2019 IL App (1st) 172611-U

FOURTH DIVISION
May 9, 2019

No. 1-17-2611

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANGELICA SEMLER, Plaintiff-Appellee/Third-Party Plaintiff-Appellee/Cross-Appellant, v. JEREMY LUND, Defendant-Appellee, and D'APRILE PROPERTIES, LLC, an Illinois Corporation, Third-Party Defendant-Appellant/Cross-Appellee.	)	Appeal from the Circuit Court of Cook County 2014-M1-118108 Honorable Allison Conlon, Judge Presiding

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

O R D E R

Held: In dispute involving landlord, landlord's rental broker, and tenant, summary judgment was affirmed where broker waived mandatory arbitration clause and made unpersuasive arguments about its contractual obligations to landlord and statutory obligation to tenant; landlord was not entitled to shift attorney fees; and cause was remanded for tenant's appellate fee petition.

¶ 1 When Angelica Semler sued Jeremy Lund, her former tenant, for breach of lease and unpaid rent, he counterclaimed for violations of the Chicago Residential Landlord and Tenant

Ordinance (RLTO), and she followed with a third-party complaint attributing any breach of the ordinance to her rental broker, D'Aprile Properties, LLC (D'Aprile). Chicago Municipal Code § 5-12-010 (added Sept. 8, 1986). Lund occupied Semler's Chicago condominium, 3519 North Pine Grove Avenue, Unit 1N, for only three months before vacating at the end of 2013 and Semler sold the unit a few months later. After three-and-a-half years of litigation, the trial judge found Semler liable to Lund for failing to issue a security deposit receipt as mandated by the RLTO, and that D'Aprile had breached its contractual obligation to Semler to issue the receipt to Lund. Chicago Municipal Code §§ 5-12-080(b)(1) (amended July 28, 2010). The trial judge awarded Lund $4050, as his $1350 security deposit and double damages, and $27,238 in attorney fees and $432 in costs. See Chicago Municipal Code §§ 5-12-080(f) and 5-12-180 (amended July 28, 2010). D'Aprile contends it was entitled to dismissal of Semler's third-party claim, due to an arbitration clause in D'Aprile's rental listing contract, which Illinois courts generally favor as a more expeditious and economical means of resolving disputes, and that the judge abused her discretion by finding D'Aprile waived the clause by litigating for a year. In the alternative, D'Aprile contends it should not be held liable for the $4050 judgment because D'Aprile was under no obligation to perform its client's obligations as a landlord. D'Aprile raises a host of arguments about Lund's attorney fees award, including that he did not "prevail" under the RLTO because he voluntarily dismissed some of his claims. Chicago Municipal Code §§ 5-12-180 (amended July 28, 2010). In response, Semler and Lund argue the judgment is sound, she cross-appeals arguing that if D'Aprile is liable for Lund's damage award, D'Aprile should also have to pay the attorney fees she incurred opposing Lund's claim, and he also seeks an additional award against D'Aprile for the attorney fees he incurs in this appeal.

¶ 2 Semler, as "Seller" of the subject condominium property, and D'Aprile, as "Broker,"

entered into an exclusive listing agreement on August 5, 2013, in which Thomas Reid, a "sponsored licensee" of D'Aprile, was identified as the "Designated Agent" for the sale or lease of Semler's one-bedroom residential unit. D'Aprile's form contract also included the following:

> "7. MINIMUM SERVICES. Pursuant to the Illinois Real Estate License Act of 2000 (265 ILCS 454/1 *et seq.*), as amended, Broker through the Designated Agent, must provide to Seller, at a minimum, the following services: (a) accept delivery of and present to Seller offers and counteroffers to buy, sell, lease or otherwise transfer any interest in the Property or any portion thereof; (b) assist Seller in developing, communicating, negotiating and presenting offers, counteroffers and notices that relate to the offers and counteroffers until a lease or purchase agreement is fully executed and all contingencies are satisfied or waived; and (c) answer Seller's questions relating to the offers, counteroffers, notices and contingencies.
>
> * * *
>
> "O. **Dispute Resolution**. The parties agree that any dispute, controversy or claim arising out of or relating to this Agreement, or any breach of this Agreement by either party, shall be resolved by arbitration in accordance with the Code of Ethics and Arbitration Manual of the National Association of REALTORS, as amended from time to time, through the facility of the Chicago Association of REALTORS. The parties agree to be bound by any award rendered by any professional standards arbitration hearing panel of the Chicago Association of REALTORS and further agree that judgment upon any award rendered *** may be entered in any court having jurisdiction."

¶ 3 The RLTO provided in relevant part:

> 5-12-010 Title, purpose and scope. This chapter shall be known and may be cited as the

"Residential Landlord and Tenant Ordinance", and shall be liberally construed and applied to promote its purposes and policies. It is the purpose of this chapter and the policy of the city, in order to protect and promote the public health, safety and welfare of its citizens, to establish the rights and obligations of the landlord and the tenant in the rental of dwelling units, and to encourage the landlord and the tenant to maintain and improve the quality of housing. This chapter applies to, regulates and determines rights, obligations and remedies under every rental agreement for a dwelling unit located within the City of Chicago, regardless of where the agreement is made, subject only to [limitations that are not relevant to the current appeal].

5-12-080 Security deposits.

* * *

(b)(1) Except as provided for in subsection (b)(2) [regarding electronic fund transfers], any landlord who receives a security deposit from a tenant or prospective tenant shall give said tenant or prospective tenant at the time of receiving such security deposit a receipt indicating the amount of such security deposit, the name of the person receiving it and, in the case of the agent, the name of the landlord for whom such security deposit is received, the date on which it is received, and a description of the dwelling unit. The receipt shall be signed by the person receiving the security deposit. Failure to comply with this subsection shall entitle the tenant to immediate return of security deposit.

