2014 IL App (1st) 130578-U
No. 1-13-0578
March 26, 2014

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

AMERICAN EAGLE BANK OF CHICAGO, Plaintiff-Appellee, v. CARD & PARTY GIANT IV, LTD., Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 12 M1 707788 The Honorable David A. Skryd, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting summary judgment on the use and occupancy is affirmed.

¶ 2 Plaintiff, American Eagle Bank of Chicago sued Card and Party Giant, VI, LTD, for the immediate possession of the commercial property at 1015 Waukegan Road, Glenview, under the Forcible Entry and Detainer Act, 735 ILCS 5/9-101 (West 2010). First, American Eagle obtained a "Judgment of Foreclosure and Sale," in a chancery proceeding and then,

before a judge hearing forcible entry and detainer actions, an order requiring defendant and tenant Card and Party to pay $5,000 a month for use and occupancy. After the chancery judge confirmed the foreclosure sale establishing American Eagle as the owner, American Eagle moved for summary judgment in this case on the past due use and occupancy charges. The trial court granted summary judgment, and entered a judgment against Card and Party for $30,000 on the unpaid use and occupancy.

¶ 3 Card and Party contends an evidentiary hearing should have been held on the validity of the lease agreement between it and the original owner. Additionally, Card and Party argues summary judgment was improper because the trial court erred in applying the statute governing use and occupancy payments. And, even if the statute applies, Card and Party's security deposit should have been used as a "setoff" to cover use and occupancy payments.

¶ 4 We affirm the trial court's grant of summary judgment and its award of use and occupancy.

¶ 5 BACKGROUND

¶ 6 Several years before this litigation, Card and Party's president, Charles Schwartz, entered into a five-year lease agreement with Ronald Kozil, the original owner of the property. Under the original lease, Card and Party agreed to pay $11,458.33 a month for rent from May 2003 through February 2006. Afterwards, the rent would increase in steps. Additionally, Card and Party would pay ownership taxes, estimated at $2,000 per month at the time the original lease was signed. On February 1, 2008, Card and Party and Kozil signed a five-year "Lease Extension Agreement," lowering the monthly rent to $11,000 and leaving Card and Party responsible for the ownership taxes until the lease terminated on January 31, 2013.

¶ 7 Three years later, on March 23, 2011, Card and Party and Kozil amended the lease extension agreement (First Amendment). While still required to pay ownership taxes, Card and Party's monthly rent dropped to $5,000 based on its "financial circumstances." The First Amendment also allowed Kozil to retain "sole discretion [to] terminate the Extended Lease and Tenant's right to possession of the premises upon thirty (30) day notice."

¶ 8 The parties disagree as to what occurred between Card and Party and Kozil following the execution of the First Amendment. Card and Party contends that on April 10, 2011, a little over two weeks after the First Amendment was prepared, a second amendment to the lease extension was executed (Second Amendment). Again citing the financial difficulties of Card and Party, the Second Amendment lowered the monthly rent to $3,500 and eliminated its responsibility for paying the ownership taxes. While referencing the original and extended lease agreements, the Second Amendment does not refer to the First Amendment. Card and Party also asserts a third amendment executed on the same day as the Second Amendment (Third Amendment), in which the rent remains the same, but the landlord's right to terminate the tenancy at his discretion no longer applies. The Third Amendment states,

> "Landlord and Tenant agree that as long as Tenant does not default in payment of reduced monthly gross rent of $3,500.00 per month through January 31, 2013, Landlord will take no action to terminate Tenant's leasehold interest hereunder, and no additional monies will be due."

¶ 9 Six months after the Third Amendment was allegedly executed, American Eagle became the mortgagee in possession of the property. As mortgagee in possession, American Eagle had authority to "collect the rents."

¶ 10 Both parties agree American Eagle received a copy of the Second Amendment from Card and Party on December 5, 2011. But, Card and Party contends that when it attempted to provide American Eagle with the Third Amendment, American Eagle "refused to acknowledge it." Conversely, American Eagle disclaims any knowledge of the existence of a Third Amendment until Card and Party attached it to its Answer to the motion for use and occupancy.

