2019 IL App (2d) 180281-U
No. 2-18-0281
Order filed February 11, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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977 OAKLAWN, LLC, an Illinois limited liability company,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 16-AR-855
SOUTH WATER SIGNS, LLC, an Illinois limited liability company,	)	Honorable Ann Celine O'Hallaren Walsh, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered judgment in favor of plaintiff on its breach-of-contract claim in this commercial lease dispute. The trial court did not abuse its discretion in granting plaintiff's motion for leave to file its reply to the affirmative defenses. Defendant failed to establish lack of standing. Judgment in favor of plaintiff on its claim for breach of the commercial lease was supported by the plain language of the contract. There was no basis for reversal of the damages award.

¶ 2 Defendant, South Water Signs, LLC (South Water Signs), appeals from that portion of the trial court's judgment in favor of plaintiff, 977 Oaklawn, LLC (977 Oaklawn), following a

bench trial on 977 Oaklawn's breach-of-contract claim and South Water Signs's breach-of-contract counterclaim. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case involves a dispute regarding a commercial lease between 977 Oaklawn as the owner and stated agent for the landlord and South Water Signs as the tenant of Suites 103 and 109 located in the office building at 977 North Oak Lawn Avenue, Elmhurst. On July 6, 2016, 977 Oaklawn sued South Water Signs for breach of the lease for Suite 103, alleging that South Water Signs failed to honor the length of the lease term. The complaint sought damages for unpaid rent and costs for the replacement of unreturned keys.

¶ 5 Following an extension to answer or otherwise plead, on September 8, 2016, South Water Signs answered, filed affirmative defenses, and counterclaimed for breach of the lease for Suite 109 on grounds that 977 Oaklawn failed to provide the requisite 30-days' notice of lease termination. The counterclaim sought damages for the expenses South Water Signs incurred in vacating Suite 109 without proper notice, its unreturned security deposit, and an inadvertent rent payment. Both sides sought their attorney fees as the lease provided that the prevailing party in litigation or arbitration with respect to enforcement or interpretation of the lease was entitled to attorney fees and costs.

¶ 6 The case proceeded to arbitration. The arbitrators entered an award in favor of South Water Signs on 977 Oaklawn's complaint and in favor of South Water Signs on its counterclaim in the amount of $9,552.25. However, 977 Oaklawn rejected the arbitration award, and the case proceeded to a bench trial on the complaint and counterclaim. The factual recitation set forth below is taken from the evidence adduced at the two-day bench trial.

¶ 7 The lease was entered into on June 4, 2013 (Lease).[1] At this point, the Lease defined the "Premises" as Suite 103 located in the office building at 977 North Oak Lawn Avenue, Elmhurst, Illinois. Article 2 of the Lease, entitled "Term," provided a lease term of June 10, 2013, through December 31, 2013, "unless sooner terminated as provided herein." The Term provision further provided that "[e]ither party, Landlord or Tenant, shall have the right to terminate this lease with thirty (30) days written notice to the other party." The parties to the Lease were Argus Holdings, Inc., defined as the "Managing Agent" or "Manager," and South Water Signs, defined as the "Tenant." The signatory for Argus Holdings was its president and shareholder Emin Tuluce as the "Managing Agent for Landlord"; the signatory for South Water Signs was its owner, president, and chief executive officer Thomas Merkel (Merkel).[2]

¶ 8 Other relevant provisions of the Lease included Article 32, entitled "Notices," and Article 34, entitled "Landlord's Transfer of Interest." The Notices provision stated in pertinent part:

> "All notices, waivers, demands, requests or other communications required or permitted hereunder shall, unless otherwise expressly provided, be in writing and be deemed to have been properly given, served and received (a) if delivered by messenger, when delivered, (b) if mailed, on the second (2nd) business day after postmark in the

[1] The parties do not address this, but there appear to be some missing words or lines on the bottom of some of the pages in the Lease. There is also no explanation as to why the provisions in pages two and three of the Lease are crossed out.

[2] The Lease did not define Landlord except in Article 26 ("Indemnification"), which provided that Landlord, "for purposes of this Article 26," included "Landlord and Landlord's beneficiaries, Managing Agent and their respective officers, directors, shareholders, employees, agents and contractors."

> United States Mail, certified or registered, postage prepaid, return receipt requested, (c) if faxed, telexed or telegraphed, four hours after being dispatched by fax, telex, or telegram *** or (d) if delivered by reputable overnight express courier, freight prepaid, the next business day ***. *Notices via email or via the Internet are not permitted.* ***" (Emphasis added).

¶ 9 The Landlord's-Transfer-of-Interest provision stated in relevant part, "Landlord hereby reserves the right to sell, assign or transfer this lease upon the condition that in such event this Lease shall remain in full force and effect, subject to the payment and performance by Tenant of all the terms, covenants and conditions on its part to be performed."

¶ 10 In a quit-claim deed signed by Emin Tuluce for Argus Holdings and recorded on July 17, 2013, Argus Holdings transferred the real property at 977 North Oaklawn Avenue Elmhurst to 977 Oaklawn. 977 Oaklawn is an Illinois limited liability company. Its two members are spouses Emin Tuluce (Emin) and Annalisa Zaccaria-Tuluce (Annalisa); the sole manager is Emin.

