

NOTICE  
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2019 IL App (5th) 170134-U

NO. 5-17-0134

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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DAN STEVENS and NEIL R. THOMPSON,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Jackson County.
	)	
v.	)	
	)	
ROBERT L. NEWMAN, TRUSTEE-	)	
(NG LAND) TRUST #1, TERRY NEWMAN,	)	
and ROBERT L. NEWMAN, Individually,	)	
	)	
Defendants-Appellees,	)	
Third-Party Plaintiffs,	)	Nos. 02-LM-436 &
Third-Party Counterdefendants	)	16-L-16
	)	
v.	)	
	)	
PEOPLES NATIONAL BANK OF	)	
MCLEANSBORO,	)	
	)	
Third-Party Defendant-Appellant,	)	
Third-Party Counterplaintiff,	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
ROBIN M. NEWMAN and BRANDI S.	)	
NEWMAN,	)	Honorable
	)	Christy W. Solverson,
Third-Party Defendants.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.

Justices Chapman and Barberis concurred in the judgment.

## ORDER

¶ 1 *Held:* The trial court's July 28, 2016, order is vacated and remanded for a new trial limited to damages flowing from the breach of fiduciary duty and conversion claims based on the misapplication of the letter of credit proceeds by The Peoples National Bank of McLeansboro (PNB); the court's December 11, 2015, order granting the Newmans' motion for summary judgment in favor of the plaintiffs must be vacated and remanded in part for proceedings consistent with this order and *Stevens v. Newman*, 2019 IL App (5th) 170155-U; and, the court's decision in its December 11, 2015, order to impose Illinois Supreme Court Rule 137 (eff. July 1, 2013) sanctions against PNB was not an abuse of discretion and is therefore affirmed.

¶ 2 This appeal arises from litigation commencing November 22, 2002, when Dan Stevens and Neil R. Thompson (plaintiffs) sued Terry Newman and Robert Newman (Newmans) to recover back rent on a commercial lease for a restaurant building located in Anna, Illinois. The Newmans filed a third-party complaint against The Peoples National Bank of McLeansboro (PNB), seeking indemnity (count I) for the back rent based on a holdback provision in an agreement between the parties, which provided that PNB, to assure payment of the rent owed to the plaintiffs, was to hold back \$81,000 of an irrevocable letter of credit for which both the Newmans and PNB were listed as beneficiaries. The Newmans later amended the complaint, alleging additional counts for conversion of the letter of credit (count II) and breach of fiduciary duty in applying the proceeds of the letter of credit (count III).

¶ 3 The trial court entered an order regarding the holdback provision; this order granted the Newmans' motion to reconsider the trial court's previous denial of their motion for partial judgment on the pleadings. PNB filed an interlocutory appeal, and this

court determined that the Newmans were entitled to judgment on the pleadings as a matter of law. *Stevens v. Newman*, 2015 IL App (5th) 130338-U.

¶ 4 Thereafter, the plaintiffs and the Newmans each sought summary judgment. The plaintiffs' motion sought judgment against the Newmans, while the Newmans' motion sought judgment against PNB in favor of the plaintiffs. The circuit court granted the Newmans' summary judgment motion but found the plaintiffs' summary judgment motion moot. The plaintiffs appealed the order denying their summary judgment motion, which we address in a different appeal. In the case before us, PNB appeals the court's grant of the Newmans' summary judgment motion.

¶ 5 The case between the Newmans and PNB proceeded to a bench trial on damages only for the Newmans' conversion and breach of fiduciary duty claims. The Newmans presented evidence of lost profits and wages and emotional distress. They requested approximately \$31 million in combined punitive and compensatory damages and were awarded approximately \$16 million.

¶ 6 PNB filed a posttrial motion for equitable relief to prevent a fraud upon the court, which the trial court found to be untimely. The court also denied PNB's motion for leave to file documents under seal. PNB appeals from the court's rulings in multiple orders. For the following reasons, we vacate and remand in part and affirm in part.

¶ 7 In 1996, the Newmans formed New Group, Inc. (New Group), an Illinois corporation, for the purpose of operating Taco John's franchises. The Newmans were the sole shareholders and officers of New Group. To finance their operations, the Newmans borrowed funds from PNB through both conventional and United States Small Business

Administration (SBA) loans. While New Group was the principal borrower, the Newmans signed personal commercial guaranties for the loans. Approximately two months after the guaranties were signed, New Group executed a SBA promissory note, payable to PNB in the amount of \$230,000 (SBA loan).

¶ 8 On September 1, 1998, the plaintiffs and the Newmans entered into a commercial lease agreement (hereinafter "the lease") for an Anna, Illinois, location in which the Newmans were to operate a Taco John's. The Newmans agreed to lease the premises from the plaintiffs for a five-year period commencing September 1, 1998, and terminating on August 31, 2003.

¶ 9 The Newmans operated the Taco John's at this premises until 2001, when they began negotiating to sell their stock in New Group to Amigos Food Services, LLC (Amigos), pursuant to several agreements. On or about March 6, 2001, the Newmans signed a "Memorandum of Understanding" with Amigos, which provided that Amigos would pay the Newmans \$270,000 and assume approximately \$4 million of debt owed to PNB. On March 27, 2001, the Newmans signed an "Undertaking of the Parties," which reaffirmed the obligations set out in the Memorandum of Understanding. As security, Amigos agreed to supply a \$150,000 letter of credit to be held by PNB in favor of the Newmans and PNB, and pledged "the shares of stock of New Group, Inc., and [to] execute such pledge agreement necessary and convenient for [the Newmans] to obtain the management, control, and ownership of the corporation and its assets in the event of default by [Amigos.]"

