly CAM charge that included water charges for the other two water lines at the shopping center, and it received a CAM reconciliation bill for those charges at the end of the year.

¶ 19 Gino's paid the CAM reconciliation bills in 2013 and 2014, with "no evidence that [it] paid them under any sort of protest." The court thus found that the 2013 and 2014 payments were "clearly barred" by the voluntary payment doctrine. The court continued that the 2015 and 2016 payments were slightly different, in that Gino's East sent Frontier a letter regarding payment, and the court found that Gino's paid the 2015 and 2016 CAM reconciliation bills under protest.

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<sup>1</sup> Gino's East was a tenant in 2013 for only part of the year, and thus its *pro rata* share was reduced proportionally. The figures provided for 2014 through 2016 were 11.2% of the total listed water expenses for those years.

¶ 20 The court continued that the question was whether the protest amounted to duress that would overcome the voluntary payment doctrine. Based on the case law it had reviewed, the court determined that Gino's East was not under duress sufficient to overcome the voluntary payment doctrine, explaining that Frontier would have had to first go to court after Gino's failed to pay the CAM fees and then prove that the CAM fees were owed. In other words, Gino's East could defend itself in court before harm would befall it, and therefore it was not under duress for purposes of the voluntary payment doctrine. Accordingly, the court found the 2015 and 2016 CAM payments were barred by the doctrine.

¶ 21 Nevertheless, the court found the situation "somewhat troubling" in that Gino's was "apparently the only one in the whole complex" paying its own water bill and also paying for somebody else's water bill "to a large degree." The court cited a letter where Frontier acknowledged that Gino's East had no obligation to pay for the CAM reconciliation related to other tenants' water usage, but it also noted that Gino's conceded that "some amount of the water" was being used for the "common watering, common area maintenance and watering." Therefore, the court concluded that Gino's had paid "some amount" of other tenants' CAM reconciliation charges. The court did not know, however, how much that amount was.

¶ 22 The court continued that under section 5.3 of the lease, costs and expenses related to cleaning, gardening, and landscaping services were proper CAM charges. Frontier could assess CAM charges for water used to clean or hose down sidewalks or maintain or improve the gardening and landscaping. The court did not "think it's the most fair circumstance" that Gino's was paying some amount of other tenants' water and sewer charges, but it did not know "in the absence of better information from the plaintiff" what percentage of the water—"10 percent or 20 percent or 5 percent"—was properly billed for common area maintenance versus improperly

billed for other tenants' usage. The burden of proof was on Gino's East, and because the court could not determine which CAM charges were properly for common area maintenance, the court ruled in favor of Frontier.

¶ 23

## II. ANALYSIS

¶ 24 On appeal, Gino's East argues that the court erred in applying the voluntary payment doctrine. It contends that it did not have full knowledge of all material facts when it made payments to Frontier, it made its payments under protest, and it made payment under duress. Gino's argues that its damages were \$9,498.44, amounting to a full refund of its water CAM charges from 2013 through 2016.

¶ 25 Frontier responds that the court did not err in applying the voluntary payment doctrine. Frontier alternatively argues that we should affirm because Gino's East failed to prove damages.

¶ 26 Gino's East does not address Frontier's argument about damages, instead arguing in its reply brief that water and sewer usage by other tenants cannot be billed as a CAM charge. It argues that water is not even listed as a CAM charge in section 5.3 of the lease.

¶ 27 We first conclude that Gino's has forfeited argument over damages. "Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Here, Gino's did not address the court's finding regarding its inability to compute damages in its appellant's brief. It only argued that the voluntary payment doctrine did not apply in both its appellant's brief and reply brief. As the voluntary payment doctrine and failure to prove damages were two independent bases for the trial court's ruling, Gino's East's failure to argue damages requires that we affirm.

¶ 28 Nevertheless, we agree with Frontier that the trial court's finding on damages was not against the manifest weight of the evidence. The complaint alleged breach of lease by Frontier.