¶ 11 In an undated "Assignment and Assumption of Management Rights" (Assignment), Argus Holdings assigned "all rights to serve as the Property Manager" for the "real property and improvements located at 977 N. Oaklawn Avenue, Elmhurst, IL 60126" to 977 Oaklawn. The Assignment provided that 977 Oaklawn "hereby assumes the obligations of Argus Holdings and agrees to Manage the property heretofore described." The Assignment further provided that 977 Oaklawn "shall be substituted in for Argus Holdings, Inc. as the Property Manager or 'Managing Agent' and shall have all powers heretofore vested in Argus Holdings, Inc., including but not limited to the power to enter into leasehold interests with tenants." Emin was the signatory for Argus Holdings; Annalisa was the signatory for 977 Oaklawn.

¶ 12 There were four "Lease Amendment and Extension Agreements" (Lease Amendments) between 977 Oaklawn and South Water Signs. The first, dated November 7, 2013, extended the lease by six months from January 1, 2014, to June 30, 2014 (First Lease Amendment). The "Recitals" provision provided in relevant part, "Managing Agent and Tenant desire to extend the lease for a term of SIX (6) months starting January 1, 2014." Section Two of the First Lease Amendment, entitled "Lease Term," stated, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of June 2014."[3]

¶ 13 The Second Lease Amendment, dated March 5, 2014, extended the lease by twelve months from July 1, 2014, to June 30, 2015. The Recitals provision stated in pertinent part, "Managing Agent and Tenant desire to extend the lease for a term of TWELVE (12) months starting July 1, 2014. However, Tenant may terminate the extension after the first 6 months with 60 day advance notice." The Lease Term in Section Two stated, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of June 2015."

¶ 14 The Third Lease Amendment, dated October 22, 2014, extended the lease by six months from January 1, 2015, to June 30, 2015. (We note that the Lease already was extended to June 30, 2015, by virtue of the Second Lease Amendment. There is no adequate explanation in the record for this discrepancy although it is ultimately not relevant). The Recitals provision in the

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[3] We note that a rider to the Lease purported to provide South Water Signs with an option to renew the Lease for one year on the same terms by tendering written notice to the Landlord at least 60 days prior to the expiration of the term. However, the rider also provided that "[b]oth parties retain the right to cancel this lease with 30 days' written notice to the other party during the term of this renewal" and set forth an increased monthly rent amount. It does not appear from the record that the parties considered the provisions of this rider in extending the Lease.

Third Lease Amendment stated in pertinent part, "Managing Agent and Tenant desire to extend the lease for a term of SIX (6) months starting January 1, 2015." Next to this provision, there was a handwritten notation stating, "Rights to extend to 12/31/15 are considered. TM [Thomas Merkel]." The Lease Term in Section Two, provided, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of June 2015."

¶ 15 With respect to all of the first three Lease Amendments, the evidence was undisputed that the signatory for 977 Oaklawn was Emin as its Managing Agent and the signatory for South Water Signs remained Merkel.

¶ 16 At the heart of this dispute is the Fourth Lease Amendment, dated August 21, 2015. The Fourth Lease Amendment not only addressed the Lease Term for Suite 103 but also added Suite 109 to the Premises being leased. The Recitals provision set forth three separate paragraphs:

> "Pursuant to the lease dated June 4th, 2013 ("lease"), Tenant leased from Managing Agent 5,473 sqft—out of 38,067 sq ft of net rentable area in the building located at 977 N. Oaklawn Ave Suite 103 Elmhurst, IL, 60126 (the 'Premises'), and more specifically described in the lease, for a term which expires on the last day of December 2016 (lease termination date)
>
> 977 N. Oaklawn Ave Suite 109 Elmhurst, IL, 60126 (the 'Premises'), for a term which will be month to month. Landlord and Tenant can terminate the lease by providing a THIRTY (30) [*sic*] notice (lease termination date)[.]
>
> Therefore, in consideration of the mutual promises contained in this lease amendment and extension agreement, the parties agree as follows: [the The Fourth Lease Amendment proceeds to set forth delineated sections]."

¶ 17 Section Two of the Fourth Lease Amendment, entitled "Lease Term," provided, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of December 2016 for 977 N. Oaklawn, Suite 103." There was no Lease Term provision for Suite 109. The "Defined Terms" section of the Fourth Lease Amendment provided (as it did in the prior three Lease Amendments) that "[a]ll terms used in this lease amendment and extension agreement shall have the meanings ascribed to them in the lease unless otherwise defined in this instrument." The Fourth Lease Amendment raised the monthly rent for Suite 103 from $3,250 to $3,563. The monthly rent for Suite 109 was $3,051.04.

¶ 18 Unlike the Lease and the first three Lease Amendments, the signatory on the Fourth Lease Amendment was Annalisa as Managing Agent for 977 Oaklawn. Emin testified that he authorized Annalisa to sign the Fourth Lease Amendment. The signatory for South Water Signs on the Fourth Lease Amendment purports to be Merkel, but Merkel testified that he had no knowledge of the Fourth Lease Amendment and that the signature on the Fourth Lease Amendment was not his.