¶ 11 On January 27, 2012, American Eagle served notice to Card and Party of its intent to terminate the lease and "Tenant's Right to Possession" in 30 days.

¶ 12 On April 5, 2012, American Eagle filed for immediate possession of the property under the Forcible Entry and Detainer Act, 735 ILCS 5/9-101 (West 2010). Section 9-201 of the Act allows for an order requiring a tenant to pay a market reasonable rent referred to as "use and occupancy" through the duration of the lawsuit. See *Stein v. Green*, 6 Ill. 2d 234 (1955) (defines "use and occupancy" as "the value of the use and occupation of the land during the period of a defendant's wrongful possession, measured in terms of rents and profits.") American Eagle argued Card and Party's tenancy properly terminated on February 29, 2012, and, therefore, by failing to surrender the premises, Card and Party remained in possession without the right. American Eagle, as the mortgagee in possession, sought use and occupancy payments under section 201(2) of the Forcible Entry and Detainer Act. 735 ILCS 5/9-201 (West 2010). Section 201(2) provides when "lands are held and occupied by any person without any special agreement for rent," the landlord is entitled to "recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof." 735 ILCS 5/9-201(2) (West 2010).

¶ 13 Before the trial court and on appeal, Card and Party argues based on the Third Amendment's language, that American Eagle had no right to terminate the lease unless the tenant failed to make rental payments.

¶ 14 On May 15, 2012, an order of default in the foreclosure action was entered against several defendants, including Card and Party, by virtue of its leasehold interest in the property. The property was ordered to be sold to satisfy the amount due American Eagle in the judgment.

¶ 15 American Eagle purchased the property at the foreclosure sale. A decree confirming the sale, dated September 7, 2012, states that "in the event possession is withheld, the Sheriff of Cook County is directed to evict *** Ronald Kozil." The order went on to state that only the occupants named in the order of possession could be evicted "without a Supplemental Order of Possession or an order from the Forcible Entry and Detainer Court." Card and Party was not named on the order as an occupant.

¶ 16 On June 7, 2012, the trial court granted American Eagle's motion for use and occupancy as of May 1, 2012, at $5,000 per month for the duration of the litigation. The trial court's order does not state why or how it arrived at the $5,000. Shortly thereafter, the trial court denied Card and Party's motion to reconsider the grant of use and occupancy.

¶ 17 In September 2012, as the owner of the foreclosed property following the foreclosure sale, American Eagle filed a motion for summary judgment requesting a judgment for $25,000 in unpaid use and occupancy charges and immediate possession of the property. In reply, Card and Party offered Charles Schwartz's affidavit as evidence of the Third Amendment's authenticity. Schwartz states,

> "On April 10, 2011, I entered into a modification in the morning, which was then itself modified in the afternoon of April 10, 2011 *** after signing the initial agreement in the morning, I re-read it and realized that it did not remove the landlord's option to terminate the lease upon 30 days' notice *** he agreed to remove the 30 day provision and then we entered into the lease attached hereto."

¶ 18 On October 18, 2012, the trial court granted summary judgment in favor of American Eagle. Possession of the property is not at issue on this appeal, only the $30,000 judgment in use and occupancy charges, which depends on whether the Third Amendment raises an issue of fact as to the extant lease.

¶ 19 ANALYSIS

¶ 20 Before the trial court and on appeal, Card and Party argues based on the Third Amendment's language, that American Eagle had no right to terminate the lease unless the tenant failed to make rental payments. Card and Party contends the trial court erred by failing to hold an evidentiary hearing concerning the validity of the Third Amendment before granting use and occupancy payments. Furthermore, Card and Party maintains that the applicability of the Third Amendment is a genuine issue of material fact rendering summary judgment improper.

