2017 IL App (2d) 160100-U
No. 2-16-0100
Order filed April 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VPC PIZZA OPERATING COMPANY, Plaintiff-Appellee and Cross-Appellant, v. EAT PIZZA AT DOWNTOWN NAPERVILLE, LLC, BARRY ALLEN AYNESSAZIAN, and JOE LOCASCIO, Defendants-Appellants and Cross-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 13-LM-2699 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: In this forcible-entry-and-detainer suit, the trial court properly entered judgment in defendants' favor on the possession issue, but erred in calculating defendants' portion of property taxes and common area maintenance expenses. The court did not abuse its discretion in denying defendants' request for attorney fees. Affirmed in part and reversed in part; cause remanded.

¶ 2 Plaintiff, VPC Pizza Operating Company, a franchisor/lessee of a building containing a Giordano's restaurant in Naperville, sought to evict defendants/franchisees/sub-lessees, Eat Pizza At Downtown Naperville, LLC, Barry Allen Aynessazian, and Joe Locascio, following a dispute

over amounts owed for real estate taxes and common area maintenance expenses (CAM). Following a bench trial, the trial court declined to award VPC possession of the premises, but awarded it $199,488 for back due taxes and CAM, adopting defendants' proposed formula (that they each be calculated at a rate of 9.78%). The court also denied the parties' cross-motions for attorney fees, finding that neither party substantially prevailed in the suit. Defendants appeal from the denial of their attorney-fees petition, and VPC cross-appeals from the order concerning possession and calculation of taxes and CAM. We affirm in part, reverse in part, and remand cause for application of the proper formulas.

¶ 3 I. BACKGROUND

¶ 4 In August 2005, Naper Place, L.L.C., as landlord, and Giordano's Enterprises, Inc., (Giordano's), as tenant, entered into a lease (effective as of September 1, 2005, and amended several times thereafter) for the rental of certain space at 119 S. Main St. in Naperville. Also on this date, Giordano's entered into a sublease with defendants, who essentially assumed Giordano's obligations in its prime lease with Naper Place. Giordano's, as franchisor, and defendants, as franchisee, also entered into a franchise agreement. [1]

¶ 5 Subsequently, by virtue of a deed and assignment of the lease, Station II, LLC, became the successor-in-interest to Naper Place[2] and VPC became the successor-in-interest to Giordano's.[3]

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[1] Aynessazian and Locascio are Eat Pizza's two principals and formed the entity in order to enter into a franchise agreement with Giordano's. Aynessazian formerly worked for Giordano's.

[2] Station II, LLC, acquired the premises in 2012.

[3] In 2011, as part of Giordano's bankruptcy proceedings, Giordano's sold its rights under

¶ 6 In 2013, a dispute arose between Station II and defendants as to the amount of CAM and taxes defendants owed. In an April 29, 2013, email to Julie Peckham at Calibrate Property Management (Station II's property manager), Aynessazian stated that defendants disagreed with the property tax and CAM calculations and requested copies of supporting documentation. He also stated that defendants "will only be paying base rent this month" and that, if VPC tried "to auto debit our bank account for more than the base rent of $13,003 we will stop the payment from being processed." In June 2013, Calibrate sent a demand letter to defendants, and, in August 2013, Calibrate directed a five-day notice to VPC, demanding $26,657.96. 735 ILCS 5/9-209 (West 2014). Defendants also received the notice.

¶ 7 On August 23, 2013, Calibrate filed a forcible-entry-and-detainer complaint against VPC, seeking possession, over $26,000 in past due rent, CAM, real estate taxes, and certain additional rent from April 3, 2013. Subsequently, pursuant to an assignment-and-assumption agreement (wherein VPC paid defendant Eat Pizza's debt), VPC substituted itself as plaintiff and alleged that defendants defaulted under the lease and sublease by failing to pay certain rents, taxes and CAM.