¶ 19 On January 18, 2016, Emin sent Merkel an email stating, "There is a broker who brought a tenant for Suite 109. Therefore, please accept this email as [a] Termination Letter to our MTM arrangement for this suite. If you still need additional space, I can accommodate you in the building, in another Suite." Merkel responded, "Do we have until 2/1? When do you need us to move?" Emin replied, "Yes, we have until end of January. I have Suite 200 available for short term with cubical." At that point, Merkel wrote, "Okay. I will notify David and we will plan accordingly. We will be in touch." ("David" is David Fitzgerald (Fitzgerald), Vice President of Project Management at South Water Signs). Merkel followed up about 30 minutes later on

January 18, 2016, with another email asking, "Any chance we can have one more week? 2/7 departure?"

¶ 20 Emin testified that on January 18, 2016, he also delivered a letter entitled "Notice of Lease Termination" to South Water Signs. The letter was from Emin as Manager for 977 Oaklawn to Merkel. The header of the letter specified the manner of delivery as "personal delivery at Suite 109." The reference line stated "Suite 109 Lease Termination." The body of the letter provided in relevant part, "Per email communication today, your lease at Suite 109 has been terminated." There is a handwritten notation on the letter that states "Delivered via Personal Delivery Suite 103 1/18/16." Emin testified that he made the handwritten notation and that he delivered the letter to Suite 103. He testified that he did not "give it to any certain person;" rather, he "was asked to leave it by the coffee table right at the entrance." Fitzgerald, who was responsible for the logistics of South Water Signs, testified that no one at 977 Oaklawn was authorized to enter Suite 103 and that South Water Signs never received the January 18, 2016, letter.

¶ 21 Nine days later, on January 27, 2016, Emin responded to Merkel's January 18, 2016, email regarding the departure date for Suite 109, stating, "I have to deliver Suite 109 second week of February. Meantime, we have to open a door to corridor, install closet door, paint and replace carpet. If you don't mind some of the work while you are there latest 2/7/2016 will be fine. Please let me know." A couple minutes later, Merkel emailed in relevant part, "Very kind of you. Let me verify if we need this. We are working hard with little room for error on new space to be in there this weekend. Dave F. [Fitzgerald] will confirm what's best for all." Fitzgerald was copied on this email. A few minutes later on January 27, 2016, Fitzgerald responded to Emin and Merkel,

> "The extra couple of days is greatly appreciated! My plans right now are to get things moved this Friday, but we are walking a fine line with the buildout in our new space. I think we'll have to play it by ear, but it's very nice to know that we have a fall back in case our tradesmen run into to [*sic*] problems. I'll let you know right away if we will be in a position to accept your offer for the extra time. Thanks again."

South Water Signs vacated Suite 109 on January 29, 2016.

¶ 22 Meanwhile, there was also email correspondence about Suite 103. On January 25, 2016, Merkel sent an email to Emin with the subject line "977 suite 103." The email stated in relevant part, "We will be leaving the space at the end of February, next month if not earlier. We will close out and discuss everything soon." Emin testified that he never received the email.

¶ 23 Subsequently, on February 29, 2016, Fitzgerald emailed Emin and copied Merkel, stating,

> "South Water is completely moved out of suite 103. *** No one from South Water intends on returning to use the space except to clean it this evening, so we consider the rental agreement terminated as of today. I have keys for both the office door and the outer door at my desk. Let me know when you want them. Thanks for your service during our stay at your building."

¶ 24 The next day, on March 1, 2016, Emin responded in pertinent part, "Please see attached Lease Amendment and Extension Agreement. South Water Sign[s]'s lease term for Suite 103 ends on 12/31/2016." The Fourth Lease Amendment was attached to the email.

¶ 25 On March 11, 2016, Emin sent an email to Merkel and copied Fitzgerald with the subject line "March 2016 Invoice." The email stated,

> "When we received Mr. Fitzgerald's email on February 29th, stating South Water Sign[s] completely moved out and has no intentions to come back, we immediately inform[ed] you that South Water Sign's lease for Suite 103 shall expire on 12/31/2016 and Suite 103 is still under your lease and control. Therefore, please send your payment as soon as possible. If you should have any question[s], please let us know."

¶ 26 Merkel responded,

> "Dave was handling this, but no way did either of us sign a lease through the end of the year being we knew we were taking the new space at our church street building, you sent a copy of something to Dave a few weeks ago that I never saw before. I'm sorry that this is not clear at this time as we enjoyed our time at your building, but we never signed a lease through 12/31 therefore we are not paying any longer."

¶ 27 Emin replied,

> "I am attaching the last amendment to the lease dated August 21, 2015. It clearly states that lease for Suite 109 shall be MTM Tenancy with 30 day termination notice but Suite 103's lease extended at expiration date and new expiration date shall be 'Last day of December 2016.' The signature on this amendment is the same signature [as] the one on [the] previous amendment. Further we have the original signature on this amendment. That being stated if you have no intention[] to honor your lease agreement, we will have our attorney [] begin legal action against [South Water Signs] immediately."

¶ 28 A slew of email correspondence ensued throughout March 2016 with Merkel disputing that the signature on the August 21, 2015, Fourth Lease Amendment was his and with both sides maintaining their positions with respect to the termination date of the lease for Suite 103. The evidence established that 977 Oaklawn procured a new tenant for Suite 103 with a lease that

began in November 2016 although it was negotiated that the tenant's rent was abated for November 2016 and the rent obligation did not begin until December 2016.

