2019 IL App (1st) 182450-U

THIRD DIVISION
September 30, 2019

No. 1-18-2450

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IMPERIAL REALTY COMPANY, as agent for The Klairmont Enterprises, Inc., an Illinois corporation, Plaintiff-Appellee, v. CHICAGO KOREAN RADIO BROADCASTING, INC., an Illinois corporation d/b/a K Radio a/k/a Chicago Radio Korea a/k/a K-radio 1330 WKTA and DAVID YOUL CHO, individually, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 16 M1 721760 Honorable David A. Skryd, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of plaintiff and properly denied defendants' motion to reconsider where defendants failed to establish a genuine issue of material fact.

¶ 2 Plaintiff Imperial Realty Company filed a forcible entry and detainer complaint against defendants Chicago Korean Radio Broadcasting, Inc., (Chicago Korea Radio) and David Youl Cho (collectively defendants) alleging a default of a commercial lease and seeking possession as

well as damages for rent, costs, and attorney fees. Plaintiff subsequently filed a motion for summary judgment, which the trial court granted. Defendants filed a motion to reconsider summary judgment, but the trial court denied the motion and entered judgment in favor of plaintiff awarding $43,700 in rent, $511.26 for costs, and $4087.50 in attorney fees.

¶ 3 On appeal, defendants argue that the trial court erred in granting summary judgment because plaintiff failed to satisfy its duty to mitigate damages in reletting the subject premises.

¶ 4 A commercial lease was entered into between JHC Investment, LLC, as the landlord and Chicago Korea Radio as the tenant for office space located at 2454 East Dempster Street in Des Plaines, Illinois. The term was from April 1, 2013, to March 31, 2018, with a base rent of $2200 per month. Defendant Cho signed the lease on behalf of Chicago Korea Radio and also signed a personal guaranty for the lease.

¶ 5 On December 6, 2016, plaintiff filed its complaint for forcible entry and detainer. The complaint alleged that Klairmont Enterprises, Inc. purchased the commercial property located at 2434-2454 East Dempster Street by virtue of a judicial sale deed dated December 19, 2014, which was recorded on February 23, 2015. Plaintiff is the managing agent of the property with authority to sign a lease, collect rents, make demands for payment from tenants, and undertake legal action.

¶ 6 Chicago Korea Radio took possession on April 1, 2013, and continued possession during Klairmont's ownership. Chicago Korea Radio had defaulted under the lease terms by failing to pay monthly rent beginning in September 2016 and continuing through the date the complaint was filed. A five days' notice was served on Chicago Korea Radio on October 12, 2016. Defendants failed to cure the default. Plaintiff sought possession and an award of unpaid rent plus reasonable attorney fees and court costs.

¶ 7 On December 29, 2016, the trial court entered an *ex parte* order for possession. On January 5, 2017, defendants filed a motion to vacate the default judgment, which the trial court granted. In February 2017, defendants filed their answer to plaintiff's complaint and raised multiple affirmative defenses, including a claim that the landlord had failed to mitigate damages under section 9-213.1 of the Code of Civil Procedure (735 ILCS 5/9-213.1 (West 2016)). Also in February 2017, plaintiff filed a motion for use and occupancy payments for the rental property while the court proceedings were pending. In their response to the motion, defendants asked the trial court to deny the motion because Chicago Korea Radio intended to vacate the premises in March 2017. Plaintiff subsequently withdrew its motion.

¶ 8 In November 2017, plaintiff filed its motion for summary judgment, arguing that no genuine issue of material fact existed and it was entitled to judgment as a matter of law. Plaintiff alleged that defendants had not made any payments since September 30, 2016, when a payment of $2300 was made and applied to the August 2016 rent. Chicago Korea Radio vacated the leased premises on or about March 10, 2017. In response to defendants' affirmative defense, plaintiff maintained that it had taken reasonable measures to mitigate damages against defendants by taking steps to relet the premises, which included advertising on three websites as well as a sign posted outside the building which stated, "Spaces Available." The property had not been leased to a new tenant and plaintiff sought rent for the term of the lease as of the date of the motion.