¶ 10 The next day, the parties entered into a pledge agreement, which provided that if Amigos defaulted on its promise to pay all outstanding indebtedness of New Group, then the Newmans would be appointed attorney-in-fact to arrange for the transfer of shares of New Group back to the Newmans. The agreement stated that PNB "shall hold the shares as security for the payment of outstanding indebtedness." It provided, in relevant part, that if PNB received notice from the Newmans of a default in the debt payments, then Amigos had 30 days in which to cure the default or PNB would "release the shares pledged and all other documents and things held in escrow by it to [the Newmans]." It also stated that, if Amigos defaulted in the performance of any of the agreement's terms or in payment of the principal and interest of New Group's outstanding debt, then the Newmans "shall have the right to declare a forfeiture of [Amigos's] rights under that certain Memorandum of Understanding, by and between [the Newmans,] as seller, and [Amigos,] as purchaser and [Amigos] shall return all shares to [the Newmans] immediately without any payment by [the Newmans] to [Amigos]." The Newmans, all Amigos's owners, and a PNB representative signed this agreement.

¶ 11 The \$150,000 letter of credit issued by AmSouth Bank on March 30, 2001, provided it could only be drawn upon by a statement signed by the Newmans and PNB stating that "the amount claimed is due and owing due to default under that certain 'Memorandum of Understanding,' by and between the beneficiaries and the applicant." The letter of credit was set to expire on March 30, 2002.

¶ 12 On April 1, 2001, the parties closed the sale. The Newmans received \$270,000, and PNB and the Newmans received the \$150,000 letter of credit. All but 1000 shares of

New Group stock were transferred to Amigos. The remaining 1000 shares were placed in escrow with PNB.

¶ 13 On August 23, 2001, Amgios, the Illinois Small Business Growth Corporation, and the SBA entered into an assumption agreement. Under the terms of this agreement, the Newmans remained guarantors on two debts, the \$230,000 SBA loan and another SBA loan in the amount of \$824,000. A document entitled "consent to assumption of loan," containing the purported signatures of the Newmans, gave their consent to remain as guarantors on the loans.

¶ 14 On September 24, 2001, in a three-party assumption agreement among PNB, Amigos, and the Newmans, Amigos assumed the debts and obligations of New Group to PNB. The language maintaining the Newmans as guarantors was struck and initialed by the parties.

¶ 15 On October 17, 2001, the Newmans and PNB entered into a debt-retirement agreement releasing the Newmans from all debt arising from the sale, stating that Amigos and its owners would thereafter have sole liability for any and all amounts owed to PNB related to the Taco John's stores and New Group. However, the agreement noted one exception, stating that the liability release "shall not include a release for [the SBA loan] in the amount of \$230,330."

¶ 16 The agreement also provided that \$81,000 of the \$150,000 letter of credit was to be used solely as security for lease payments to the plaintiffs. It stated that the \$81,000 was "to remain to assure repayment of a lease dated September 1, 1998 between Dan Stevens and Robert Newman and Terry Newman." The agreement also provided that

"the letter of credit securing said lease will be reduced as lease payments are made by [Amigos]" and that "the letter of credit securing the lease may be released to [PNB] when a reassignment is completed to [Amigos] of the lease dated September 1, 1998." The remainder of the letter of credit was to be held by PNB" as sole beneficiary and will be used to secure the New Group, Inc. obligation."

¶ 17 In November or December 2001, PNB assessed a late charge for payment on the \$230,000 loan, which Amigos paid on December 18, 2001. Amigos made timely payments on the note in January, February, and March 2002. Amigos made no further payments on the principal after March 27, 2002, and defaulted on the note in April 2002.

¶ 18 On March 22, 2002, a letter was presented to AmSouth Bank regarding the letter of credit. The letter stated that, "the amount claimed is due and owing due to default under that certain 'memorandum of understanding' by and between the beneficiaries and the applicant." The Newmans' signatures appear at the bottom of the document. AmSouth Bank thereafter released the required \$150,000 to PNB.

¶ 19 In September 2002, the plaintiffs did not receive a lease payment for the Anna property. On October 25, 2002, and again on November 4, 2002, the plaintiffs notified the Newmans of their failure to pay pursuant to the lease agreement. The Newmans subsequently notified PNB, demanding that, pursuant to the debt-retirement agreement, PNB use the \$81,000 set aside from the \$150,000 letter of credit to pay the outstanding lease obligations. However, on multiple instances ranging from April 30, 2002, to December 12, 2002, PNB instead allocated the funds to various other Amigos

outstanding account balances; all but one of these accounts were obligations for which the Newmans were not personally liable. These events ignited the present litigation.

¶ 20 On November 22, 2002, the plaintiffs filed suit against the Newmans for failure to pay rent, insurance, and taxes under the lease for the Anna property. On February 14, 2003, the Newmans filed a third-party complaint against PNB seeking indemnity (count I), asserting that PNB was responsible for curing the default with the proceeds from the letter of credit.