¶ 29 At the close of 977 Oaklawn's case, South Water Signs moved for a directed judgment; the trial court denied the motion. The bench trial concluded on February 23, 2018; the trial court reserved its ruling until March 14, 2018. On March 5, 2018, 977 Oaklawn filed a motion for leave to file its reply to South Water Signs's affirmative defenses (the reply was about a year and a half overdue at this point). In the motion, counsel for 977 Oaklawn pointed out that he did not represent 977 Oaklawn at the time the affirmative defenses were filed and that "[a]t trial it became apparent previous counsel failed to properly answer the Affirmative Defenses raised by [South Water Signs]. 977 Oaklawn argued that its complaint contradicted the affirmative defenses in any event and thus no reply was necessary. On March 13, 2018, the trial court entered an order, granting the motion over South Water Signs's objection and allowing 977 Oaklawn leave to file its reply to the affirmative defenses *instanter*.

¶ 30 In its oral ruling on March 14, 2018, the trial court found all witnesses credible as a preliminary matter. Regarding the Assignment from Argus Holdings to 977 Oaklawn of "all rights to serve as the Property Manager," the trial court found the Assignment valid. It also found that Annalisa had the authority to bind 977 Oaklawn to the Fourth Lease Amendment. With respect to whether Merkel signed the Fourth Lease Amendment, the trial court found that "his signature in and of itself varied from each of these particular documents, and the Court could not make a determination just based on the Court's eyes as to whether or not he in fact—the signature on [the Fourth Lease Amendment] was actually his." However, the trial court found that it was undisputed that South Water Signs remained in the Premises beyond the date of the

Fourth Lease Amendment. The trial court concluded that, "despite his testimony, I do find that that lease extension was entered into by both parties."

¶ 31 The trial court found that Article 32, the Notices provision of the Lease prohibiting notification by email "remained in full force and effect in each of the lease extensions." It was undisputed that the only notification that South Water Signs provided with respect to its termination of the Lease Term for Suite 103 was by email. Thus, the trial court found that South Water Signs breached the Notices provision with respect to its termination of the Lease Term for Suite 103. The trial court found that the parties' course of dealing through email did not excuse strict compliance with the Notices provision. The trial court also expressly declined to find Emin's January 18, 2016, email to Merkel that it found a tenant for Suite 109 and to therefore "please accept this email as [a] Termination Letter to our MTM arrangement for this suite" a breach of the Notices provision in light of Emin's hand-delivered letter to South Water Signs that same day giving "Notice of Lease Termination" for Suite 109. However, for purposes of South Water Signs's counterclaim, it found that 977 Oaklawn breached the Fourth Lease Amendment because the letter was delivered to Suite 103 rather than Suite 109 and failed to give South Water Signs the requisite 30 days' notice.

¶ 32 Accordingly, the trial court entered judgment in favor of 977 Oaklawn on its breach-of-contract complaint in the amount of $35,385.28 for unpaid rent for Suite 103 from March 2016 to November 2016 and interest at the default rate of 18% under the Lease less South Water Signs's unreturned security deposits for both suites. With respect to South Water Signs's counterclaim, the trial court entered judgment in favor of South Water Signs in the amount of $10,769.67 for relocation expenses and the inadvertent rent payment for Suite 109. The trial

court declined to award attorney fees and costs to either party on grounds that there was no prevailing party.

¶ 33 South Water Signs timely appealed from the portion of the trial court's judgment in favor of 977 Oaklawn. 977 Oaklawn did not appeal.

¶ 34 II. ANALYSIS

¶ 35 South Water Signs argues on appeal that the trial court erred in granting 977 Oaklawn's motion for leave to file its reply to South Water Signs's affirmative defenses. It also contends that 977 Oaklawn lacked standing to sue South Water Signs for breach of contract and that, regardless, 977 Oaklawn failed to establish breach of the Lease. Accordingly, South Water Signs argues that it was the prevailing party and the case therefore should be remanded for entry of its attorney fees and costs. Alternatively, South Water Signs argues that 977 Oaklawn failed to mitigate its damages.

¶ 36 A. Leave to File Reply to Affirmative Defenses

¶ 37 South Water Signs challenges the trial court's order allowing 977 Oaklawn leave to file its untimely reply to South Water Signs's affirmative defenses. Section 5/2-602 of the Code of Civil Procedure (735 ILCS 5/2-602 (West 2016)) provides that if a defendant pleads a "new matter" in its answer, "a reply shall be filed by the plaintiff, but the filing of a reply is not an admission of the legal sufficiency of the new matter." The reply must be filed within 21 days after the last day allowed for filing the answer. Ill. S. Ct. R. 182(a) (eff. Jan. 1, 1967). The failure to reply to an affirmative defense constitutes an admission of the facts alleged therein. *Pancoe v. Singh*, 376 Ill. App. 3d 900, 908 (2007). However, the failure to reply to an affirmative defense "does not amount to an admission that such new matter constitutes a valid legal defense." *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574,

586 (1985). Moreover, if the complaint itself negates the affirmative defense, a reply is not necessary. *State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill. App. 3d 242, 246 (1991). The rule excusing the filing of a reply to an affirmative defense should be liberally construed. *Id.*

¶ 38 977 Oaklawn moved for leave to file its reply to the affirmative defenses pursuant to sections 5/2-616(a) and (c) of the Code of Civil Procedure (735 ILCS 5/2-616(a), (c) (West 2016)), which, respectively, allow for certain amendments "on just and reasonable terms" at any time before final judgment and for a pleading to be amended "at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."