* * *

(d)The landlord shall, within 45 days after the date that the tenant vacates the dwelling unit *** return to the tenant the security deposit [.]

* * *

(f)(1) *** [I]f the landlord fails to comply with any provision of Section 5-12-080(a) - (e) [which concern the disposition of the security deposit during the tenancy, the issuance of a receipt when the security deposit is received, and the return of the security deposit after the tenant vacates], the tenant shall be awarded damages in an amount equal to two times the security deposit plus interest at a rate determined in accordance with Section 5-12-081. ***

* * *

5-12-180 Attorney's fees. Except in cases of forcible entry and detainer actions, the prevailing plaintiff in any action arising out of a landlord's or tenant's application of the rights or remedies made available in this ordinance shall be entitled to all court costs and reasonable attorney's fees[.]" Chicago Municipal Code §§ 5-12-010, 5-12-080, 5-12-180 (amended July 28, 2010).

¶ 4 The following month, Lund found D'Aprile's internet listing and arranged to view the unit with Reid. Lund and Semler exchanged e-mails to fine-tune the specifics of a lease addendum regarding repairs and updating of the premises, but D'Aprile handled the other aspects of the one-year lease. D'Aprile obtained Lund's signature on the final version of the lease and also accepted a $1350 check made payable to D'Aprile and two $1350 checks made payable to Semler. It is undisputed that Lund was not given a receipt for any of the checks. Lund moved in as scheduled on October 1, 2013, but moved out on December 31, 2013, telling Semler that the unit was still in disrepair and that she was mistaken when she assured him the condo association would not enforce its two-pet-maximum policy. Semler sold her condominium on May 23, 2014.

¶ 5 In her second amended complaint, Semler sued Lund for damages under the common law

and the RLTO and for attorney fees under the RLTO. She alleged he waived his right to the repairs by failing to inform her that her handyman had not completed his work and that because Lund failed to update the kitchen before 2014, as they had agreed, he should bear the $3589 expense she incurred to do the work. In Lund's answer and nine-count counterclaim filed on October 24, 2014, he complained that, in disregard of the RLTO, he had not been given a tenant's summary of the RLTO (Count I); a receipt when he tendered his security deposit (Count III); or his security deposit refund within 45 days of vacating (Count II). Lund's six other counts were resolved by a settlement agreement with Semler and are not at issue. Semler answered Lund's allegations and filed her third-party claim against D'Aprile on November 13, 2014, indicating her rental broker was liable for its failure to tender an RLTO summary and security deposit receipt to Lund when it handled the leasing process. The judge referred the case to mandatory arbitration to occur on January 22, 2015. A court-ordered arbitration session is routine in certain small claims in Cook County circuit court (*see* Ill. S. Ct. R. 86 (eff. Jan. 1, 1994); Cook County Cir. Ct. R. 18.3 (eff. Aug. 1, 2001)) and is not to be confused with the arbitration clause that D'Aprile contends was its right pursuant to its contract with Semler.

¶ 6 However, after D'Aprile filed an appearance on December 11, 2014, D'Aprile filed a motion to strike the mandatory arbitration date and reopen discovery, which the judge granted, and D'Aprile followed with a motion to dismiss Semler's third-party claim. The motion to dismiss that D'Aprile filed in February 2015 would be the first of four such motions, all of which relied on the contents of D'Aprile's contract with Semler. First, D'Aprile filed a section 2-619.1 combined motion to dismiss which included two distinct arguments pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2014). D'Aprile argued Semler had not factually alleged breach of a fiduciary duty to provide her

compliance with the RLTO and that there were no terms in the D'Aprile contract which could obligate the broker to provide its client's compliance. The judge granted D'Aprile's combined motion in April 2015, but gave Semler leave to amend, and Semler amended that same month. D'Aprile filed its second motion to dismiss in May 2015 and again asked the judge to examine the terms of D'Aprile's contract. This time, D'Aprile relied entirely on its section 2-615 argument that it was not required to give Lund a tenant's summary or receipt on Semler's behalf. See 735 ILCS 5/2-615 (West 2014). In June 2015, the judge granted D'Aprile's motion and gave Semler leave to amend. Semler amended later that same month. D'Aprile's third motion to dismiss, filed in September 2015, was essentially a repeat of the second motion to dismiss, but in October 2015, the judge denied the motion and ordered D'Aprile to answer by November 12, 2015. Instead of complying with the order, on December 30, 2015, D'Aprile filed its fourth motion to dismiss, but for the first time argued that Semler's third-party action was flawed because the D'Aprile contract contained an arbitration clause. Semler responded that D'Aprile waived the clause. The judge denied D'Aprile's motion.

¶ 7 This is the first ruling that D'Aprile appeals. We address it first.

¶ 8 Illinois courts favor the alternative of arbitration as a " ' "speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions." ' " *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 667, 456 N.E.2d 889, 893 (1983) *(quoting Layne-Minnesota Co. v. Regents of the University of Minnesota,* 266 Minn. 284, 287-88, 123 N.W.2d 371, 374 (1963) (Illinois courts favor arbitration and disfavor finding waiver of arbitration rights, due to the fact that arbitration allows for "an easier, more expeditious and less expensive [disposition of disputes] than by litigation.")); *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC,* 376 Ill. App. 3d 411, 425, 876

N.E.2d 203, 215 (2007) (same). Furthermore, the "public policy concerns that favor arbitration outweigh concerns regarding judicial economy, duplication of effort, or possibly inconsistent results." *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1096, 746 N.E.2d 294, 300 (2001) (citing *Board of Managers of the Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 76-77, 697 N.E.2d 727, 732 (1998) (*Courtyards*). Thus, agreements to arbitrate will be enforced even when the arbitration process delays multiparty litigation. See *Courtyards*, 183 Ill. 2d at 71.