¶ 21 On June 5, 2003, PNB filed an answer, counterclaim, and third-party complaint, alleging that the Newmans were responsible for the payment of the \$230,000 SBA loan.

¶ 22 The Newmans filed an amended third-party complaint on November 5, 2004, alleging additional counts for conversion of the letter of credit proceeds (count II) and breach of fiduciary duty in applying the proceeds of the letter of credit (count III).

¶ 23 Count II alleged that PNB received the entire \$150,000 proceeds of the letter of credit; that the Newmans did not transfer their rights as beneficiaries to the letter of credit proceeds; and, that without the Newmans' knowledge or consent, PNB applied the letter of credit proceeds to various loans and interest payments, which benefitted PNB and Amigos to the Newmans' detriment, as they had no liability for the remaining loans that were partially paid by the proceeds. The Newmans claimed that they were damaged in the amount of \$150,000, "which [constituted] the balance of the proceeds and interest from the letter of credit." The Newmans' prayer for relief requested \$150,000, the amount of the letter of credit proceeds that PNB converted to its own use; interest on that amount; punitive damages in an amount that would successfully deter similar future

action; attorney fees; and, "for other and such further relief as [the court] determines appropriate and just."

¶ 24 Count III alleged that PNB received the entire \$150,000 proceeds of the letter of credit; that the Newmans did not transfer or assign their rights as beneficiaries to the letter of credit proceeds; that PNB had a fiduciary duty to the Newmans to ensure that the proceeds were applied for the benefit of the beneficiaries; that PNB violated its fiduciary duty by taking the proceeds without the Newmans' notice or consent and unilaterally applying them to loans which provided no benefit to the Newmans but benefitted PNB; and, the Newmans were damaged by PNB's failure in the amount of \$150,000. The Newmans' prayer for relief echoed the language found in count II.

¶ 25 The Newmans filed a motion for partial judgment on the pleadings on count I of their complaint, seeking an \$81,000 judgment "as may be found due to plaintiffs \*\*\* in the original complaint." The trial court denied the motion, but the Newmans moved to reconsider, requesting a judgment of PNB's liability "in such amounts as may be found due to plaintiffs \*\*\* in the original complaint." On November 18, 2013, the court granted the motion to reconsider, finding that pursuant to their agreement, PNB was required to reserve the \$81,000 to secure the Newmans' lease obligations to the plaintiffs.

¶ 26 PNB filed an interlocutory appeal seeking to overturn the trial court's November 18, 2013, order and its May 18, 2012, order granting the Newmans' motion to strike PNB's affirmative defenses. This court affirmed the order and determined that the Newmans were entitled to judgment on the pleadings as a matter of law. *Stevens v. Newman*, 2015 IL App (5th) 130338-U. At the time of the trial court's order and this

court's decision, the pledge agreement had not been made of record and was not presented to either court.

¶ 27 Thereafter, the plaintiffs and the Newmans each sought summary judgment.<sup>1</sup> The plaintiffs' motion sought judgment against the Newmans, while the Newmans' motion sought judgment against PNB, in favor of the plaintiffs. In a December 11, 2015, order, the trial court granted the Newmans' summary judgment motion, finding that the plaintiffs were entitled to recover the unpaid rents directly from PNB due to the debt-retirement agreement between the Newmans and PNB. The court found the plaintiffs' summary judgment motion moot, reasoning that the plaintiffs had waived their contractual rights against the Newmans by accepting rents from a third party and allowing that third party to occupy the restaurant building and were therefore estopped from claiming that the Newmans remained liable under the lease agreement terms.

¶ 28 The case between the Newmans and PNB proceeded to a bench trial on damages only for the Newmans' conversion and breach of fiduciary duty claims. The trial court ordered the parties to file pretrial memoranda containing, among other information, the following: a brief statement of the relevant facts of the case; each cause of action to be asserted at trial; the elements of each cause of action to be asserted at trial, with case citations concerning each element; contested issues of law, with case citations; the original copy of all evidence depositions; and, an exhibit list identifying each exhibit number and descriptive title.

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<sup>1</sup>For clarity, we continue our discussion of these motions and the December 11, 2015, order following our discussion of the bench trial and the July 28, 2016, order.

¶ 29 The Newmans' memorandum provided:

"Nature of Case: The issues remaining in this case involve the damages sustained by the Defendants in their Amended Third Party Complaint against Third Party Defendants.

Causes of Action  
to be asserted at trial: Damages under Count II: Conversion- against Third Party Defendant for the proceeds of the letter of credit in the amount of \$150,000.00 plus interest, punitive damages, emotional distress damages, and costs of suit including attorney fees.  
Damages under Count III: Breach of Fiduciary duty- against Third Party Defendant for the failure to maintain the proceeds of the letter of credit as agreed upon by the parties and for the benefit of the Defendants resulting in damages in the amount of \$150,000.00 plus interest, punitive damages, emotional distress damages, and costs of suit including attorney fees.

Elements of Causes of  
Action at trial: This Court has granted judgment as to the liability of Third Party Defendant as to Count II and Count III. The issues remaining to be determined at trial are the compensatory and punitive damages."

The Newmans attached a list of exhibits, which did not include the pledge agreement.