¶ 8 The parties' dispute centered on the methodology for calculating the real estate taxes and CAM. The 2005 Naper Place-Giordano's lease provides that the tenant shall pay a certain portion of the taxes and CAM. As to CAM, section 6.02 of the lease provides that the tenant will reimburse the landlord for its proportionate share of all costs and expenses incurred by the landlord in managing, servicing, etc., "*all the common areas of the ground floor of retail space* and the non-structural elements of the building in which the Leased Premises are located (the 'Common Area Maintenance Expenses')." (Emphasis added.) The provision further provides:

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the franchise agreement, lease, and sublease to VPC.

> "Tenant's obligations shall be calculated as follows: (a) Landlord shall aggregate together all Common Area Maintenance Expenses; (b) multiply the CAM by a fraction, the numerator of which is the square footage of the Leased Premises and *the denominator of which is the total square footage of the leasable ground floor retail space*[.]" (Emphasis added.)

¶ 9 Section 7.02 of the lease addresses real property taxes. Section 7.02(a) states that the tenant "shall pay *all real property taxes on the Leased Premises* during the Lease Term." (Emphasis added.) Section 7.02(c) of the provides:

> "The Real Property Taxes may be imposed by the applicable governmental authorities *on the entire Development* depicted in Exhibit A hereto, *or on a portion thereof* including the Leased Premises. The percentage of the total Real Property Taxes applicable to said Development to be paid by Tenant hereto shall be equal to a fraction the numerator of which is the square footage of the Leased Premises and *the denominator of which is the total of the square feet of leasable area on the ground floor level of the Development*." (Emphases added.)

¶ 10 Thus, the formula for calculating defendants' share of CAM is: total CAM x (square footage of leased premises/square footage of leasable ground floor retail space). Additionally, the lease provides that the tenant shall pay its portion of CAM relating to the "ground floor of retail space" and defines CAM in this way. The lease provides that the tenant shall pay all the property taxes on the premises and contains the following formula calculating defendants' portion of the taxes: total real estate taxes x (square footage of leased premises/ square footage of ground floor leasable area).

¶ 11 The premises is a four-story building with a ground floor containing a mix of retail and non-retail space and upper floors consisting of apartments. The ground floor contains three retail areas and a common area (lobby) for the upper-level apartments (used by a local college as a dormitory). At trial, the parties stipulated that the: (1) Giordano's premises consists of 4,876 square feet; (2) total building square footage equals 49,863 square feet; (3) total retail space is 6,918 square feet; (4) ground floor space equals 9,764 square feet; (5) first floor common area (*i.e.*, lobby) equals 2,846 square feet; (6) 2011 total real estate taxes equaled $153,377.64; (7) 2012 total taxes equaled $154,133.86; and (8) 2013 total taxes were $162,686.38.

¶ 12 A. 2014 Bench Trial

¶ 13 The case was tried in two parts. First, on July 17, 2014, a bench trial commenced on VPC's two-count complaint for possession and rent. VPC maintained that CAM should be calculated by dividing the restaurant space by the total square footage of the leasable ground floor retail space. As to taxes, in 2011, Naperville Township assessed the property's value and specified a reduced percentage for retail. Calibrate, instead of calculating defendant's portion as 70% (based on the percentage of retail space they occupied), calculated their share as: 27% (the percentage specified by the township) x 70% = 18.9%. Defendants, according to VPC, refused to pay this amount via an email from Aynessazian.

¶ 14 Defendants' position was that, as to their share of the real estate taxes, the lease required that defendants' square footage be divided by the square footage of ground floor *leasable* space, not only *retail* space (*i.e.*, the denominator should be a larger number). They maintained that the non-retail leased space could be converted to retail space and should be considered leasable. Defendants also maintained that VPC had no coherent methodology to calculate CAM or for identifying expenses attributable to the ground floor retail space. Defendants disputed that they

refused to pay the amounts calculated by VPC, asserting that any amounts they owed were, pursuant to the lease, to be automatically debited by VPC from their account and that VPC did *not* attempt to debit the disputed amounts from this account.