¶ 9 Nevertheless, a party may waive a contractual right to arbitration like any other contractual right. A party waives the right to have an issue decided pursuant to an arbitration clause when its conduct is inconsistent with that right. *Glazer's Distributors*, 376 Ill. App. 3d at 425 ("crucial inquiry" is "whether the party has acted inconsistently with its right to arbitrate"). A party abandons its right to arbitrate when it submits arbitrable issues to a court for decision. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174, 890 N.E.2d 1220, 1223 (2008). Thus, waiver "is determined by the types of issues submitted, not by the number of papers filed with the court." *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536-37, 491 N.E.2d 1322, 1325 (1986).

¶ 10 When reviewing a trial court's ruling on whether a party has waived its right to arbitrate, we review findings of fact for an abuse of discretion and questions of law *de novo*. *Bovay v. Sears, Robuck & Co.*, 2013 IL App (1st) 120789, ¶ 24-26, 994 N.E.2d 665.

¶ 11 D'Aprile argues that the judge failed to properly apply the Federal Arbitration Act's three-part test for waiver, which Illinois adopted in *Bovay*, 2013 IL App (1st) 120789, ¶ 30, (*citing Fisher v. A.G. Becker Paribas Inc*., 791 F.2d 691, 694 (9th Cir. 1986)). Under that test, the party seeking to prove waiver of a right to arbitration bears the burden of demonstrating

" '(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.' " *Bovay*, 2013 IL (1st) 120789 ¶ 30 (*quoting Fisher*, 791 F.2d at 694). D'Aprile argues, "While there is no question that D'Aprile knew of its right to arbitration under the arbitration clause (element one), there were no acts on the part of D'Aprile inconsistent with asserting that right and certainly no prejudice to Semler when the motion was brought (elements two and three)." D'Aprile contends we should reverse and remand with instructions to grant the dismissal of Semler's third-party claim so that she may file an arbitration claim with the Chicago Association of Realtors. Semler responds that D'Aprile waived its argument by failing to present it in the trial court, and that even if the test has relevance, the judge ruled correctly. We agree with Semler.

¶ 12 We find that D'Aprile waived any reliance on the Federal Arbitration Act's three-part test because the argument was never presented in the trial court. *Sparapany v. Rexall Corp*., 249 Ill. App. 3d 388, 392, 618 N.E.2d 1098, 1101 (1993) ("It is settled law in Illinois that a theory cannot be presented on review which was not presented in the trial court; any such theory not presented below is deemed waived.").

¶ 13 Waiver aside, the procedural history makes clear that D'Aprile acted without regard for its arbitration clause.

¶ 14 First, as the drafter of the form contract, D'Aprile knew of its arbitration clause all along, and it has admitted this knowledge.

¶ 15 Second, "[s]election of a forum in which to resolve a legal dispute should be made at the earliest opportunity" (*Midland Funding LLC v. Hiliker*, 2016 IL App (5th) 160038, ¶ 32, 68 N.E.3d 542), yet D'Aprile filed four significant motions over the course of a year that were

unnecessary if D'Aprile intended to assert the arbitration clause. Semler and Lund were poised for court-ordered arbitration when D'Aprile moved to strike the date and reopen discovery. Discovery is part of litigating in the circuit court, and thus, D'Aprile was affirmatively choosing the court system. D'Aprile could have instead sought to stay the court-ordered arbitration while Semler and D'Aprile proceeded with their separate arbitration before the realtors' association. However, D'Aprile omitted its arbitration clause argument not only from the motion to strike it filed in December 2014, but also from the motions to dismiss it filed in February, May, and June 2015. It did not incorporate the argument until its fourth motion to dismiss, which it filed in December 2015.

¶ 16 D'Aprile contends its motions to dismiss "streamlined" its dispute with Semler, because "one tribunal or another," "whether it was the Circuit Court of Cook County or a CAR arbitration tribunal, was going to have to review the allegations made by Plaintiff for their sufficiency." Litigating with Semler was not preparation for arbitration. There was no need to refine the allegations in the circuit court before asserting the right to move to the other forum. We reject D'Aprile's contention that the arguments in its first three motions to dismiss were best addressed by a judge and that a realtors arbitration panel was "in a far superior position than the trial judge" to address D'Aprile's later argument that it could not issue a security deposit receipt without crossing "auditing standards promulgated by the Illinois Department of Financial and Professional Regulation." It cannot be seriously contended that the courts are not as qualified or as capable as a group of realtors to construe D'Aprile's contractual and statutory obligations to Semler. Moreover, D'Aprile's piecemeal arguments unnecessarily increased the consumption of judicial resources and all of the parties' attorney fees over the course of the additional months of litigation. See *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Insurance Co. of*

Connecticut, 379 Ill. App. 3d 771, 775, 883 N.E.2d 740, 744 (2008) (expressing a preference for "efficient and economical resolution of disputes"). There was nothing to stop D'Aprile from including the arbitration clause in its motion to strike, and the Code of Civil Procedure expressly authorizes combining dismissal arguments in a single motion, as D'Aprile did with its first motion to dismiss. See 735 ILCS 5/2-619.1 (West 2014).

¶ 17 D'Aprile contends it was in its discretion to bring the argument in a later motion. Waiver is shown, however, not by the number of motions that D'Aprile filed or the number of months that D'Aprile litigated, but by the fact that D'Aprile failed to affirmatively choose arbitration when it could have. *Kostakos*, 142 Ill. App. 3d at 536-37 (waiver is determined by types of issues presented, not by number of filings); *Glazer's Distributors*, 376 Ill. App. 3d at 425) (crucial inquiry is whether party acted inconsistently with its arbitration rights); *TSP-Hope*, 382 Ill. App. 3d at 1174 (it is inconsistent with a right to arbitrate to submit arbitrable issues to a court). Granting a delayed demand for arbitration would permit D'Aprile to "test[] the water before taking the swim." *Hayworth v. City of Oakland*, 129 Cal. App. 3d 723, 730, 181 Cal. Rptr. 214, 218 (Ct. App. 1982) (*quoting McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 105 Cal. App. 3d 946, 951, 164 Cal. Rptr. 751 (1980)).