¶ 39 However, 977 Oaklawn was not seeking an amendment; it was seeking leave to file a late reply. The appropriate procedural mechanism was section 5/2-1007 of the Code of Civil Procedure (735 ILCS 5/2-1007 (West 2016)), which provides that "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." See, *e.g.*, *State of Illinois Capital Development Board v. G.A. Rafel & Co.*, 143 Ill. App. 3d 553, 558 (1986); *Grossman Clothing Co. v. Gordon*, 110 Ill. App. 3d 1063, 1064 (1983); *Krych v. Birnbaum*, 66 Ill. App. 3d 469, 470 (1978). This provision is liberally construed to resolve cases according to their substantive merits. *State of Illinois Capital Development Board*, 143 Ill. App. 3d at 558. We review the trial court's decision to allow 977 Oaklawn leave to file its untimely reply to the affirmative defenses for an abuse of discretion. See *id.* A trial court abuses its discretion when its decision is "arbitrary, fanciful, or unreasonable, or where no reasonable person could adopt the court's view." *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513 (2005).

¶ 40 South Water Signs argues that leave to file the late reply should not have been granted; rather, the facts set forth in certain of its affirmative defenses should have been deemed admitted. The affirmative defenses to which South Water Signs appears to refer are that: (1) 977 Oaklawn failed to state a claim because it "is not the proper party in interest and has not provided sufficient support for its contention that it was assigned the right to enforce the Lease at issue"; (2) 977 Oaklawn failed to mitigate damages because it "failed and refused to re-lease the subject property"; (3) 977 Oaklawn was estopped from seeking the relief requested in the complaint because the "Lease provides that it can be terminated for any reason upon 30 days-notice"; South Water Signs "provided the proper notice on or about January 25, 2016, and 977 Oaklawn "accepted notice of [South Water Signs's] vacation of Unit 103 and thereby ratified the termination of the Lease and Amendments thereto"; and (4) 977 Oaklawn had "unclean hands" because it "breached the lease first by failing to provide [South Water Signs] with 30 days-notice for the vacation of Unit 109." According to South Water Signs, these affirmative defenses were "new matters, and not simply contradictions or affirmative denials of the allegations of" 977 Oaklawn's complaint.

¶ 41 There was no dispute that 977 Oaklawn's reply to the affirmative defenses was untimely. The affirmative defenses were filed on September 8, 2016. It was not until March 5, 2018—a year and a half later—that 977 Oaklawn moved for leave to file its reply to the affirmative defenses. The motion was granted, and the affirmative defenses were filed *instanter* on March 13, 2018—the day before the trial court entered judgment.

¶ 42 Initially, however, South Water Signs waived any objection to the failure to file a reply to the affirmative defenses by litigating at trial the very issues raised by the affirmative defenses. See *Haskins*, 215 Ill. App. 3d at 246-47 (noting that the defendants waived any objection to the

failure to file a reply to the affirmative defenses "by introducing evidence in support of the allegations contained in the affirmative defenses and fully litigating the issues raised by the affirmative defenses"). Indeed, the testimony and documents submitted at trial focused on the very issues at the heart of the affirmative defenses—the propriety of the Assignment, 977 Oaklawn's efforts to lease Suite 103 after South Water Signs vacated the office space, the Notices provision, and the parties' communications with respect to the Lease and the Lease Amendments.

¶ 43 Moreover, a review of the affirmative defenses reflects no new factual matter requiring a reply. The affirmative defenses amount to allegations that 977 Oaklawn failed to state a claim, lacked standing to enforce the Lease, was estopped from bringing the complaint, and had "unclean hands." These are legal conclusions that are not deemed admitted by the failure to reply. See *Andrew*, 256 Ill. App. 3d at 769-70; *Mitchell Buick & Oldsmobile Sales*, 138 Ill. App. 3d at 586. The only allegation that arguably amounts to a factual assertion is that 977 Oaklawn failed to mitigate its damages by "fail[ing] and refus[ing] to re-lease the subject property." However, the complaint negates this defense in alleging that 977 Oaklawn "has engaged in attempts to re-let the premises to a replacement tenant." The trial court did not abuse its discretion in granting 977 Oaklawn's motion for leave to file its reply to the affirmative defenses.

¶ 44 B. Standing

¶ 45 South Water Signs maintains that 977 Oaklawn lacked standing to bring its breach-of-contract action. Generally, only a party to a contract or one in privity with a party has standing to sue on a contract. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. The defendant bears the burden of pleading and proving the plaintiff's lack of standing. *Id.* ¶ 16. The legal question of standing is reviewed *de novo*. *Id.* ¶ 14. However,

a trial court's factual findings on the issue of standing are reviewed under the manifest-weight-of-the-evidence standard. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 535-36 (2010). A finding is against the manifest weight of the evidence only when the opposite conclusion is clearly evident or when the finding is unreasonable, arbitrary, or without a basis in the evidence. *Sullivan v. Kanable*, 2015 IL App (2d) 141175, ¶ 10. Thus, we will review the trial court's factual findings under the manifest-weight-of-the-evidence standard and apply those facts *de novo* to the question of whether South Water Signs established lack of standing.

¶ 46 South Water Sign's lack-of-standing argument amounts to a challenge to the validity of the Assignment in which Argus Holdings assigned to 977 Oaklawn, *inter alia*, "all rights to serve as the Property Manager" of the Premises. Emin was the signatory for Argus Holdings; Annalisa was the signatory for 977 Oaklawn.