A lease is a contract and is therefore governed by the rules of contracts generally. *Rubloff CB Machesney, LLC v. World Novelties, Inc.*, 363 Ill. App. 3d 558, 564 (2006). A complaint for breach of contract must allege the existence of a contract, the plaintiff's performance of all contractual conditions required, the defendant's breach of the contract, and damages. *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 836 (2000). The interpretation of a contract presents a question of law that we review *de novo*. *Ritacca Laser Center v. Brydges*, 2018 IL App (2d) 160989, ¶ 15.

¶ 29 Damages are an essential element of a breach of contract, and the failure to prove damages entitles the defendant to judgment as a matter of law. *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19. The plaintiff has the burden to establish a reasonable basis for computing damages, and although absolute certainty of damages is not required, "damages must be proved with reasonable certainty and cannot be based on conjecture or speculation." *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008). We will not disturb the trial court's damages assessment unless its judgment was against the manifest weight of the evidence. *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 856 (2000). Damages are against the manifest weight of the evidence when the trial court ignored the evidence or used the wrong measure of damages. *Id.* at 857.

¶ 30 Here, the record supports the trial court's conclusion that Frontier's CAM expenses included proper expenses for water used to maintain the common areas and improper expenses for water used by other tenants at the shopping center. In response to the court's questions, Weidner answered that Gino's CAM charges included charges related to outdoor landscaping with water requirements. Weidner distinguished between CAM charges for other tenants' water use and Frontier's water use for common areas. He stated that he was challenging the former in

his suit and not challenging the latter. Massarelli testified that the lease permitted Frontier to charge tenants for common area water use. He also testified that Frontier watered plants in front of every unit, watered the grass, and hosed down sidewalks and other common areas. The water used by Frontier for common area maintenance shared the same two water meters with all the tenants at the shopping center except Gino's East, which had its own separate meter. He also testified that there was no way to separate water billing for common area use from tenant use because all the water use was tracked through the same two meters. Thus, while Gino's suffered some damages, it clearly was not entitled to a full refund for water CAM charges.

¶ 31 Moreover, the trial court reasonably interpreted the lease to permit CAM charges for water usage. Section 5.3 of the lease, which provides for CAM charges, states that “[w]ithout limiting the generality of the foregoing,” CAM expenses included gardening and landscaping services, snow and ice removal, sanitary control, and parking lot repair and maintenance. Thus, section 5.3's nonexhaustive list of CAM expenses would reasonably include water use for common area work such as gardening and landscaping services. We reject Gino's argument that the lease did not permit CAM charges for water use simply because water use was not explicitly listed as a CAM expense.

¶ 32 Finally, Gino's annual CAM reconciliation bills for years 2013 through 2016 do not provide any way to distinguish between other tenants' water use and common area water use. Each CAM reconciliation bill listed Frontier's various CAM expenses, broken down into categories. Those categories included expenses for exterior landscaping, snow removal, management fees, insurance, electrical utilities, and water and sewer utilities. Frontier calculated its total CAM expenses each year by adding up all these various expense categories. Gino's was responsible for its 11.2% *pro rata* share of Frontier's total CAM expenses less its CAM charges

already paid during the year. While the CAM reconciliation bills provided total expenses for water use each year, they did not break down the water expenses by tenant use and common area use. Likewise, the water and sewer bills for the two water meters at 838 and 856 South Milwaukee only provided charges for total use related to those meters. Therefore, the record supports that even though Gino's East improperly paid for some amount of the other tenants' water use, the trial court had no way to determine the actual amount that Gino's overpaid. Gino's had the burden of proving measurable damages, and the trial court determined that a full refund, which was the only relief that Gino's sought, was inappropriate in light of testimony that some water was properly used for common area maintenance. *Cf. Ollivier v. Alden*, 262 Ill. App. 3d 190, 196 (1994) (plaintiffs were contractually entitled to a roof free of leaks and working utilities for a period of six months, but they were not entitled to damages for the cost of permanent repair or replacement, only the loss of value directly linked to the contractual deficiencies over those six months). Under these facts, the trial court's conclusion was not against the manifest weight of the evidence. Because we resolve this appeal on the issue of damages, we need not consider whether the voluntary payment doctrine applied.

¶ 33

### III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the Lake County circuit court.

¶ 35 Affirmed.