¶ 30 A bench trial was held on February 8 and 9, 2016. During his opening statement, the Newmans' counsel argued:

"It is not just the obligation of a fiduciary to stand silent, but to act and inform. And the case law is replete with cases where the duty, the failure to give notice imposes liability. Did the bank give notice when they should have in this case? Did they protect my client's rights as a fiduciary under the Undertaking of the Parties and the Pledge Agreement at issue?"

Counsel stated that "had the Bank satisfied its fiduciary obligation, the evidence will show \*\*\* [the Newmans] would be running Taco John's stores and pursuing their other business interests."

¶ 31 Terry Newman testified that, before agreeing to sell the Taco John's franchises to Amigos, he and his brother operated their restaurants successfully. When asked about the gross profits of their eight franchises during the last few years of their ownership, PNB's counsel objected to the relevancy of the evidence, arguing that, "if we look at the pleadings in order to frame what the issues are today, count II and count III, they only seek damages for the letter of credit and for punitive damages, so therefore the issue of profits isn't at issue at this time according to the pleadings as written." The Newmans' counsel replied that their general prayer for relief did not limit the damages that they could request. He noted that PNB failed to conduct discovery in 14 years of litigation and thus cannot claim surprise or prejudice as a result of admission of evidence concerning damages. PNB's counsel replied that neither party requested that depositions be taken and that no notice had been given that this type of relief was being sought. The court overruled the objection, stating that "the question is relevant based upon the fact that the damages being sought include punitive damages as well as consequential damages, so I think whether or not these gentlemen were successful and what their profits were for the business and as to why they sold it and why they implemented these various documents with the bank, with Amigo Foods, letters of credit, that that is relevant to those proceedings as to why they did what they did." Terry Newman testified that at the time of the sale, their stores were grossing approximately \$3 million per year.

¶ 32 Terry Newman also testified that, had he known that PNB had begun to take down monies on the letter of credit, they would have exercised their rights under the pledge

agreement and taken their stores back. He anticipated that they would have continued to experience gross profits of \$3 million per year.

¶ 33 The Newmans went on to submit evidence from various sources purporting to show lost profits, future lost wages, and lost equity, as well as emotional distress and attorney fees. The Newmans also testified that they had no knowledge of the August 23, 2001, assumption agreement and did not sign any consent form. PNB did not present witnesses or offer exhibits. At the conclusion of the trial, PNB moved for a continuance to allow it to "prepare for a rebuttal case on the requests that were not included in the prayer for relief \*\*\* such as emotional distress, lost profits and those damages." The trial court denied the motion.

¶ 34 In their written closing argument, the Newmans argued that economic damages were available to them for a breach of fiduciary duty claim. Noting that this court stated that PNB violated its fiduciary duty by taking the letter of credit proceeds without the Newmans' notice or consent, they asserted that "in addition, [PNB] had an obligation as a fiduciary to disclose to the Newmans the default by [Amigos]." They stated that PNB breached its duty by its failure to act affirmatively to provide notice, by its refusal to provide information to the Newmans despite repeated requests, and by applying the letter of credit proceeds for its sole benefit. They stated that, had PNB conformed its conduct to its duty, "the evidence demonstrates that the Newmans would have exercised their rights under the pledge agreement of March 28, 2001, and retaken control of their company." They requested \$10,380,857.88 in compensatory damages and \$20,761,715.76 in punitive damages.

¶ 35 On February 24, 2016, PNB filed a motion to strike testimony and other evidence. PNB asserted that, despite the Newmans' testimony that they did not know about Amigos's default until they received the demand for rent from the plaintiffs in October 2002, the testimony is contradicted by the fact that the Newmans signed the March 22, 2002, document drawing on the letter of credit from AmSouth Bank. On March 8, 2016, the trial court denied the motion, concluding that it was untimely.

¶ 36 On July 28, 2016, the trial court entered judgment in favor of the Newmans for \$16,357,618.08. It found compensatory damages totaling \$6,543,047.23, derived from the Newmans' lost profits (\$1.65 million), lost income (\$2,885,245), lost equity (\$1,727,802.23), and emotional distress damages (\$280,000). It found punitive damages totaling \$9,814,570.85, including attorney fees of \$156,950.665.

¶ 37 The trial court found that PNB knew of Amigos's default prior to April 30, 2002, and on that date, PNB violated its fiduciary duty to the Newmans when it began making transfers from the credit line for its sole benefit. It determined that the Newmans did not receive notice of Amigos's default on its Undertaking of the Parties and pledge agreement obligations or on the application of the letter of credit proceeds to Amigos's indebtedness, and that they first learned of Amigos's default when the plaintiffs notified them on October 25, 2002. The court found that PNB thereafter refused to provide them information concerning Amigos's status on their debt payment obligations. The court stated that, "[PNB] breached its duty by failing to act affirmatively to provide notice, by its refusal to provide information to the Newmans, despite their repeated requests, and by its application of the Line of Credit for the sole benefit of [PNB]." The court continued,

"based on the testimony of Robert and Terry Newman, which this Court finds credible and un rebutted, had the Newmans been informed by [PNB] of the default of [Amigos], on the April 2002 loan payment for the \$230,330.00 loan, and [PNB]'s plan to apply the Line of Credit to other debts of [Amigos], the Newmans would have exercised their rights under the terms of the pledge agreement and taken back all stock and operational control of the eight Taco John's franchises at issue."