¶ 47 South Water Signs states that the Assignment was invalid because Annalisa had no authority to bind 977 Oaklawn. The trial court explicitly found the Assignment valid. The record is replete with evidence to support this finding. The evidence established that 977 Oaklawn is an Illinois limited liability company. Its two members are Emin and Annalisa, and Emin is the sole manager. The operating agreement for 977 Oaklawn provides that as the manager, Emin had the power to hire employees for the purpose of property management. In this regard, Emin testified that he hired Annalisa as an employee of 977 Oaklawn.

¶ 48 South Water Signs also states that the Assignment was invalid because the Assignment "only assigned management rights and did not even reference the Lease." The plain language of the Assignment belies this contention. The Assignment gave 977 Oaklawn "all rights to serve as the Property Manager" for the "real property and improvements located at 977 N. Oaklawn Avenue, Elmhurst, IL 60126" and "all powers heretofore vested in Argus Holdings, Inc.,

including but not limited to the power to enter into leasehold interests with tenants." Thus, the trial court's finding that the Assignment was valid was not against the manifest weight of the evidence. Accordingly, South Water Signs failed to meet its burden of establishing the affirmative defense of lack of standing and presents no basis for reversal on this issue.

¶ 49 C. Breach of the Lease

¶ 50 Regardless, South Water Signs argues that judgment for 977 Oaklawn should be reversed because 977 Oaklawn failed to prove that South Water Signs breached the Lease. The elements of a breach-of-contract claim are a valid and enforceable contract, performance by the plaintiff, breach by the defendant, and injury to the plaintiff resulting from the breach. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. The interpretation of a contract presents a question of law and is therefore reviewed *de novo*. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). However, the trial court's finding with respect to whether a breach of contract occurred involves a question of fact and will not be disturbed on appeal unless the finding was against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006); *Timan*, 2012 IL App (2d) 100834, ¶ 24.

¶ 51 Initially, South Water Signs argues that 977 Oaklawn failed to establish a *prima facie* case for breach of contract because the complaint alleged that "[a]s of March 2016, the lease obligation for Unit 109 became delinquent." According to South Water Signs, "[t]here is no allegation that the Lease for Unit 103 was breached due to failure to provide the appropriate notice or because notice was sent via email." The entirety of the complaint reflects a typographical error in referring to Suite 109 rather than Suite 103 in the particular quoted allegation. For instance, in the preceding paragraph of the complaint, 977 Oaklawn alleges that "[o]n February 29, 2015, [South Water Signs] sent an email to [977 Oaklawn] informing [977

Oaklawn] of the unilateral decision to vacate Unit 103 and the fact that [South Water Signs] thereby considered the lease terminated ***."

¶ 52 Moreover, South Water Signs answered the complaint and proceeded to trial where the parties litigated the meaning of the Lease and Lease Amendments and whether breaches occurred with respect to both Suite 103 and Suite 109. Thus, any defect in the pleading is waived. See 735 ILCS 5/2-612(c) (West 2016) ("[a]ll defects in pleadings, either in form or substance, not objected to in the trial court are waived"); *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60 (1994).

¶ 53 South Water Signs also contends that 977 Oaklawn failed to establish a *prima facie* case for breach of contract because it did not present evidence of its damages. However, the damages award was based upon the unpaid rent from March 2016 to November 2016 and interest at the default rate, as set forth in the Lease and Fourth Lease Amendment. The record demonstrates that there was no dispute as to the basic computation of the damages award. South Water Signs, therefore, presents no basis for reversal on grounds that 977 Oaklawn failed to establish a *prima facie* case for breach of contract.

¶ 54 The crux of this dispute is whether South Water Signs maintained a right to cancel the lease for Suite 103 upon 30 days' notice. If so, the issue is whether Merkel's January 25, 2016, email to Emin, terminating the lease for Suite 103 effective the end of February 2016, or Fitzgerald's February 29, 2016, email advising Emin that South Water Signs had vacated Suite 103, satisfied the Notices provision of the Lease. The primary objective in construing a contract is to ascertain and give effect to the parties' intent. *Gallagher*, 226 Ill. 2d at 232. "A court must initially look to the language of the contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id.* at 233. When the terms of a contract are

plain, the contract itself is the only proper evidence of the parties' intent. *La Throp v. Bell Federal Savings & Loan Ass'n*, 68 Ill. 2d 375, 384 (1977). A contract must be construed as a whole, viewing each part in light of the others, as words derive their meaning from the context in which they are used. *Gallagher*, 226 Ill. 2d at 233. If the contract's language is susceptible to more than one meaning, it is ambiguous, and in that instance, a court may consider extrinsic evidence to ascertain the parties' intent. *Id.*; *Doornbos Heating and Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 488 (2010).

¶ 55 South Water Signs devotes its argument to the proposition that strict compliance with the Notices provision of the Lease was not required and that its email notification of termination for Suite 103 was thus sufficient notification under the Lease. South Water Signs contends that 977 Oaklawn waived the Lease's prohibition against email notice by sending notification of the lease termination for Suite 109 by email. It also contends that the parties' course of dealing was that all notification and communications regarding the Lease and Lease Amendments were sent by email.