¶ 9 Plaintiff attached several exhibits to its motion, including an affidavit from Steve Freeman, stating that he was employed as the controller for the subject property for plaintiff and was familiar with the methods used in plaintiff's accounting for rent and other charges. He reviewed the ledger for the subject premises and invoices to defendants. He stated that the

amount due and owing as of October 12, 2016, was $4600 and as of November 10, 2017, it was $35,007.31. He also averred that no payments had been made since September 30, 2016, when a payment of $2300 was applied to August 2016 rent. Plaintiff attached the ledger sheet and an invoice supporting the statements in the affidavit. Plaintiff also attached defendants' answers to plaintiff's first interrogatories. One of the interrogatories stated, "Identify all Communications between Chicago Korea Radio or David Cho and Imperial [Realty] to the failure to mitigate damages under 735 ILCS 5/9-213.1, as alleged in Defendants' Fourth Affirmative Defense." In response, defendants referred to their answer to interrogatory number 2, which stated, "Defendants' are not currently in possession of any documents including communications between Imperial Realty and themselves."

¶ 10 In January 2018, defendants filed their response in opposition to plaintiff's summary judgment motion and disputed that reasonable measures had been taken to lease the property as stated in plaintiff's motion. Specifically, defendants claimed that plaintiff had submitted no evidence for the trial court to determine whether its actions constituted reasonable measures under the statute. Defendants asserted that there was no evidence as to what rent plaintiff was seeking and whether plaintiff had retained a real estate broker. Defendants attached plaintiff's answers to interrogatories as an exhibit, where in response to an interrogatory asking about all efforts to mitigate damages, plaintiff described the same efforts it detailed in its motion, *i.e.*, advertising on three websites and a sign indicating space available on the building. In July 2018, the trial court granted plaintiff's motion for summary judgment and continued the matter for plaintiff's prove-up of damages and the entry of judgment on damages. The record on appeal does not include a report of proceedings of the hearing on the motion, but only a handwritten order stating that plaintiff's motion for summary judgment was granted.

¶ 11 In August 2018, defendants filed a motion to reconsider the grant of plaintiff's motion for summary judgment. Defendants asserted that they had received new evidence after their summary judgment response had been filed and warranted the trial court to reconsider. According to defendants, the new evidence was plaintiff's answers to defendants' request for admissions, which were attached to the motion. In the answers, plaintiff admitted that it was advertising the leased premises at a base rate of $16 per square foot and had never advertised a base rate of $8, $10, $12 or $14 per square foot. Defendants had been paying $8 per square foot under the lease terms. Defendants argued that these admissions established that plaintiff had failed to use reasonable measures to mitigate damages.

¶ 12 In September 2018, plaintiff filed its response to the motion to reconsider and argued that the admissions did not constitute newly discovered evidence that it had not taken reasonable measures and noted that defendants did not raise any argument relating to their delinquency on rent payments. Plaintiff stated that it was a licensed real estate broker and served as Klairmont's leasing agent and had taken steps to relet the premises by actively marketing all available spaces in the building. Plaintiff again noted that it had listed the premises on three websites as well as its own website. It had not received an offer to lease the premises at a lower rate to consider. Plaintiff also maintained that the listing price of $16 per square foot was the appropriate market rate for the geographic area. Plaintiff argued that it was not seeking to profit from defendants' abandonment of the premises, but its intention was to incorporate the premises into its marketing plan for the entire building. Plaintiff would have impaired its ability to lease any of its available office spaces at the market rate if it was required to list the premises at a separate lower rate. Plaintiff also stated that it had maintained a listing of the premises on its internal space available sheet starting on or about January 17, 2017, after the initial order of possession had been entered.

¶ 13 Plaintiff attached an affidavit from Alfred Klairmont, plaintiff's president. He stated that plaintiff was a licensed real estate broker and served as Klairmont's leasing agent for the building at 2454 Dempster Street in Des Plaines. He stated that plaintiff has actively marketed all available spaces for lease in the building on three websites: Costar.com, Loopnet.com, and Craigslist.org. Plaintiff also runs an advertisement marketing the premises and other available spaces on its website. Plaintiff posted a sign outside the building stated, "Spaces Available," and listed plaintiff's main telephone number. He further stated that plaintiff lists the available spaces in the building for lease at $16 per square foot, which is the appropriate rate for the geographic area. Despite its efforts, plaintiff had not been able to interest a new potential tenant in signing a lease for the premises. Plaintiff had not received an offer to lease the premises at a lower rate to consider.