¶ 15 Julie Peckham, Calibrate's property manager, testified on VPC's behalf that the 2011 tax bill on the building was $153,377.64. Defendants' share was calculated by dividing their square footage (4,876 square feet) by the first floor leasable space (6,918 square feet, which does not include the lobby area), which resulted in 70.48%, or $108,100.54. However, VPC did not charge defendants this amount. Rather, Peckham requested that the township itemize the commercial and residential aspects of the assessment. The assessor responded that 32.45% of the tax assessment was attributable to retail. Peckham then calculated defendants' portion by multiplying $153,377.64 (total assessment) by 32.45% (retail portion) and then by 70.48% (Giordano's portion of ground floor retail space), which equaled only $35,078.63. Defendants paid $17,229.84, resulting in a $17,846.65 shortfall.

¶ 16 For the 2012 tax year, Peckham again requested a breakdown from the township assessor, who calculated the retail portion of that year's $154,133.86 tax bill at 27.81%. She calculated defendants' portion as $30,210.98 ($154,133.86 x 27.81% x 70.48%). Defendants did not pay this amount, but paid an estimate of $7,314, comprising four months of payments based on an estimated $1,828.50 monthly amount. Thus, this resulted in a $22,896.98 shortfall.

¶ 17 Peckham further testified that she provided defendants with an estimate of their 2014 tax liability, which was $2,643.57. Defendants did not make any payments towards this liability, which resulted in a shortfall as of trial of $18,505.02. No monies were debited from defendants'

account toward payment of the 2013 tax bill. In sum, the total shortfall for taxes was $54,237.33.[4]

¶ 18 Next, Peckham related how she calculated defendants' CAM liability. (The lease provides that the tenant shall pay its portion of CAM that the landlord incurs in servicing the ground floor retail space and contains the following equation: CAM x (Giordano's space/leasable ground floor retail space).) Peckham testified that she divided defendants' square footage by the total building square footage and multiplied this amount by total CAM. For 2012, Peckham multiplied the $76,812.30 total CAM by 9.78% (4,876 square feet in tenant's space/49,863 of total building square footage), which resulted in $7,511.32.

¶ 19 In 2012, defendants paid $12,664.67 towards CAM (based on estimated expenses), but ultimately should have paid only $9,478.16. Thus, they overpaid $3,186.51. This amount was credited towards their 2013 liability. Defendants' estimated 2013 CAM payments were $1,125.54 per month. Total 2013 CAM was $57,773.18. Peckham's testimony about her calculations at this point is confusing, but, apparently, defendants made several months' payments and, in the end, there was a $3,194.49 deficiency. Peckham estimated the 2014 total CAM would be $72,657.32. Defendants owed $5,438.92 through July, plus $10,016.75 in management fees. In sum, they owed VPC $69,700.89 for CAM.

¶ 20 Peckham further testified that, once VPC filed its complaint on August 23, 2013, VPC/Calibrate ceased debiting defendant's account (August was not debited), but defendants have been continuously depositing money into the account. (The lease provides that the landlord will auto-debit all required payments.) However, Peckham also testified that VPC/Calibrate

[4] By this court's count, the total was $59,248.65.

ceased debiting defendants' account after she received an email from Aynessazian on April 29, 2013, stating that, if VPC debited the entire amount, defendants would refuse payment.

¶ 21 Addressing the lobby space, Peckham explained that there is a lock on the door for security reasons. The college leases the lobby space, and it does not pay CAM and taxes because they have a master lease and pay a set fee for the entire portion of the building that they are leasing. If taxes or CAM increase, the owner "would eat the cost."

¶ 22 As to section 6.02 of the lease, Peckham interpreted it as providing that defendants pay 70% of the CAM. "That's how it should be. That's not how I billed it." In 2012, 2013, and 2014, Peckham did *not* segregate expenses that were applicable only to the *retail* common area. Nor did she do this with respect to the property taxes. She used the assessor's percentage. Peckham agreed that section 7.02 of the lease—the provision addressing taxes—does *not* refer to retail space. But Peckham used the retail portion the assessor calculated to calculate defendants' share of the taxes.