¶ 56 These arguments ignore the threshold consideration of whether South Water Signs even had a right to cancel the Lease upon 30 days' notice. South Water Signs dismisses this consideration, contending that the "trial court made it abundantly clear when it held that the Lease prohibited email notices that the Amendments did *not* amend the Lease's termination provision." As record support for this contention, however, South Water Signs cites to a page of trial testimony. We note that the trial court explicitly found that the *Notices provision* of the Lease prohibiting notification by email "remained in full force and effect in each of the lease extensions." There was no finding that the 30-day termination provision remained for Suite 103. The trial court found that South Water Signs breached the Notices provision with respect to its

termination of the Lease Term for Suite 103 on the basis that the notification that South Water Signs provided with respect to its termination of the Lease Term for Suite 103 was by email. Nevertheless, we may affirm on any ground supported by the record regardless of whether the trial court relied upon that ground and regardless of whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 57 A review of the plain language of the Lease and Lease Amendments demonstrates that the Fourth Lease Amendment extended the Lease Term for Suite 103 to December 31, 2016, and did not include the right of either party to terminate the Lease Term for Suite 103 upon 30 days' notification.[4] It is undisputed that the initial Lease contained the right to terminate upon 30 days' notification. But as the Lease Amendments were executed, it was clear from the plain language when the parties did and did not intend to maintain a right of termination.

¶ 58 In the First Lease Amendment, the parties extended the Lease Term by six months with no right to terminate. In the Second Lease Amendment, the parties extended the Lease Term by twelve months but explicitly included in the Recitals provision a right of the Tenant to "terminate the extension after the first 6 months with 60 day advance notice." In the Third Lease Amendment, the parties again extended the Lease Term with no right to terminate.

¶ 59 The Fourth Lease Amendment was different because it added Suite 109, but its format was the same. In the first paragraph of the Recitals provision, the parties extended the Lease Term for Suite 103 through December 2016 with no right to terminate. In the second paragraph of the Recitals provision, the parties added a month-to-month Lease Term for Suite 109 with the

[4] As discussed, there was a dispute at trial as to whether Merkel signed the Fourth Lease Amendment. South Water Signs does not raise the issue on appeal. Rather, it acknowledges the Fourth Lease Amendment but contends that it maintained a 30-day termination provision.

right of either party to terminate by providing 30-days' notification. The Lease Term provision stated, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of December 2016 for 977 N. Oaklawn, Suite 103." There was no Lease Term provision for Suite 109 aside from the term set forth in the Recitals.

¶ 60 We recognize that generally recitals are considered "nonbinding explanations of the circumstances surrounding the execution of a contract." *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 170 (2003). Here, although labeled as such, the Recitals in the Lease Amendments did not simply explain the circumstances surrounding their execution. Rather, the Recitals set forth Lease Terms and whether there was a right to terminate. Regardless, elimination of the Recitals from our consideration would further support a holding that the plain language of the Fourth Lease Amendment extended the Lease Term for Suite 103 to December 31, 2016. The Lease Term provision in the Fourth Lease Amendment simply stated, "The term of the leasing of the premises shall be extended to and shall terminate on [*sic*] last day of December 2016 for 977 N. Oaklawn, Suite 103." There was no inclusion in this provision of any right to terminate.

¶ 61 South Water Signs argues that if "the Amendment removed the 30-day termination provision—then it would also be true that because the Amendments are silent as to prohibiting email notifications, email notification was acceptable." This argument disregards an important detail—the Defined Terms section in each Lease Amendment, including the Fourth Lease Amendment, provided that "[a]ll terms used in this lease amendment and extension agreement shall have the meanings ascribed to them in the lease unless otherwise defined in this instrument." In sum, the plain language of the Fourth Lease Amendment is clear and demonstrates the parties' intent to extend the Lease Term for Suite 103 to December 31, 2016,

without the right of either party to terminate the Lease Term for Suite 103 upon 30 days' notification.

¶ 62 As a final matter, South Water Signs argues that 977 Oaklawn "breached the Lease first" by sending a termination notification for Suite 109 by email on January 18, 2016, and therefore "could not have maintained a cause of action against [South Water Signs] for breach of the Lease." In support, South Water Signs cites without analysis *Mohanty*, 225 Ill. 2d at 70, and *Lipschultz v. So-Jess Management Corp.*, 89 Ill. App. 2d 192, 201 (1967). *Lipschultz* is inapposite. The issue there was whether the landlord's alleged installation of a defective floor and inadequate ventilating system amounted to constructive eviction thereby relieving the tenant of its obligations under the lease. *Lipschultz*, 89 Ill. App. 2d at 201-03. The court expressly found that "a discussion of defendant's authorities on the effect of the first breach in a contract is unnecessary" as the case law involving constructive eviction "adequately encompass[es] the effect of a first breach and its waiver." *Id.* at 202.

¶ 63 The issue in *Mohanty* was whether the defendant employers' alleged prior material breach of their employments contracts with the plaintiff physicians relieved the physicians of their obligations under the restrictive covenants in their employment contracts. 225 Ill. 2d at 70-75. The trial court in *Mohanty* found that the physicians did not meet their burden of proving that the employers materially breached the employment contracts. *Id.* at 61. Our supreme court held that the trial court's finding was not against the manifest weight of the evidence, and therefore, the physicians failed to establish a basis to circumvent the requirements of the restrictive covenants. *Id.* at 75.