¶ 18 Third, Semler has been prejudiced by the money and time she expended defending her third-party action from D'Aprile's series of motions to dismiss. None of this litigation expense or delay would have been incurred if D'Aprile had sought to arbitrate before the realtors group in December 2014 rather than December 2015.

¶ 19 Thus, the record establishes that D'Aprile waived its right to compel arbitration and the court did not abuse is discretion in so finding.

¶ 20 Having addressed the main issue, we next address D'Aprile's argument concerning the

money judgment and Semler and Lund's arguments about their attorney fees.

¶ 21 Lund filed a motion for summary judgment as to the first three counts of his counterclaim and attached an affidavit swearing that he had never received an RLTO summary or security deposit receipt. Semler responded that she did not provide the RLTO documents, but had retained D'Aprile to complete the leasing arrangement. D'Aprile failed to respond. The judge entered summary judgment against Semler as to the two claims, awarded Lund $4050 on his security deposit claim, $100 on his RLTO summary claim, and "attorney[] fees in an amount to be determined by petition to be submitted by Lund's counsel plus costs;" and denied summary judgment as to Lund's remaining allegations.

¶ 22 According to Semler, during a pretrial conference on November 29, 2016, D'Aprile contended the partial summary judgment ruling in Lund's favor was not binding on D'Aprile and it would be free to argue at trial that it had given the deposit receipt and RLTO summary to Lund or his agent at D'Aprile (supposedly another person besides Reid). At this point, the judge agreed with Semler's proposal that she file a motion for partial summary judgment as to D'Aprile's liability to her and thus for Lund's damage award, and ordered D'Aprile to "produce any agency agreement" indicating Lund had been represented by a D'Aprile agent during the leasing process. The judge then scheduled a two-day trial for March 15 and 16, 2017.

¶ 23 Semler filed her summary judgment motion as scheduled. Instead of filing a response, D'Aprile filed a cross-motion for summary judgment in which it argued its contract with Semler was a unilateral agreement which obligated Semler to use D'Aprile as her only broker and imposed no obligations on D'Aprile. D'Aprile attached an affidavit from Reid (Semler's leasing agent) in which he swore that (1) another real estate agent affiliated with D'Aprile, Paula Calzolari, had been Lund's leasing agent, and (2) an RLTO summary was preprinted on the back

of one of the pages of the finalized written lease that Reid gave to Calzolari. D'Aprile never produced a document substantiating an agency relationship between Lund and Calzolari or any other D'Aprile agent. In response, Lund swore that he had never authorized Calzolari or any other real estate agent to represent him in the leasing transaction or been informed that he was being represented. Lund specified, "Although I believe that I spoke to Paula Calzolari [by phone], it was my understanding that she was an assistant or was otherwise working as part of the team at D'Aprile who was representing Ms. Semler as a leasing agent."

¶ 24 On March 3, 2017, the judge ruled on the cross-motions for summary judgment by granting Semler's motion in part and denying it in part, and denying D'Aprile's motion entirely. The judge found as a matter of law that D'Aprile owed a duty to Semler to provide Lund with both a RLTO summary and a security deposit receipt. The judge found that D'Aprile owed Semler a duty to provide the RLTO summary to Lund because the minimum services paragraph indicated D'Aprile "must" provide minimum services including to "assist [Semler] in developing, communicating, negotiating and presenting *** notices that relate to the offer and counteroffers until a lease *** is fully executed and all contingencies are satisfied or waived." The judge deemed the RLTO summary to be a "notice" of applicable landlord-tenant rights and noted that the RLTO requires landlords to provide the summary to tenants "when any [rental] agreement is offered." Chicago Municipal Code § 5-12-170 (adopted Nov 6, 1986). Therefore, D'Aprile had undertaken a contractual duty to tender the RLTO summary to Lund when the offer to lease was first made to him. The judge's reason for finding that D'Aprile owed a duty to Semler to provide Lund with a security deposit receipt was based on paragraphs of the Real Estate License Act which obligated D'Aprile to provide "Timely accounting for all money and property received in which the client has, may have, or should have had an interest," and to

"Comply with all requirements of this Act and all applicable statutes and regulations, including without limitation fair housing and civil rights statutes." 225 ILCS 454/15-15(a)(2)(D) & (a)(5) (West 2012). The judge noted that contracts incorporate statutes that exist at the time of contracting, and found that both statutory paragraphs, read in combination with the RLTO, required D'Aprile to tender a receipt to Lund for his security deposit. Furthermore, the judge found that the second quoted paragraph of the Real Estate License Act, requiring D'Aprile to "Comply with all *** applicable statutes and regulations," obligated D'Aprile to give Lund the RLTO summary. The judge was not persuaded by D'Aprile's contention that it formed a unilateral contract imposing obligations on Semler only.

¶ 25 Thus, there were two reasons for finding D'Aprile contractually obligated to tender the RLTO summary to Lund (the plain language of the minimum service paragraph and the incorporated terms of the Real Estate License Act) and one reason for finding D'Aprile contractually obligated to tender the receipt (the Real Estate License Act) to Lund.

¶ 26 The judge further found there was no question of fact as to D'Aprile's breach of its duty to issue a security deposit receipt, as it was undisputed that Lund had not received one. Accordingly, the judge granted summary judgment to Semler and against D'Aprile on her third-party claim regarding the receipt. Reid's statement declaring Calzolari to be Lund's agent lacked foundation and was insufficient to create a question of fact as to whether Lund had been provided with the RLTO summary. Nevertheless, Calzolari's name appeared in the "Agent" block of the lead paint and mold disclosure forms for the unit. Although the signature block did not identify Calzolari's principal nor when Calzolari signed, viewing the facts in the light most favorable to D'Aprile as the non-moving party, there was a genuine issue of material fact regarding the RLTO summary requirement.