¶ 23 VPC rested, and defendants moved for a directed finding (735 ILCS 5/2-1110 (West 2014)), arguing that VPC did not abide by the lease in calculating CAM and taxes and further arguing that VPC did not attempt to debit defendants' account after it filed its complaint, even though the disputed funds were in the account and the lease placed the burden on VPC to debit defendants' account.

¶ 24 The trial court granted defendants' motion for a directed finding on the issue of possession (735 ILCS 9-101 (West 2014)), noting that the case centered on the issue of what constitutes leasable space on the ground floor. The court found that the lobby area was once a common area and became leasable space once the college leased it. At that point, according to the court, the leasable ground floor space increased and this reduced what defendants owed. The

court noted that it could not make any findings as to the precise percentage because the parties disputed the square footage of the lobby area. However, it determined that the lobby area, which, it found, constitutes leasable space, must be considered in calculating the CAM and taxes that defendants owe. The court entered judgment in defendants' favor on the possession issue. The trial court continued the case so that the parties could calculate the precise amount owed (including the amount of leasable space that is the lobby).[5] As noted, they ultimately stipulated that the lobby area encompassed 2,846 square feet.

¶ 25 Defendants next orally moved for attorney fees under both the statute and the lease. The court denied the motion,[6] finding that there was a *bona fide* dispute and the case was not brought in bad faith. The court set the case for a pre-trial conference on the calculations.

¶ 26 B. 2015 Continuation of Bench Trial

¶ 27 On July 16, 2015, the second part of the trial commenced and the parties presented evidence on the rent (*i.e.*, taxes and CAM) issue.

¶ 28 Julia Peckham testified that Aynessazian emailed her in April 29, 2013, stating that, if VPC/Calibrate tried "to auto debit our bank account for more than the base rent of $13,003 we will stop the payment from being processed."

¶ 29 Aynessazian testified on defendants' behalf, acknowledging that he wrote the April 29, 2013, email to Peckham, but stated that the auto-debits continued for several months after he sent the email.

[5] The parties disagreed on the size of the lobby area. VPC maintained it was 2,786 square feet, and defendants maintained it was 3,081 square feet.

[6] The court later noted that the denial was without prejudice.

¶ 30 Addressing the tax calculation, Aynessazian stated that he would use the total ground floor space and divide it by the total building square footage, or about 19.58%. Then, Aynessazian continued, he would divide the Giordano's space (4,876 square feet) by the total ground floor square footage (9,764 square feet), which equals 49.94%. To calculate defendants' share of the taxes, Aynessazian maintained that he would multiply 49.94% by 19.58%, which yields 9.7%.[7]

¶ 31 At the end of trial, the court ruled that it accepted defendants' view as to the manner by which to calculate taxes under the lease. Specifically, it found that defendants' portion was 9.78%, based on the fact that the Giordano's space constitutes 9.78% of the entire building. As to CAM, the court announced that "the same logic" applies and that Peckham did not offer any testimony as to what percentage of CAM is attributable to the ground floor as opposed to the entire building. Thus, "the only reasonable interpretation of the lease is the application of the same percentage to the [CAM] as was applied to the taxes." The court adopted the 9.78% figure for the CAM calculation. The trial court continued the case for entry of a written judgment order.

¶ 32 On September 24, 2015, defendants moved to reconsider the denial of their fee petition following the first part of the trial and for leave to re-file a fee petition. They argued that they were entitled to the contractual fees because they prevailed with respect to the possession claim and prevailed in defeating the rent claim. On November 6, 2015, VPC filed its own motion for

[7] This figure is very close to the 9.78% figure the trial court ultimately found applied to both taxes and CAM, but is arrived at by a different formula: 19.5% (first floor as percentage of building) x 49.9% (restaurant's share of first floor) = 9.74%. The 9.78% figure is derived by calculating the restaurant's square footage as a percentage of the total building square footage.

leave to file a fee petition, arguing that, because defendants had to pay $199,448.20 (as we note below) on VPC's rent claim, VPC was the prevailing party.