¶ 38 The trial court found that gross profits for the eight stores totaled \$3 million per year and calculated that the Newmans would have earned net profits, after debt service, of 4%, totaling \$1.65 million in past lost profits. The court calculated lost wages of \$104,918 for each Newman brother over a period of 13 years and 9 months, totaling \$2,885,245. Finally, it found that the Newmans' stores would have accumulated additional equity of \$1,727,802.23.

¶ 39 The trial court, having determined that the August 23, 2001, assumption agreement was a forgery, also found that PNB proximately caused the Newmans emotional distress by "failing to provide information, leaving [them] to speculate on the condition of the company, despite their effort to gain information from the Bank, using forged documents to leave the Newmans responsible, without their knowledge, for over \$800,000 of indebtedness, and refusing to satisfy its obligation to use the Line of Credit as required by its agreement with the Newmans." The court awarded each Newman brother \$140,000 in emotional distress damages, totaling \$280,000.

¶ 40 Finally, the trial court awarded punitive damages, stating that PNB "engaged in a pattern of violations in breach of its [fiduciary] duty, including the conversion of the Line

of Credit for the sole benefit of the Bank, to the detriment of the Newmans, the failure to give notice to the Newmans of the Bank's use of the Line of Credit, the Bank's failure as a fiduciary to give notice to the Newmans when the Bank knew by the Pledge Agreement that said failure would occasion the loss of known rights possessed by the Newmans, and the misuse of this court, since at least 2005, to seek compensation to which the Bank had no rights." The punitive damages award of \$9,814,570.85 amounted to 150% of the compensatory damages award.

¶ 41 The trial court noted that PNB raised one significant objection: that the Newmans' evidence of damages was improper because the scope of the damages that they sought at trial were not specifically set forth in their prayer for relief. The court concluded that there was no basis under Illinois law for PNB to claim surprise, reasoning that PNB conducted no discovery over the 14 years that the case was pending, and that section 2-604 of the Code of Civil Procedure (Code) permits relief in excess of the amount requested under the prayer for relief. 735 ILCS 5/2-604 (West 2016) ("Except in cases of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise."). The court concluded that the Newmans' general prayer for relief provided adequate notice to PNB that additional consequential damages would be at issue and that there had been no change in the theory of the case or the types of remedies available under those theories.

¶ 42 On October 14, 2016, PNB filed a posttrial motion, arguing that the Newmans failed to allege a claim of conversion or breach of fiduciary duty involving the pledge

agreement and that allowing them to prosecute that claim deprived PNB of its due process rights; the pledge agreement claim was time-barred; that the Newmans should not have been awarded damages in excess of their prayer for relief; that the emotional distress damages were unwarranted; that the calculation of lost profits and lost wages was purely speculative and the award for lost equity contained a plain error; that the Newmans were not entitled to the entire \$150,000 letter of credit; that the award of 9% interest was unwarranted; that many of the attorney fees were unreasonable and should be reduced; and that the Newmans were not entitled to a punitive damages award. In regards to the trial court's December 11, 2015, order, PNB argued that the award of Rule 137 sanctions must be set aside because no evidentiary hearing was held and PNB's actions in pursuing the counterclaim were in good faith and in accordance with SBA standard operating procedure, and that even if sanctions were proper, they cannot reach back to July 2005.

¶ 43 On November 10, 2016, PNB filed a motion for equitable relief to prevent a fraud upon the court, arguing that the Newmans presented testimony at trial to establish that they each earned \$104,918 annually, when, in fact, they did not; that Terry Newman gave testimony that their business grossed \$3 million annually at the time of the sale, when, in fact, it did not; and that Terry Newman testified that their business was always profitable when, in fact, it was not. The Newmans moved to strike the motion on the basis that it was untimely as a section 2-1203 motion (735 ILCS 5/2-1203(a) (West 2016)) and premature as a section 2-1401 petition (*id.* § 2-1401). That same day, PNB also filed a motion to file documents under seal.

¶ 44 On March 21, 2017, the trial court entered an order denying PNB's posttrial motion, denying the Newmans' motion to strike PNB's motion for equitable relief; denying PNB's motion for equitable relief, finding it untimely; and denying PNB's motion to file documents under seal. PNB appeals.

¶ 45 On appeal to this court, PNB first asserts that the trial court violated its due process rights by allowing the Newmans to prosecute a claim that was not pleaded until the first day of trial, as their third-party amended complaint contained no factual allegations regarding the pledge agreement.

¶ 46 The Newmans respond that, at trial, they presented evidence of damages available under Illinois law for conversion and breach of fiduciary duty and that the proofs at trial were supported by the pleadings. They assert that there was no due process violation because there was no change in the theory of the case, and to the extent that PNB claims surprise by the evidence of lost income and profits, the fault was PNB's for failing to conduct discovery.

¶ 47 The constitutional right to due process requires notice and an opportunity to be heard and defend in an orderly proceeding. Ill. Const. 1970, art. I, § 2. Whether a trial court violated due process rights is a question of law that is reviewed *de novo*. *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 21.