¶ 21 This court reviews the lower court's grant of summary judgment *de novo*. *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 236 (1996). Summary judgment is warranted when the pleadings and evidence as a whole reveal no genuine issue of material fact exists entitling the moving party to a judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2012);

Chatham Foot Specialists, P.C. v. Health Care Service Corp., 216 Ill. 2d 366, 376 (2005). To determine whether a genuine issue of material fact exists, the court reviews the evidence in the light most favorable to the non-moving party. *Harrison v. Hardin County Cmty. Unit School Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Also, the court must refrain from assessing the credibility of evidence presented on a motion for summary judgment. *Nosal*, 279 Ill. App. 3d at 236. As the Illinois Supreme Court noted in *Chatham*, "summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Chatham*, 216 Ill. 2d at 376 (quoting from *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 145 Ill. 2d 90, 102 (1992)).

¶ 22 We turn to section 201 of the Forcible Entry and Detainer Act. This section entitles an "owner of lands" to recover use and occupancy payments in five instances. 735 ILCS 5/9-201 (West 2010). Both parties agree section 201(2) is the provision relevant here. Section 201(2) allows use and occupancy "when lands are held and occupied by any person without any special agreement for rent." 735 ILCS 5/9-201(2) (West 2010). Card and Party claims American Eagle did not have the authority to terminate the special agreement for rent based on the alleged Third Amendment, which prohibited termination of the lease unless Card and Party failed to make rental payments of $3,500 a month. American Eagle asserts a Third Amendment never existed and that what Card and Party purports to be the Third Amendment is bogus.

¶ 23 Card and Party argues the trial court erred when it refused to consider as the extant lease Card and Party's alleged Third Amendment, which was attached to Schwartz's affidavit in response to American Eagle's motion for summary judgment. Card and Party contends the

Third Amendment raised a factual issue, namely, which lease controlled and, therefore, whether American Eagle could seek use and occupancy.

¶ 24 The purpose of a summary judgment proceeding is to determine whether there is competent evidence showing a genuine issue of material fact. Card and Party is correct that at the summary judgment stage, the court may not make credibility determinations *(Nosal*, 279 Ill. App. 3d at 236); however, evidence that would not be admissible at trial may not be considered in support or opposition of a motion for summary judgment *(Kaplan v. Disera*, 199 Ill. App. 3d 1093, 1096 (1990)). Accordingly, it is necessary for the trial court to consider and decide whether the affidavits and other supporting documentation would in fact be admissible evidentiary material at a trial on the merits; if not, the material should be excluded from consideration in connection with the summary judgment.

¶ 25 The admission of evidence falls within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion exists where " 'no reasonable person would take the view adopted by the trial court.' " *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848, (2010) (quoting *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005)).

¶ 26 To "authenticate a document, evidence must be presented to demonstrate that the document is what its proponent claims." *Gardner v. Navistar Int'l Transp. Corp.*, 213 Ill. App. 3d 242, 247-48 (1991). A finding that the document is authentic is merely a finding that there is sufficient evidence to justify presentation of the evidence to the trier of fact. But, this finding does not preclude the opponent from contesting the genuineness of the writing after the basic authentication requirements have been satisfied. *People v. Downin*,

357 Ill. App. 3d 193 (2005). A document may be authenticated by direct or circumstantial evidence. *People v. Towns*, 157 Ill. 2d 90 (1993).

¶ 27 Card and Party incorrectly contends that instead of holding an evidentiary hearing, the trial court "simply ignored the [Third Amendment] and entered an order for use and occupancy." Based on our thorough review of the record, we find the trial court properly determined the Third Amendment, and Schwartz's affidavit averring it, were inadmissible. The trial court found the circumstances surrounding the alleged execution of the Third Amendment suspicious: (i) the form of the Third Amendment differs drastically from the Second Amendment, yet it was dated the exact same day; (ii) it was not tendered to American Eagle until this matter was initiated; (iii) it was typed in a different font than the Second Amendment and has suspicious spacing; and (iv) it contains the exact same provisions as the Second Amendment, leaving out only the 30-day termination period. Just as the trial court did, we find Schwartz' affidavit was insufficient to create a genuine issue of fact as to whether the Third Amendment was authentic. We cannot say the trial court abused its discretion in finding the Third Amendment inadmissible and, therefore, hold the trial court properly disregarded the Third Amendment in deciding the motion for summary judgment.