¶ 33 On December 10, 2015, the court entered judgment in defendants' favor and against VPC on the possession claim. It found that the past due amounts of CAM and taxes were $199,448 and that payment had been received. Further, the court ordered that defendants pay real property taxes on the leased premises at a rate of 9.78% of the real property taxes on the total leased building during the lease term. It also ordered that defendants pay CAM fees at the rate of 9.78% of the total CAM charges during the lease term. The court continued the case for hearing on the cross-motions for attorney fees.

¶ 34 On January 11, 2016, the trial court denied the parties' cross-motions for fees "for the reasons stated in open court." There, it had found that neither party was the prevailing party on the issues in the case, and, thus, attorney fees were not appropriate. The court further found that each part "prevailed on some part of the controversy," with defendants prevailing at the initial hearing on the possession issue and with VPC prevailing "to a certain extent" as to the CAM issue. However, in the court's view, neither party substantially prevailed. It also found that there was no just reason to delay appeal of its order pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016). Defendants appeal from the denial of their attorney-fees petition, and VPC cross-appeals from the order concerning possession and calculation of taxes and CAM.

¶ 35 II. ANALYSIS

¶ 36 We first address the issues in the cross-appeal, which involve the lease. Normal principles of contract interpretation apply in interpreting a lease. *Midland Management Co. v. Helgason*, 158 Ill. 2d 98, 103 (1994). The principal objective in construing a contract is to determine and give effect to the parties' intent at the time they entered into the contract. *Fleet*

Business Credit, LLC v. Enterasys Networks, Inc., 352 Ill. App. 3d 456, 469 (2004). To determine the parties' intent, we must look to the instrument itself, its purpose, and the surrounding circumstances of its execution and performance. *Id.* If the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). If the terms of the contract are reasonably susceptible of more than one meaning, they are ambiguous and will be strictly construed against the drafter. *Id.* Further, if the language of the contract is ambiguous, we may look to extrinsic evidence to determine the parties' intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). An ambiguity is not created simply because the parties do not agree upon an interpretation. *Fleet Business Credit*, 352 Ill. App. 3d at 469. We review *de novo* the interpretation of a lease. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005).

¶ 37 A. CAM

¶ 38 We begin by addressing the CAM and tax issues because they are the central issues in this appeal. As to CAM, the lease states that the tenant will pay its portion of expenses incurred in servicing the ground floor retail space common areas and defines CAM in this way: it notes that the tenant will reimburse the landlord for its proportionate share of all costs and expenses incurred by the landlord in managing, servicing, etc., "*all the common areas of the ground floor of retail space* and the non-structural elements of the building in which the Leased Premises are located (*the 'Common Area Maintenance Expenses'*)." (Emphases added.) The lease also contains a formula for calculating defendants' share of CAM: total CAM x (square footage of leased premises/square footage of leasable ground floor retail space).

¶ 39 The trial court found that the lease was "not a model of clarity." As to CAM, the trial court determined that the lease provides that the landlord will maintain the ground floor retail space and further found that there was no evidence specifying what portion of CAM was attributable to the ground floor, as opposed to the entire building. Thus, "the only reasonable interpretation of the lease is the application of the same percentage to the [CAM] as was applied to the taxes," specifically, 9.78% (which is derived by calculating the restaurant's square footage as a percentage of the total building square footage).

¶ 40 VPC argues first that the proper apportionment of CAM to defendants is 49.9%, which it arrives at as follows: square footage of leased premises/square footage of leasable ground floor retail space = 4,876/9764 = 49.9%. In this calculation, which it advanced at oral argument, VPC includes the lobby area in the denominator. VPC argues elsewhere that the proper apportionment of CAM to defendants is 70%, which it arrives at as follows: 4,876/6,918 = 70%. In this calculation, VPC does *not* include the lobby area in the denominator, as the trial court did, arguing that the college is not using it as retail space.

¶ 41 Defendants respond that the lease provides, at section 6.02, that defendants shall pay the landlord for their proportionate share of the costs incurred in maintaining "all common areas of the *ground floor* of retail space." In defendants' view, the CAM to be apportioned to the restaurant is limited to the CAM expenses for the ground floor, not the entire building, a view the trial court accepted. Defendants offer no precise calculation in their brief, relying instead on the trial court's calculation of 9.78%.