¶ 48 The issues in a case are created by the pleadings and the allegations, to which the proof must correspond, and a party cannot have relief under proof without allegations. *In re Jackson*, 243 Ill. App. 3d 631, 651 (1993). Thus, a party must recover, if at all, according to the case he has made for himself in his pleadings, "and he cannot make one

case by his averments and have judgment on another and different ground without amendment, even though the different ground is established by the proof.” (Internal quotation marks omitted.) *Gault v. Sideman*, 42 Ill. App. 2d 96, 104 (1963). Due process requires that both parties know in advance of a proceedings which issues will be tried at that proceeding. *Delarosa v. Approved Auto Sales, Inc.*, 332 Ill. App. 3d 623, 627 (2002).

¶ 49 In considering whether the Newmans' complaint sufficiently supported its damages request at trial, we liberally construe the pleading to do substantial justice between the parties. 735 ILCS 5/2-603(c) (West 2016). We also consider the exhibits attached to the complaint, as they are considered part of the complaint. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18.

¶ 50 Here, count II, the conversion allegation, asserted that PNB received the entire \$150,000 of proceeds from the letter of credit; that the Newmans did not transfer their rights as beneficiaries to the letter of credit proceeds; and that without the Newmans' knowledge or consent, PNB applied the letter of credit proceeds to various loans and interest payments, which benefitted PNB and Amigos to the Newmans' detriment as they had no liability for the remaining loans that were partially paid by the proceeds. The Newmans claimed that they were damaged in the amount of \$150,000, "which [constituted] the balance of the proceeds and interest from the letter of credit." The Newmans' prayer for relief requested \$150,000, the amount of the letter of credit proceeds that PNB converted to its own use; interest on that amount; punitive damages in

an amount that would successfully deter similar future action; attorney fees; and "for other and such further relief as [the court] determines appropriate and just."

¶ 51 Count III, the breach of fiduciary duty allegation, asserted that PNB received the entire \$150,000 proceeds of the letter of credit; that the Newmans did not transfer or assign their rights as beneficiaries to the letter of credit proceeds; that PNB had a fiduciary duty to the Newmans to ensure that the proceeds were applied for the benefit of the beneficiaries; that PNB violated its fiduciary duty by taking the proceeds without the Newmans' notice or consent and unilaterally applying them to loans which provided no benefit to the Newmans but benefitted PNB; and the Newmans were damaged by PNB's violation of its fiduciary duties in the amount of \$150,000. The Newmans' prayer for relief echoed the language found in count II.

¶ 52 Attached to the complaint were copies of the March 30, 2001, letter of credit and the October 17, 2001, agreement.

¶ 53 The Newmans' amended third-party complaint pleads no facts and contains no allegations regarding the duties laid out in the pledge agreement. There is no claim that PNB had a fiduciary duty to notify the Newmans of a default by Amigos or that such failure caused them to lose an opportunity to retake the restaurants. Indeed, when this case was before this court in the previously filed interlocutory appeal, no argument was presented regarding this alleged duty and breach by PNB. This court did not contemplate such a duty and certainly did not determine that PNB violated that duty in our judgment as a matter of law in favor of the Newmans. See *Stevens v. Newman*, 2015 IL App (5th) 130338-U.

¶ 54 The Newmans cite to section 2-604 of the Code, which provides that relief may be granted under the general prayer different from that specifically prayed for when it is consistent with the facts alleged and proved, provided it does not take defendant by surprise. 735 ILCS 5/2-604 (West 2016); *Van Zanten v. Van Zanten*, 269 Ill. 491, 498 (1915). They assert that damages known to exist under a pled theory do not constitute a surprise.

¶ 55 While we agree that Illinois law does not require a plaintiff to specifically pray for every relief sought for it to be properly granted, we disagree with the Newmans that the relief granted in this case was consistent with the facts alleged and proved. As stated above, the Newmans failed to include any facts alleging a duty to notify the Newmans of a default by Amigos in their amended complaint and again failed to include this argument or a copy of the pledge agreement when ordered to present their case to the trial court via the pretrial memorandum; indeed, the Newmans affirmatively represented that the case would focus on claims based on the letter of credit. The Newmans cannot obtain relief for allegations that were not made.

¶ 56 This trial was intended to be on damages only, following this court's determination that the Newmans were entitled to judgment on the pleadings as a matter of law. However, in order for the trial court to reach its conclusion that the Newmans were entitled to lost profits, lost wages, and equity, it necessarily had to conclude that "had the Newmans been informed by the Bank of the default of [Amigos] \*\*\* the Newmans would have exercised their rights under the terms of the pledge agreement and taken back all stock and operational control of the eight Taco John's franchises at issue." This is a

finding of liability, not damages. In order to recover these damages, the Newmans were required to allege facts in their amended complaint establishing their rights under the pledge agreement. We therefore find that the trial court erred in awarding those damages, and we vacate and remand for a new trial limited to damages flowing from the breach of fiduciary duty and conversion claims based on PNB's misapplication of the letter of credit, which was properly alleged in the Newmans' amended complaint and affirmed in this court on appeal.

¶ 57 Due to the nature of our above conclusion, we decline to address PNB's arguments on points II, III, and IV of their brief.

¶ 58 We turn to the parties' arguments regarding the December 11, 2015, order. We reiterate the relevant procedural history below.