¶ 27 The judge subsequently issued a clarification order stating that based on her findings on March 3, 2017 of a potential agency relationship between Calzolari and Lund, the court was vacating the summary judgment previously entered against Semler in the amount of $100 on Count I of Lund's counterclaim, as to whether Lund had received a RLTO summary when the lease was offered to him. The judge reiterated the remainder of the March 3, 2017 order, including summary judgment against Semler on Count III of Lund's counterclaim regarding the security deposit receipt issue, in the amount of $4050 plus attorney fees and costs would stand.

¶ 28 Thus, at this point in the proceedings, (1) Lund's motion for summary judgment about his right to a security deposit receipt had resulted in $4050 judgment against Semler; (2) Semler's motion for summary judgment as to her third-party action had resulted in judgment against D'Aprile as to its contractual obligation to issue the security deposit receipt, but, there was no order holding D'Aprile liable for a specific amount of damages; and (3) the trial judge was anticipating Lund's petition for attorney fees and costs. Also, Lund's $100 claim about the RLTO summary was still at issue; Lund's six remaining counts, which were primarily about the condition of the rented premises, were also unresolved; and Semler was still seeking rent and other compensation from Lund.

¶ 29 On March 8, 2017, one day before a pre-trial conference was scheduled for March 9, 2017, and one week before the trial was set to begin on March 15, 2017, D'Aprile made a flurry of requests. D'Aprile filed a combined motion in which it contended that the judge had erred in granting summary judgment on the basis of the minimum services language and should (a) reconsider and (b) allow D'Aprile to supplement its Rule 213(f) disclosures in order to bring in a lawyer to testify about what the contract clause truly meant. D'Aprile also argued that the summary judgment ruling was erroneous because D'Aprile was now contending for the first time

that there was a "dispute" as to whether D'Aprile had received Lund's security deposit check. D'Aprile indicated that Calzolari was willing testify that she accepted Lund's check but could not recall what she did with it and Reid was willing to testify that he never saw or possessed the check. According to D'Aprile, this newly-proposed testimony indicated Lund's version of events was "demonstrably false" and then it would be "Lund's burden of proof to establish where the check went." It is unclear from this argument why this so-called "dispute" over what Calzolari did with the check was of any concern to Lund or Semler.[1] D'Aprile's second motion sought to postpone the trial so that D'Aprile could conduct more discovery.

¶ 30 The judge denied these motions during the pre-trial conference on March 9, 2017. In addition, during the pre-trial conference, D'Aprile made what it called an "oral offer of proof" about facts it contended could be proven at trial by its retained legal expert and Calzolari, if D'Aprile were permitted to call them as witnesses. The "oral offer of proof" was also denied. Semler and Lund advised the judge that they had settled their cross-claims and the trial judge struck the trial dates. Thus, the only remaining issues were the specific amount of damages that D'Aprile owed to Semler on the security deposit receipt issue and the amount of Lund's attorney fees.

¶ 31 After briefing and oral arguments, the judge held D'Aprile liable to Semler for the entire $4050 damages and Lund's reasonable attorney fees; denied Semler's request that D'Aprile pay

[1] We have disregarded the summary of Calzolari's proposed testimony that appears on pages 12-to-14 of D'Aprile's opening brief and argument about Calzolari that appears on pages 20 and 21 of D'Aprile's reply brief. As Semler correctly points out, the final judgment order on appeal is a summary judgment order. In seeking appellate review of a summary judgment ruling, the appellant may only (1) refer to the record that existed when the trial court ruled, (2) outline the arguments made at the time, and (3) explain why the trial court erred in granting summary judgment. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 322, 943 N.E.2d 752, 756 (2010) ("because the content of Greg's deposition was not properly before the court at the March 2009 summary judgment hearing, we refuse to consider it on appeal [from the summary judgment ruling]"). When reviewing a summary judgment order, we consider the record as it existed when the trial court issued its order. *Casey v. Forest Health System, Inc.*, 291 Ill. App. 3d 261, 263, 683 N.E.2d 936, 937 (1997).

her attorney fees; and reduced Lund's $44,832.06 fee petition to $27,237.50 in fees and $432.06 in costs. This concluded the circuit court proceedings and permitted the parties to take their appeals pursuant to Supreme Court Rules 301 (eff. Feb. 1, 1993) and 303 (eff. June 4, 2008).

¶ 32 We now address the remaining appellate arguments.

¶ 33 D'Aprile's second contention is that it was error to grant summary judgment to Semler on her allegations that D'Aprile owed and breached its obligation under the minimum services paragraph to provide a receipt for the security deposit it accepted from Lund. D'Aprile contends the court misconstrued the contract, the obligation was Reid's, not D'Aprile's, or that there was at least a question about the proper interpretation of the minimum services paragraph which could have been resolved at trial by the retained expert witness D'Aprile subsequently disclosed. D'Aprile contends that the contract language demonstrates there was an error or that we should remand for resolution of a genuine issue of material fact.

¶ 34 Semler responds that D'Aprile has waived this issue by failing to address both of the judge's two reasons for finding that D'Aprile breached its contract with Semler by failing to provide Lund with a security deposit receipt. D'Aprile has addressed the first reason, the minimum services paragraph, but has ignored the second, independent reason, the language in the Real Estate License Act which required D'Aprile to provide timely accounting for its client's money and property and which required D'Aprile to comply with all applicable statutes and regulations. Semler contends that because D'Aprile has not effectively addressed the trial judge's ruling, D'Aprile has waived review of that ruling.

¶ 35 D'Aprile replies that it "certainly takes issue with the trial court's decision that an entire statute was incorporated into the [exclusive listing agreement]" (the judge's second reason) but "[f]or now, it is enough to observe that the only place in the [contract] where the Real Estate

License Act is referenced is [the minimum services language in] Paragraph 7" (the judge's first reason). Thus, D'Aprile acknowledges its failure.