¶ 42 We conclude that the trial court erred in its determination. The lease provision addressing CAM begins by stating that the landlord agrees to maintain the common areas of the "ground floor retail space" and that the tenant agrees to reimburse the landlord for costs incurred

by it in maintaining "all common areas of the ground floor of retail space and the non-structural elements of the building in which the Leased Premises are located (the 'Common Area Maintenance Expenses')." Thus, clearly, the lease *defines* CAM as those expenses related to the common areas of the *ground floor retail space* and further provides that defendants' obligation is to pay only a portion of the expenses related to ground floor retail space maintenance. The lease continues, listing examples of CAM, including water, sewer, snow and trash removal, attorney and auditor fees, etc. Finally, as relevant here, it specifies the following fraction: square footage of leased premises/square footage of leasable ground floor retail space. But, again, the lease defines CAM as the expenses related only to the common areas of the ground floor retail space. Thus, defendants' contractual obligation is more limited than the CAM fraction. As the trial court noted, the evidence did not reflect that the CAM expenses were itemized in such a way as to specify the portion attributable to the ground floor retail space. The court used the following calculation: Giordano's square footage/total building square footage: 4,876/49,863 = 9.78%.

¶ 43 We conclude that the proper calculation *first* assesses ground floor retail square footage (which does *not* include the lobby area, as discussed below) as a percentage of the total building square footage: 6,918/49,863 = 13.87%. Thus, as the lease states, the CAM that defendants owe is their portion of 13.87% CAM, *i.e.*, the CAM attributable to the ground floor retail space. *Next*, defendants' specific portion is calculated by applying the lease fraction: square footage of leased premises/square footage of leasable ground floor retail space. The square footage of the Giordano's restaurant is 4,876 square feet. The question with respect to the denominator—the leasable ground floor retail space—is whether the lobby area should be included as part of that space. The lobby area is not currently used as a retail space, but it is leased out. The general public does not have access to it, as they do to the retail spaces. We conclude that the trial court

erred in determining that the lobby is part of the leasable ground floor retail space. Thus, we calculate the CAM fraction as follows: 4,876/6,918 = 70.4%. Finally, the complete equation, applying the unambiguous contractual language, is: 13.87% x CAM x 70.4% = 9.76% CAM. In calculating CAM at 9.78%, a percentage that does not vary from this court's calculation by a significant amount, the trial court erred by utilizing an incorrect formula.

¶ 44 B. Taxes

¶ 45 Turning to real estate taxes, the lease states that the tenant "shall pay all real property taxes on the Leased Premises during the Lease Term." The definition of real property taxes is not limited to a certain portion of the building or with respect to a certain use. The lease also contains the following fraction: square footage of leased premises/square footage of ground floor leasable area. [8] The trial court found that the leased premises constitutes 9.78% of the entire building and that the lease "is clear" that defendants are responsible for that percentage of each year's taxes.

¶ 46 VPC argues that the proper apportionment of taxes to defendants is 49.9%, which it arrives at by utilizing the lease's formula, as follows: 4,876/9,764 = 49.9%. For the denominator, VPC includes the lobby area as part of the ground floor leasable area. VPC maintains that the lease is not ambiguous and that there is no interpretation where the court could deem the denominator—the ground floor leasable area—to be the entire building, including the upper floors.

¶ 47 Defendants maintain that the trial court did not err in its calculation, noting that the lease provides that the tenant shall pay property taxes "on the Leased Premises" and that the leased

[8] We note that the tax denominator—ground floor leasable area—is not as limiting as the CAM denominator—leasable ground floor retail space.

premises comprises only 9.78% of the building: 4,876 (square footage of Giordano's)/49,863 (total building square footage). They contend that VPC ignores the limiting language in the lease. They do not explain how the fraction factors into their calculation.