¶ 14 Also in September 2018, defendants filed their reply in support of their motion to reconsider and maintained that plaintiff failed to provide sufficient evidence of its reasonable measures to mitigate damages. On October 19, 2018, the trial court denied defendants' motion to reconsider and entered judgment in favor of plaintiff and against defendants in the amount of $43,700 for rent due under the lease term, plus $511.26 in court costs and $4087.50 in attorney fees. Again, no report of proceedings was included with the record on appeal. A handwritten order stated that defendants' motion to reconsider was denied and entered the judgment amounts.

¶ 15 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on November 16, 2018. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 16 On appeal, defendants argue that the trial court erred in granting summary judgment in favor of plaintiff because an issue of material fact existed as to whether plaintiff had met its duty

to mitigate damages as required under section 9-213.1 of the Code of Civil Procedure (735 ILCS 5/9-213.1 (West 2016)).

¶ 17 In the notice of appeal, defendants indicated they were appealing both the order granting summary judgment and the order denying the motion to reconsider and entering the monetary judgment in favor of plaintiff. We review a trial court's grant of summary judgment *de novo*. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 228 (2007). In contrast, the standard of review of a trial court's denial of a motion to reconsider is an abuse of discretion. *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 861 (2004) (quoting *Chelkova v. Southland Corp.*, 331 Ill. App. 3d 716, 729 (2002)).

¶ 18 Initially, we point out again that the record on appeal does not include a report of proceedings for either the hearing on the summary judgment motion or the hearing on the motion to reconsider. Defendants, as the appellants, bear the burden of providing a sufficiently complete record to support its claims of error. Illinois Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as bystander's report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. July 1, 2017). In the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubt arising from the incompleteness of the record will be resolved against the appellants. *Id*. at 392. "In the absence of a report of proceedings, particularly when the judgment order states that the court is fully advised in the premises, a reviewing court 'will indulge in every reasonable presumption

favorable to judgment, order or ruling from which an appeal is taken' and must presume that the evidence heard by the trial court was sufficient to support the judgment absent any contrary indication in the record." *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 149-50 (1988) (quoting *In re Pyles*, 56 Ill. App. 3d 955, 957 (1978)). We will review defendants' arguments on appeal, but will presume the trial court acted in accordance with the law when the lack of transcripts impacts our consideration of these issues.

¶ 19 We first consider the trial court's grant of summary judgment in favor of plaintiff. Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). "A genuine issue of material fact is said to exist when the evidence is sufficient to cause a reasonable jury to return a verdict for the party opposing the entry of summary judgment." *Schuster v. Occidental Fire & Casualty Co. of North America*, 2015 IL App (1st) 140718, ¶ 16. "Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002).

¶ 20 " 'The form of affidavits used in connection with motions for summary judgment is governed by Supreme Court Rule 191 ***.' " *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 21 (quoting *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992)). Supreme Court 191(a) provides in relevant part:

> "Affidavits in support of *** a motion for summary judgment
> under section 2-1005 of the Code of Civil Procedure *** shall be

> made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 21 An affidavit under Rule 191(a) "must not contain mere conclusions and must include the facts upon which the affiant relied." *US Bank*, 2014 IL App (1st) 140718, ¶ 22. " '[T]he affidavit is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony.' " *Id*. (quoting *Harris Bank Hinsdale*, 235 Ill. App. 3d at 1025). Evidence that would be inadmissible at trial may not be considered when reviewing a summary judgment motion. *Id*. " 'If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). " 'Facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.' " *US Bank*, 2014 IL App (1st) 140718, ¶ 31 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)).

¶ 22 Under section 9-213.1 of the Code of Civil Procedure, "a landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1 (West 2016). "The landlord bears the burden of proving that it complied

with the statutory duty of mitigation." *Danada Square, LLC v. KFC National Management*, 392 Ill. App. 3d 598, 608 (2009) (citing *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 166 (1994)). "If a landlord cannot show that it took reasonable steps to mitigate its damages, the damages that it would otherwise recover are reduced, and 'losses which reasonably could have been avoided are not recoverable.' " *Id*. (quoting *St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 293 (1998)). "The purpose of section 9-213.1 *** is to require a landlord to undertake reasonable efforts to relet the premises after a defaulting tenant departs, rather than allowing the premises to stand vacant and then attempting to collect the lost rent in the form of damages." *Id*. at 609.