¶ 36 It is well settled that points not argued on appeal are waived. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 253, 930 N.E.2d 895, 916 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in the appellant's opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, we find that by failing to address the trial judge's second, independent reason for finding D'Aprile had a contractual obligation, D'Aprile has waived our review of that ruling.

¶ 37 Furthermore, the judge's analysis was correct. In reviewing a summary judgment order on appeal, we apply the *de novo* standard of review. *Simmons*, 406 Ill. App. 3d at 322. A motion for summary judgment is properly granted when the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the party opposing summary judgment, reveal no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Simmons*, 406 Ill. App. 3d at 322.

¶ 38 Generally, the duties that contracting parties owe to one another are found entirely within the "four corners" of their agreement. *Fox v. Heimann*, 375 Ill. App. 3d 35, 44-45, 872 N.E.2d 126, 136 (2007). However, there is a presumption "that parties contract with knowledge of the existing law, and [that] the statutes and laws in existence at the time a contract is executed are considered part of the contract." *Fox*, 375 Ill. App. 3d at 45. "The rationale for this rule is that the parties to the contract would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provided for it." (internal quotation marks omitted) *Fox*, 375 Ill. App. 3d at 45. "While a court will not imply factual conditions that the parties failed to express in a contract, a court cannot construe a contract

outside the legal conditions underlying a transaction." *Fox,* 375 Ill. App. 3d 35 (deeming provisions of the statute to be part of a contract as though expressly made part of the contract). Thus, the terms of the Real Estate License Act were part of D'Aprile's form contract. Pursuant to that principle, by contracting with Semler, D'Aprile agreed to provide her with "Timely accounting for all money and property received in which the client has, may have, or should have had an interest," and to "Comply with all requirements of this Act and all applicable statutes and regulations, including without limitation fair housing and civil rights statutes." 225 ILCS 454/15-15(a)(2)(D) & (a)(5) (West 2012). Thus, as a matter of law, D'Aprile was contractually required to provide a security deposit receipt to Lund when it received his security deposit.

¶ 39 It is undisputed that one of D'Aprile's agents, Calzolari, received Lund's executed lease and security deposit check, and undisputed that no one at D'Aprile then gave Lund the receipt that he was entitled to receive pursuant to the RLTO. D'Aprile attempts to make much of the fact that Lund made the check payable to Semler and thus "[s]uch a check would have been impossible for D'Aprile to deposit." It makes no difference how or when the check was deposited. The RLTO entitled Lund to a receipt when D'Aprile received Lund's security deposit, and Lund's RLTO rights to that receipt cannot be diminished by what D'Aprile and Semler subsequently did or did not do with Lund's security deposit check. Semler was entitled to summary judgment as to D'Aprile's failure to issue the receipt to Lund on Semler's behalf. We will not belabor this conclusion by also discussing the minimum services language. We affirm the entry of summary judgment as to D'Aprile's breach of its obligation to give Lund a receipt for his security deposit.

¶ 40 We next address the parties' arguments regarding their attorney fees. D'Aprile contends that the trial court erred in awarding Lund's attorney fees and requiring D'Aprile to pay the

award because: (1) Lund did not "prevail" within the meaning of the RLTO, (2) Lund's fee petition was "impossibly vague;" (3) D'Aprile was held liable for Lund's attorney fees as the RLTO claim on which he prevailed, but Semler would have been solely liable for the attorney fees Lund incurred bringing other RLTO claims that he settled, so Semler should not be able to recover Lund's fee award from D'Aprile; (4) attorney fee awards are precluded by the American rule as discussed in *Goldstein v. DABS Asset Manager, Inc.*, 381 Ill. App. 3d 298, 886 N.E.2d 1117 (2008); (5) (D'Aprile's fifth argument is incomprehensible to this court); and (6) the amount awarded was excessive.

¶ 41 Illinois follows the American rule under which, generally, the successful litigant is not entitled to recover his or her attorney fees and litigation expenses from the other party or parties. *Meyer v. Marshall*, 62 Ill. 2d 435, 442, 343 N.E.2d 479, 483 (1976) (the successful party does not have the right to recover attorney fees and the other burdens of litigation); *Leahy Realty Corp. v. American Snack Foods Corp.*, 253 Ill. App. 3d 233, 250, 625 N.E.2d 956, 968 (1993) (under the American rule each party must bear its own attorney fees) *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 572, 739 N.E.2d 1263, 1271 (2000) (Illinois follows the American Rule).

¶ 42 Exceptions are made when an award is authorized by statute or when the parties have contracted to shift fees. *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 86, 980 N.E.2d 1170. As a matter of public policy, the RLTO includes a fee-shifting provision to benefit landlords or tenants who have meritorious cases, but due to the limited nature of their controversy, would not normally consider a lawsuit to be cost effective. *Pitts v. Holt*, 304 Ill. App. 3d 871, 873, 710 N.E.2d 155, 157 (1999). The RLTO provides: "the prevailing plaintiff in any action arising out of a landlord's or tenant's application of the rights or remedies made

available in this ordinance shall be entitled to all court costs and reasonable attorney's fees." Chicago Municipal Code § 5-12-180 (added Nov. 6, 1991). The RLTO's fee-shifting provision applies only to actions based on the RLTO and cannot be tacked onto landlord-tenant claims brought under the common law, such as breach of contract actions. Chicago Municipal Code § 5-12-180 (amended November 6, 1991); *Willis v. NAICO Real Estate Property and Management Corp.*, 379 Ill. App. 3d 486, 490, 884 N.E.2d 752, 755 (2008).