¶ 28 As in this case, the court in *People ex rel. Dept. of Transp. v. Cook Development Co.*, addressed the defendant's claims that a "full evidentiary hearing was required before the circuit court could find that the lease had been terminated." *Cook*, 274 Ill. App. 3d 175, 180 (1995). In *Cook*, the court found if no evidence is presented, an evidentiary hearing is not required before deciding a motion for use and occupancy. *Id*. at 180 (stating further, "[h]ere, CDC proffered no evidence; thus, no evidentiary hearing was required.") As Card and Party correctly reasons, the language in *Cook* indicates that once it offered evidence supporting the

validity of the lease, an evidentiary hearing should have been held. American Eagle, however, is correct that the evidence proffered must be *admissible* evidence. (Emphasis added.) *CCP Ltd. P'ship v. First Source Fin., Inc.*, 368 Ill. App. 3d 476, 498-99 (2006) (noting an "affidavit may provide the authentication needed to make a document admissible"). Because the evidence of the Third Amendment was not admissible, consistent with the *Cook* decision, no evidentiary hearing was required before it could be disregarded.

¶ 29 Having found the Third Amendment inadmissible, the trial court did not need to make a determination of whether the original lease, the lease extension or an amendment, whether it was the First or Second, controlled because all of the documents the parties executed contained a 30-day notice provision. Accordingly, under either amended version of the lease, when American Eagle provided Card and Party with timely notice of its intent to terminate the lease, Card and Party's possession of the property after that time was unlawful. Hence, the only question before the trial court on summary judgment was what use and occupancy Card and Party owed.

¶ 30 In its order granting summary judgment, the trial court awarded $30,000 to American Eagle as a result of six months of litigation with a $5,000 monthly rate set for use and occupancy. Because no lease governed the parties at that time, having terminated on February 29, 2012, when Card and Party failed to properly surrender the premises, it owed use and occupancy payments. Finding no compelling reason to overturn the trial court's award, particularly in light of Card and Party's admission that it owed rent for the time it remained in possession of the property, we affirm the trial court's award.

¶ 31 Lastly, Card and Party asserts the trial court erred in failing to grant a setoff for the use and occupancy payments. For the first time, in a motion to reconsider the summary

judgment order, Card and Party claims the $22, 916.66 security deposit paid to Kozil should setoff the amount of use and occupancy owed to American Eagle. As a general rule, a defendant must raise a counterclaim, such as a setoff, before a motion to reconsider a judgment to give the other party notice and an opportunity to defend against the claim. *MidAmerica Bank, FSB v. Charter One Bank, FSB,* 232 Ill. 2d 560, 574-75 (2009). Relying on *Thorton v. Garcini,* Card and Party contends its setoff claim is not barred by *MidAmerica Bank a*nd may be asserted outside the pleadings. In *Garcini,* the court did not overrule *MidAmerica Bank,* but rather, found one particular type of setoff, which could be raised in a post-trial motion. *Thornton v. Garcini,* 237 Ill. 2d 100, 112-113 (2009). A setoff that is requested by a defendant as a "reduction of the damage award because a third party has already compensated the plaintiff for the same injury" is part of an "enforcement action" and can be raised at any point. *Garcini,* 237 Ill. At 113. This is not the type of setoff present here. Rather, the setoff claimed by Card and Party is a separate counterclaim, which should have been raised in a pleading. Therefore, this court will not review the setoff claim.

¶ 32 CONCLUSION

¶ 33 The trial court properly granted summary judgment in American Eagle's favor.

¶ 34 Affirmed.