¶ 64 Here, the trial court found, in entering judgment for South Water Signs on its counterclaim, that 977 Oaklawn breached the Fourth Lease Amendment because Emin delivered

the January 18, 2016, letter regarding "Suite 109 Lease Termination" to Suite 103 rather than Suite 109 and failed to give South Water Signs the requisite 30 days' notice. However, the trial court expressly declined to find that Emin's January 18, 2016, email to Merkel was a breach of the Notices Provision, stating,

> "Well, that's not even really what happened here. What happened was he [Emin] sent—I found he was credible, that he had sent that email—there's no dispute that he sent the email with regard to vacating Unit 109; however, he did testify, and the Court found him credible, that he did testify that he provided them the actual written notice that was required under Article 32."

¶ 65 Based upon our review of the record, we cannot say that the trial court's finding was against the manifest weight of the evidence. South Water Signs provides no legal basis to support a holding that it should be relieved of its obligation to the Lease Term for Suite 103.

¶ 66 Accordingly, we affirm the trial court's judgment in favor of 977 Oaklawn on its breach-of-contract claim on grounds that the plain language of the Fourth Lease Amendment extended the Lease Term through December 2016 with no right to terminate upon 30 days' notification. South Water Signs breached the contract by terminating the Lease effective February 29, 2016. In light of our holding, we need not address South Water Signs's argument that strict compliance with the Notices provision was not required. Also, we need not address South Water Signs's argument that it was the prevailing party under the Lease. We note in this regard that 977 Oaklawn likewise argues that it was the prevailing party. 977 Oaklawn did not file a cross-appeal. Thus, our review is confined to the issues raised by the appellant, South Water Signs. See *Rathje v. Horlbeck Capital Management, LLC*, 2014 IL App (2d) 140682, ¶ 49 ("[a] notice of cross-appeal is mandatory for review of a judgment adverse to the appellee").

¶ 67 D. Failure to Mitigate Damages

¶ 68 South Water Signs argues alternatively that the damages award should be reduced because 977 Oaklawn failed to mitigate its damages. According to South Water Signs, 977 Oaklawn took no "meaningful action" to lease Suite 103 after South Water Signs vacated the office. A landlord must "take reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1 (West 2016); *Danada Square, LLC v. KFC Management Co.*, 392 Ill. App. 3d 598, 608 (2009). The landlord bears the burden of proving that it mitigated its damages. *Danada Square, LLC*, 392 Ill. App. 3d at 608. Failure to establish that reasonable steps were taken to mitigate its damages results in reduction of otherwise recoverable damages. *Id.* The question of whether a landlord mitigated its damages is generally a question of fact to which we apply the manifest-weight-of-the-evidence standard of review. *Id.* at 607-08.

¶ 69 Regarding 977 Oaklawn's efforts to mitigate its damages, Emin testified that he listed the property with a commercial real estate broker. He also testified that he was a commercial real estate broker and in this capacity also personally listed the property with commercial real estate multiple listing services including "Loopnet" and "Costar." The listing sheets were introduced into evidence. South Water Signs argues that the property described in the listing sheets does not match the square footage of Suite 103 and that Emin failed to testify as to the precise timing of when he listed the property. A review of the record demonstrates that the listing sheets advertised for an amount of office space in the building in excess of the square footage for Suite 103. However, Emin testified that the listing sheets included Suite 103. Emin also testified, in response to the question of what 977 Oaklawn did once South Water Signs vacated Suite 103 and 977 Oaklawn determined that "they were not coming back and not paying anymore," that 977 Oaklawn "included their space in our vacant space list and continued marketing it."

¶ 70 The trial court awarded 977 Oaklawn unpaid rent from March 2016 to November 2016—the time period after which South Water Signs vacated Suite 103 and before 977 Oaklawn procured a new tenant (and received rent from the new tenant). In doing so, the trial court implicitly found that 977 Oaklawn took reasonable measures to mitigate its damages. Based upon our review of the record, we cannot say that an opposite conclusion was clearly evident or that this finding was unreasonable, arbitrary, or without a basis in the evidence.

¶ 71 South Water Signs nevertheless argues that 977 Oaklawn was only entitled to unpaid rent for March and April 2016 because it was constructively evicted from Suite 103 on April 28, 2016. South Water Signs states that in April 2016, 977 Oaklawn demanded that South Water Signs return the office keys. South Water Signs returned the keys on April 28, 2016. According to South Water Signs, this amounted to constructive eviction thereby relieving it of any further obligation to make rent payments.

¶ 72 Constructive eviction is "something of a serious and substantial character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises." *Shaker and Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 134 (2000). For instance, a tenant may abandon the premises if "the landlord's breach of the covenant to repair makes [the premises] unfit for the purpose for which they were leased." *Id.* 977 Oaklawn's demand for the office keys after South Water Signs vacated Suite 103 was not constructive eviction. It was an exercise of its right, pursuant to the terms of the Lease, to require a tenant to return all keys upon vacating the office suite. See Article 30 ("Termination of Lease—Surrender of Premises"), Section (a) of the Lease ("All keys to the Premises and to the Building shall be returned to the Landlord ***"). South Water Signs presents no basis upon which to reverse the trial court's damages award.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the trial court's judgment in 977 Oaklawn's favor on its breach-of-contract claim.

¶ 75 Affirmed.