¶ 43 D'Aprile erroneously contends that the governing standard is *de novo*. Only reasonable fees will be allowed, and that determination is made in the sound discretion of the trial court. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983, 518 N.E.2d 424, 427 (1987). When a party requests attorney fees, the trial judge is to scrutinize the supporting documents to determine whether the requested amount is reasonable. *Kaiser*, 164 Ill. App. 3d at 983. "An appropriate fee consists of reasonable charges for reasonable services *** however, to justify a fee, more must be presented than a mere compilation of hours multiplied by a fixed hourly rate or bills issued to the client ***, since this type of data, without more, does not provide the court with sufficient information as to their reasonableness—a matter which cannot be determined on the basis of conjecture or on the opinion or conclusions of the attorney seeking the fees *** (internal citations omitted)." *Kaiser*, 164 Ill. App. 3d at 983-84. Whether fees are reasonable depends on several considerations, including the nature of the case, the novelty and difficulty of the case, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work, the benefit to the client, the connection between the litigation and the fees, and the court's own expertise and experience. *Kaiser*, 164 Ill. App. 3d 984, 989. The court abuses its discretion only when its decision is arbitrary and unreasonable such that no reasonable person would adopt the same view. *Pekin Insurance Co. v.*

St. Paul Lutheran Church, 2016 IL App (4th) 150966, ¶ 69, 78 N.E.3d 941. This is "the most deferential standard of review recognized by the law." *Pekin Insurance*, 2016 IL App (4th) 150966, ¶ 69.

¶ 44 D'Aprile contends that one of the counts Lund settled with Semler, Count VIII of his counterclaim, which concerned the habitability of the condominium "was clearly [his] most significant claim," but Lund dismissed Count VIII when he dismissed "89% of his claims" "on the eve of trial *** when it was apparent he could not win them." D'Aprile cites *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1034, 715 N.E.2d 804, 813 (1999), in which the trial court deemed the parties' lawsuit to be a draw and declined to enforce a contract clause entitling the prevailing party to a fee award from the losing party. D'Aprile also relies on *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 873 N.E.2d 989 (2007) for the proposition that if each party prevails on a significant issue, then neither party is considered the prevailing party.

¶ 45 Semler responds that D'Aprile's own cases, including *Peleton* indicate that a litigant need not succeed on all of his or her claims to be considered the prevailing party, that Lund clearly prevailed, and that D'Aprile is relying on cases that are factually distinguishable. *Peleton*, 375 Ill. App. 3d at 227 (stating that "a prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit").

¶ 46 Lund also responds that he was clearly the prevailing party, given that Semler initially sued him for breach of the lease, but when Lund counterclaimed, he obtained summary judgment entitling him to almost the maximum amount he could have possibly recovered under the RLTO. Lund contends that in a strategic decision, he decided not to pursue Count I, regarding the failure to provide a RLTO summary, because the potential recovery was only $100 and the time and

attorney fees of going to trial would have far exceeded $100. He states that he settled the remaining issues with Semler because his recovery would have been nominal and did not justify additional time and expense. Furthermore, in her attorney fees order, Judge Conlon noted that the settlement allowed the parties to "forego the need for trial, and mitigate further attorney[] fees." In addition, the judge was well-versed in the case, and she rejected D'Aprile's contention that Lund was not the prevailing plaintiff within the meaning of the RLTO.

¶ 47 In reply, D'Aprile spends three pages contending that Lund's appellate brief should be stricken because Lund is not a proper appellee and has no standing in this appeal. D'Aprile has cited no authority that would support such an order. Issues are to be clearly defined, cohesive legal argument is to be presented, and pertinent authority is to be cited to this court. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5, 960 N.E.2d 1226 (*citing* Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013)). Issues that are ill-defined and insufficiently presented do not satisfy the rule and are waived. *Walters*, 2011 IL App (1st) 103488, ¶ 6.

¶ 48 We find Semler and Lund's responses persuasive. We are not persuaded by D'Aprile's subjective characterization of Count VIII as the most "significant" of Lund's lawsuit, we do not accept D'Aprile's opinion as to why Lund decided to dismiss certain claims rather than incurring the additional expense and time of proceeding to trial, and we conclude that D'Aprile's cited authority is distinguishable. To reverse on the basis of D'Aprile's subjective, self-serving mischaracterization of the record and the precedent would be unsound. Reversal would also be contrary to the RLTO's indication that a fee award is mandated (*see* Chicago Municipal Ordinance, §5-12-180, amended July 28, 2010) (the "prevailing plaintiff "shall be entitled to all court costs and reasonable attorneys fees")) and to the fact that the RLTO fee provision is "meant to give a financial incentive to attorneys to litigate on behalf of those clients who have

meritorious cases, but who, due to the limited nature in controversy, would not normally consider litigation to be in their client's financial best interest." *Pitts*, 304 Ill. App. 3d at 873. Moreover, the judge was familiar with the parties, their claims, and their arguments, given that the case was assigned to her trial courtroom on June 13, 2016, and in the 15 months she presided over the case before entering the attorney fees award, she considered numerous motions and conducted a nearly day-long settlement conference that was unsuccessful. Judge Conlon deemed Lund to be the prevailing party within the meaning of the RLTO paragraph authorizing a fee award, and she rejected D'Aprile's argument to the contrary. In our deferential review of her ruling, we decline to disturb her finding.

¶ 49 In addition, none of D'Aprile's other arguments about Lund's fee award are persuasive, as they are unclear and/or rely on mischaracterizations of the record and either a misapplication of or a failure to cite supporting authority. For instance, D'Aprile's last argument, that the amount awarded was excessive, consists of subjective criticisms of counsels' billing entries. Our review of the record discloses that the fee petition followed the familiar guidelines of *Kaiser*, 164 Ill. App. 3d 978; the judge deemed the billing rates to be reasonable and within the range of rates charged in the Chicago market for similar work; and the judge's written order reflects that she pored over the details of the billing entries and took D'Aprile's arguments into account when she made specific deductions from Lund's fee petition.