¶ 23 Here, defendants argue that plaintiff has failed to show that it took reasonable steps to mitigate damages in leasing the property to a new tenant as to preclude summary judgment in its favor. In response, plaintiff maintains that summary judgment was proper and the motion to reconsider was properly denied. It also sets forth an alternative argument that it had no obligation to mitigate damages under a provision in the parties' lease agreement. In support, plaintiffs relies on the recent decision in *Takiff Properties Group Ltd. #2 v. GTI Life, Inc.*, 2018 IL App (1st) 171477 (holding that parties may contractually waive the requirement to mitigate damages under section 9-213.1). In their reply, defendants assert that plaintiff is unfairly raising this argument for the first time on appeal and contend that *Takiff* should not apply retroactively to the instant case. We address the trial court's grant of summary judgment and denial of the motion to reconsider first because we find those orders dispositive of the appeal.

¶ 24 Plaintiff has consistently stated that the subject premises were included in advertisements on three websites as well as a sign in front of the building. Plaintiff responded with this information in its answers to defendants' interrogatories, which were verified by Klairmont as

plaintiff's agent. Plaintiff again included this information in its motion for summary judgment. Defendant has not countered these statements with any evidence, but instead has asserted that it was not sufficient. When asked in plaintiff's interrogatories about its communications with plaintiff regarding a failure to mitigate damages, defendants responded that they were not in possession of any documents, including communications between themselves and plaintiff. Defendant has only set forth a bare statement that plaintiff has failed to take reasonable measures to mitigate damages. It supplied no affidavits, depositions, exhibits or other form of evidence to show a factual dispute. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opposing party cannot rest on its pleadings to create a genuine issue of material fact." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). Defendants cannot merely rely on pleading an affirmative defense; they must show some facts which create a genuine issue of material fact. Since defendant has not shown a genuine issue of material fact, we affirm the trial court's order granting plaintiff's motion for summary judgment.

¶ 25 Next, we consider defendants' argument that the trial court erred in denying their motion to reconsider summary judgment in favor of plaintiff. "The purpose of a motion to reconsider is to bring to a court's attention (1) newly discovered evidence, (2) changes in the law, or (3) errors in the court's previous application of existing law." *Jones v. Live Nation Entertainment, Inc.*, 2016 IL App (1st) 152923, ¶ 29. A party may not raise a new legal theory or factual argument in a motion to reconsider. *Id*. " 'The allowance of new matter in a motion to reconsider is subject to the trial court's discretion and should not be permitted without a reasonable explanation of why it was not made available at the time of the original hearing.' " *Id*. (quoting *In re Paternity of Rogers*, 297 Ill. App. 3d 750, 756 (1998)). As noted previously, we review a trial court's ruling

on a motion to reconsider for an abuse of discretion. *Avenaim*, 347 Ill. App. 3d at 861. "A court abuses its discretion only where its ruling is 'arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view.' " *Maniscalco v. Porte Brown, LLC*, 2018 IL App (1st) 180716, ¶ 29 (quoting *TruServ Corp. v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007)).

¶ 26 In their motion, defendants asserted that newly discovered evidence disclosed that plaintiff was advertising the premises for $16 per square foot and had not advertised it for a lower rate. Plaintiff supported this assertion by attaching plaintiff's answers to defendants' request for admissions which admitted the advertised rental rate. According to defendants, this supported their argument that plaintiff failed to take reasonable measures to mitigate damages by offering the premises at a rental rate twice the rate in their lease. In response, plaintiff disputed that the advertised rental rate showed a failure to mitigate damages. In an affidavit, plaintiff's president stated that the advertised rates were the market rate for the geographic area and were part of the marketing of the available spaces for the building. Defendants did not present any evidence to counter the affidavit.

¶ 27 As previously discussed, the record on appeal does not include a report of proceedings for the hearing on the motion to reconsider. The record only contains handwritten orders stating that the court was "advised in the premises" and that defendants' motion to reconsider was denied. Under this record, we are unable to ascertain the trial court's reasoning in denying defendants' motion to reconsider and have no basis to review this decision for an abuse of discretion. Defendants asserted that plaintiff's advertised rents showed a failure to mitigate damages. In response, plaintiff presented an affidavit from Klairmont that explained the advertised rates were the appropriate market value for the geographic area. Defendants did not

counter this affidavit with a counteraffidavit. Under well established authority, defendants did not raise a question of material fact so as to preclude judgment as a matter of law. Further, absent a complete record, we presume that the trial court's decision conformed with the law and had a sufficient factual basis. Therefore, we find no abuse of discretion in the trial court's denial of the motion to reconsider.

¶ 28 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 29 Affirmed.