¶ 59 On September 10, 2015, the Newmans filed a motion requesting that the trial court enter summary judgment "on behalf of [the plaintiffs] and against PNB as the obligor to the Newmans in the amount of all amounts prayed for in the complaint filed by [the plaintiffs]." They cited the October 17, 2001, agreement as the basis for PNB's liability. The Newmans noted that the payment from PNB to the plaintiffs would resolve all material issues from the plaintiffs' November 22, 2002, complaint and excuse the Newmans from any remaining liability. The Newmans attached the trial court's November 18, 2013, order and this court's April 17, 2015, order.

¶ 60 On September 21, 2015, the plaintiffs filed a motion for summary judgment against the Newmans, arguing that the Newmans admitted liability for the lease default by obtaining a letter of credit specifically for securing rent payments for the Anna

location and later demanding PNB release the segregated letter of credit funds to satisfy their obligation to the plaintiffs. The plaintiffs also asserted that the Newmans admitted liability for the unpaid rent by pursuing and obtaining judgment against PNB for its conversion of the segregated letter of credit funds, noting that "[u]nless [the Newmans] were liable for the lease obligations to plaintiffs, [PNB] could not be guilty of conversion." Finally, the plaintiffs noted that the Newmans did not assign the lease to New Group, and the plaintiffs did not waive any rights against the Newmans as a result of rent being paid by New Group.

¶ 61 On December 11, 2015, the trial court granted the Newmans' summary judgment order and found the plaintiffs' motion moot, holding that that the plaintiffs were prohibited from claiming that the Newmans were liable under the lease because they had accepted rent payments from Amigos, thereby acquiescing to the assignment. The court concluded that, "based upon the assignment of the lease to [Amigos] and the letter of credit held by PNB, there is no material issue of fact."

¶ 62 Thereafter, on January 8, 2016, the plaintiffs filed a motion for leave to amend their complaint to conform to the summary judgment order. The amended complaint echoed the language used by the Newmans in count I of their third-party complaint against PNB, asserting that PNB was responsible for curing the default with the proceeds from the letter of credit. Like the Newmans, the plaintiffs asserted in their amended complaint that "[Amigos] did not complete a reassignment of the lease dated September 1, 1998." On January 29, 2016, the court granted plaintiffs' motion to amend the pleadings, and the plaintiffs filed their amended complaint that day.

¶ 63 Upon review of the trial court's December 11, 2015, summary judgment decision in its entirety, we find that this court has no option but to also vacate and remand this part of the trial court's order, as any other ruling would create inconsistencies with our holding in *Stevens v. Newman*, 2019 IL App (5th) 170155-U.

¶ 64 According to the October 17, 2001, agreement, "the letter of credit securing [the] lease [between the plaintiffs and the Newmans] will be reduced as lease payments are made by [Amigos]" and "the letter of credit securing the lease may be released to [PNB] when a reassignment is completed to [Amigos] of the lease dated September 1, 1998." Thus, the agreement states that the release of the letter of credit funds to PNB was contingent on a reassignment of the lease to Amgios. It was on this basis that the Newmans first sought indemnity against PNB in count I of their third-party complaint, asserting that PNB was responsible for curing the default with the proceeds from the letter of credit because if there was no reassignment of the lease, PNB did not have the authority to take the letter of credit funds for its own benefit.

¶ 65 The assertion that Amigos did not complete a reassignment of the lease, first stated by the Newmans in their amended third-party complaint, is reiterated in the plaintiffs' amended complaint, which was amended to conform to the December 11, 2015, summary judgment order. Yet, in granting the Newmans' summary judgment order in favor of the plaintiffs, the trial court concluded that a reassignment did occur.

¶ 66 A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from undisputed facts. *Williams v. Manchester*, 228 Ill. 2d 404, 417

(2008). Summary judgment remains a drastic means of disposing of litigation and therefore should be allowed only where the right of the moving party is clear and free from doubt. *Id.*

¶ 67 Here, an issue remains in dispute and affected the trial court's conclusion in disposing of both summary judgment orders. The court made its decision based on the conclusion that there was an implicit assignment of the lease to Amigos. However, in *Stevens v. Newman*, 2019 IL App (5th) 170155-U, this court concluded that there remains a genuine issue of material fact regarding whether the plaintiffs waived their objection to the assignment of the lease by their acceptance of rents from Amigos. Thus, for the same reasons as we have reached in *Stevens v. Newman*, 2019 IL App (5th) 170155-U, and the reasons stated above, the trial court's order granting the Newmans' motion for summary judgment in favor of the plaintiffs must be vacated and remanded for proceedings consistent with this order and *Stevens v. Newman*, 2019 IL App (5th) 170155-U.

¶ 68 We turn to PNB's arguments regarding the trial court's imposition of Illinois Supreme Court Rule 137 sanctions. Ill. S. Ct. R. 137 (eff. July 1, 2013).

¶ 69 In count I of their September 10, 2015 motion, the Newmans requested summary judgment in favor of the plaintiffs. In count II, they requested summary judgment as to their liability to PNB for the \$230,330 SBA loan, as they were no longer liable for payment on that loan and PNB no longer owned the loan that it sought to recover. In count III, the Newmans sought sanctions under Rule 137 against PNB, alleging that PNB continued to litigate their claim for the SBA loan for more than nine years after it had any

right to enforce the claim, and it made no effort to correct, dismiss, or inform the parties or the court that the counterclaim was no longer viable.