¶ 50 It is also apparent from the record and appellate briefs that D'Aprile prolonged the litigation and unnecessarily increased the time and attorney fees incurred by the parties, including itself. D'Aprile delayed in asserting its arbitration clause; caused unnecessary briefing, arguments, and judicial analysis about the arbitration clause; and then made the judge's waiver finding a key issue on appeal. D'Aprile similarly delayed in responding to whether Lund

received a tenant's summary of the RLTO, delayed in responding to whether D'Aprile was contractually obligated to provide that summary on Semler's behalf, waited until after the trial judge ruled on the basis of only Semler and Lund's arguments, and then took the position that it was free to continue litigating those issues. Consequently, Semler prudently proposed that the issue be resolved through another motion for summary judgment, rather than leaving the questions open to the greater expense of trial preparation and trial. Only then did D'Aprile take the time to prepare Reid's affidavit indicating, without factual foundation, that he believed Calzolari had functioned as Lund's leasing agent and to argue that another interpretation of the minimum services paragraph was plausible. After the judge found D'Aprile's position largely unpersuasive, D'Aprile filed motions claiming that a real estate attorney it retained was more capable than the judge to interpret D'Aprile statutory and contractual obligations in this case and that the trial D'Aprile wanted should be delayed while D'Aprile conducted an intrusive and unnecessary search into Lund's email and text records. D'Aprile's conduct increased the attorney fees that D'Aprile now contends are excessive.

¶ 51 Given the trial judge's careful analysis of both Lund's fee petition and D'Aprile's response, and the history of litigation in this case, we do not find that Lund's award was arbitrary or unreasonable. The judge's ruling was not an abuse of discretion.

¶ 52 We next address Semler's contention that she is entitled to the attorney fees that she incurred in defending against Lund's security deposit counterclaim. Semler acknowledges that according to the American Rule, which we set out above, litigation expenses are generally not shifted to another party, absent a statute or contract. Semler contends, however, that an exception is made where a breach of contract forces the wronged party to incur attorney fees and costs. Semler relies primarily on *Bituminous Casualty Corp. v. Commercial Union Insurance Co.*, 273

Ill. App. 3d 923, 652 N.E.2d 1192 (1995), and contends the exception applies here because she suffered damages in the form of attorney fees as a direct result of D'Aprile's breach of contract in failing to give Lund a receipt for his security deposit.

¶ 53 We need not address Semler's argument about the exception, as the record shows the judge denied Semler's request for a different reason: notwithstanding D'Aprile's breach of contract, Semler did not properly plead a right to attorney fees and it "would prejudice [D'Aprile] in that it was not on notice of such a theory and would not have had an opportunity to mitigate." Semler did not expressly plead a right to attorney fees, but concluded her second amended complaint with the statement: "WHEREFORE, Plaintiff/Counter-Defendant/Third Party Plaintiff Angelica Semler prays that, in the event she is held liable to Jeremy Lund on Counts I or III of the Counterclaim, that Plaintiff/Counter-Defendant/Third Party Plaintiff be awarded judgment against [D'Aprile] in an amount attributable to [D'Aprile] in causing the alleged damages and penalties to Jeremy Lund." In our opinion, this was a conclusory statement that does not even mention the word fees and it was not a claim for attorney fees.

¶ 54 Semler contends that to the extent she did not properly plead attorney fees, she should have been given leave to amend. Although Semler correctly states that leave to amend a complaint should be freely given when justice so requires, the right to amend pleadings is not unlimited or absolute. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467, 605 N.E.2d 493, 508 (1992). We review a judge's decision to grant or deny leave to amend pleadings for an abuse of discretion. *Lee*, 152 Ill. 2d at 467. Absent an abuse of that discretion, the decision will not be disturbed on review. *Lee*, 152 Ill. 2d at 467. In deciding whether to allow a plaintiff to amend pleadings, the court may consider whether the amendment would cure a defect in the pleadings, whether the other party would be prejudiced or surprised by the proposed amendment, whether

the proposed amendment is timely, and whether there were previous opportunities to amend the pleadings. *Lee*, 152 Ill. 2d at 467-68.

¶ 55 We conclude that the record does not reflect that Semler pled a right to attorney fees, or that she asked the trial judge for leave to amend, or that any of the factors to be weighed are in Semler's favor. Semler is asking that she be permitted to plead an entirely new claim. It was not an abuse of discretion to deny attorney fees or leave to amend with this new claim.

¶ 56 The final issue is Lund's request for appellate attorney fees. As previously indicated, the RLTO provides that the prevailing plaintiff in a case involving "the rights or remedies made available in this ordinance shall be entitled to all court costs and reasonable attorney's fees." Chicago Municipal Code § 5-12-180 (added Nov. 6, 1991). In *Trutin*, which was a landlord-tenant dispute brought under the RLTO, the court stated that "[t]ypically, where a party that prevails in the trial court is required to defend that victory on appeal, courts award attorney fees to that party for their work on the appeal, too, provided they prevail on appeal as they did at trial." *Trutin v. Adam*, 2016 IL App (1st) 142853, ¶ 35, 54 N.E.3d 277. Lund has been required to defend against D'Aprile's appeal. In light of this, we find that Lund is entitled to reasonable attorney fees and court costs for successfully opposing D'Aprile's appeal, as they relate to his original dispute under the ordinance. *Trutin*, 2016 IL App (1st) 142853, ¶ 35. We therefore remand Lund's request for appellate costs and attorney fees to the trial court for its initial review of a fee petition. *Trutin*, 2016 IL App (1st) 142853, ¶¶ 47, 49.

¶ 57 For the foregoing reasons, we affirm the judgment of the trial court and remand the matter to allow Lund to petition for reasonable attorney fees for work performed in this appeal and his appellate court costs, including the costs of preparing the fee petition.

¶ 58 Affirmed and remanded.