¶ 70 Attached to the motion was an affidavit by John Bancroft, a supervisory attorney for the SBA. The following information was included in the affidavit and in the associated documents attached as exhibits.

¶ 71 On July 19, 2005, PNB Senior Vice President Chris Howton sent correspondence requesting that the SBA honor its guaranty of the SBA loan. As part of that submission, PNB submitted a "wrap-up report" to the SBA. That report stated that all guarantors for the loan were pursued but had filed bankruptcy, eliminating all hope of recovery from them personally. On April 14, 2006, Howton requested that the loan be liquidated by the SBA, and on August 18, 2006, the SBA purchased the SBA loan from PNB, wiring \$151,404.22 for the loan in the principal amount of \$230,330.

¶ 72 Following the SBA's standard operating procedures (SOPs), the SBA referred the loan to the United States Department of Treasury (Treasury) for further attempted collection actions. On October 31, 2013, the Treasury demanded payment from Robert Newman; according to the SOPs, once the referral was made, the SBA obtained sole authority to continue litigation in the matter. On August 28, 2014, Bancroft executed a termination agreement on behalf of the SBA, releasing the Newmans from liability related to the SBA loans made to New Group and guaranteed by the Newmans; as a result of the loan purchase and the subsequent agreement, the Newmans were no longer liable for the SBA loan.

¶ 73 In the trial court's December 11, 2015, order, it found that PNB was aware that it could not continue litigation against the Newmans as of July 15, 2005, and that "all such litigation expenses that have accrued since that time were unnecessarily expended by the Newmans."

¶ 74 The trial court explained that PNB, following the SOPs, was required to submit litigation authority to the SBA upon its submission of the "wrap-up report" to the SBA. At that point, a referral to the Treasury was mandatory and a reasonable inquiry by PNB would have revealed that it no longer had authority to continue the litigation against the Newmans. The court stated that Rule 137 "allows this court to sanction PNB for an amount not less than the cost of litigation accrued by [the Newmans] since July 19, 2005." The court stated that in the alternative, PNB should have dismissed its suit against the Newmans upon either the receipt of the Treasury's demand to Robert Newman or the execution of the termination agreement entered into between the Newmans and the SBA, both of which could have been discovered through reasonable inquiry. The court ordered the Newmans' counsel to submit an affidavit for attorney fees and set the matter for hearing regarding the amount of the sanction; however, the court's only award of fees came in its July 28, 2016, judgment, which did not reference the sanctions order.

¶ 75 Illinois Supreme Court Rule 137 provides that a party may be sanctioned for filing pleadings that are interposed for an improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation. Ill. S. Ct. R. 137 (eff. July 1, 2013). Rule 137 requires that every pleading, motion, and other document of a party be well-grounded in fact and warranted by existing law or a good-faith argument for the

extension, modification, or reversal of existing law. *Id.*; *American Service Insurance v. Miller*, 2014 IL App (5th) 130582, ¶ 13. A trial court's decision to award sanctions is reviewed for an abuse of discretion. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 78.

¶ 76 PNB first argues that the Rule 137 sanctions must be reversed because the trial court entered the order granting the sanctions without providing PNB the opportunity for an evidentiary hearing. See *In re Estate of Baker*, 242 Ill. App 3d 684, 687-88 (1993) (Illinois law requires that a party subject to a claim for Rule 137 sanctions must be afforded an evidentiary hearing before sanctions may be imposed). However, the record reflects that a hearing was held on November 11, 2015, in which arguments were presented on the parties' pending motions, including the Newmans' motion for sanctions; the court's docket entry provides notations on the parties' sanctions arguments. Thus, PNB's argument is not well taken.

¶ 77 PNB next argues that the trial court erroneously relied on a 2013 amendment to the SBA's SOPs in holding that PNB had no authority to pursue the Newmans for their liability on the SBA loan since July 19, 2005. PNB asserts that during the majority of the time that it pursued the Newmans for liability on the SBA loan, the SOPs did not prohibit such collection efforts; therefore, PNB argues that the trial court erred in applying SBA authority applicable between 2013 and 2015 to conduct occurring between 2005 and 2013.

¶ 78 However, even assuming *arguendo* that this is true, we note that PNB still litigated the claim from 2013 to 2015, when the supposed amendment was in effect. During this

time, PNB knew or should have known through reasonable inquiry that it no longer owned the loan, that the issue had been referred to the Treasury, that the Newmans' liability on the loan had been terminated by the SBA, and that, pursuant to the SOPs in effect at that time, the SBA had obtained sole authority to continue litigation in the matter. Therefore, we find that the trial court did not abuse its discretion in determining that PNB's claim was not "well grounded in fact and [warranted] by existing law or a good-faith argument." See Ill. S. Ct. R. 137 (eff. July 1, 2013). Thus, at the very least, sanctions were warranted against PNB for its litigation efforts during that time period.

¶ 79 Finally, PNB argues that "even if sanctions are proper, they cannot reach back to July 2005." However, as the trial court did not explicitly award monetary sanctions based on Rule 137, we decline to determine the appropriate amount of attorney fees and attributable costs in this instance.

¶ 80 For the foregoing reasons, the trial court's July 28, 2016, order is vacated and remanded, and its December 11, 2015, order is vacated and remanded in part and affirmed in part.

¶ 81 Vacated and remanded in part and affirmed in part.