¶ 48 We agree with VPC that the lease unambiguously provides that the proper apportionment of the total real estate taxes (*i.e.*, on the entire building) to defendants is 49.9%. Section 7.02(c) of the lease states: "The Real Property Taxes may be imposed by the applicable governmental authorities on the *entire* Development *** or on *a portion thereof* including the Leased Premises." (Emphases added.) It continues, stating that the percentage of "*total* Real Property Taxes" (emphasis added) assessed against the tenant is the following fraction: square footage of leased premises/ground floor leasable area. The trial court focused on the general language that obligates the tenant to pay taxes on the leased premises. Section 7.02(a) of the lease states: that the tenant "shall pay all real property taxes on the Leased Premises during the Lease Term." However, the court ignored the specific formula by which the tenant must satisfy this obligation. Section 7.02(c), again, specifies how the taxes are to be calculated, specifically, by applying the following fraction: square footage of leased premises/square footage of ground floor leasable area. Applying the stipulated numbers to this equation, we conclude that defendants' proportion is: 4,876/9,764 = 49.9%. The denominator is the square footage of the ground floor area, *including* the lobby area, because it is leasable area. Indeed, it is currently being leased to the college.[9]

¶ 49 Returning to the first sentence of section 7.02(c) quoted above, which acknowledges that taxes may be assessed on the entire property or a portion thereof, we address the import of that

[9] We disagree with the dissent's reading that it must be leasable *by defendants*. The contract does not contain this limitation.

sentence on the specified fraction for calculating defendants' share because a question necessarily arises in cases where the assessor provides an assessment for only a portion of the property. We conclude that the fraction does not, indeed, cannot, apply when an assessment is provided on only the retail portion because the fraction includes in the denominator "ground floor leasable area," which necessarily includes the lobby area, a leasable area that is not a retail area. In other words, an assessment for the retail portion of the property would not include the lobby area and, thus, a fraction that applies to calculate defendants' share of taxes cannot apply in cases where the assessment is for that limited portion. We hold that the lease unambiguously provides that the equation containing the fraction applies only in cases where the assessment is for the entire property.[10]

¶ 50 In sum, we hold that the trial court erred in finding that defendants' portion of property taxes is 9.78%. The proper apportionment to defendants when taxes are assessed on the entire property is 49.9%. Although we appreciate the trial court's equitable approach to the issue, we believe that the court ignored the lease's terms, which, although harsh, are clear.[11]

[10] In cases where the assessment is only for a portion of the property, an issue on which the parties did not focus, the lease is silent as to the proper apportionment between the tenants. Thus, where the assessor apportions taxes to provide a figure for ground floor retail space, the lease offers no guidance. In this respect, the trial court erred in failing to consider the parties' course of conduct for tax years in which the retail apportionment was provided and used. Similarly, as to the question concerning which assessment to use when both are available, the lease is silent. This does not render it ambiguous, as the dissent suggests. On this question, we believe that the trial court erred in failing to consider the parties' course of conduct.

[11] We further note that, in arriving at this conclusion, we make no assumptions as to what

¶ 51 C. Possession

¶ 52 Next, VPC argues that the trial court erred in entering a directed finding in defendants' favor on the possession issue. It contends that it should have been awarded possession because defendants had ceased making the CAM and tax payments (starting in May and never made any after August 13, 2013) and never attempted to tender any amounts in September 2013. Defendants' email to VPC, wherein it stated that, if VPC tried to auto-debit defendants' account for more than the base rent, defendants would stop the payment from being processed, reflects that it would have been futile for VPC to debit the amounts owed. Rather, VPC asserts that defendants should have attempted to cure VPC's demand with an amount they believed was due and owing. Instead, defendants did nothing and, therefore, cannot avoid the effect of a five-day notice—awarding possession to VPC.

¶ 53 Defendants respond that VPC failed to establish that defendants underpaid rent. Peckham, according to defendants, testified that she did not know the amounts that were owed under the lease, and VPC presented no evidence of the rent due. Defendants note that they kept sufficient funds in the account to be debited and that they had no further responsibility. They also argue that VPC forfeited its argument that defendants were required to cure the demand with the amount they believed was due and owing because it failed to raise the argument below.

¶ 54 In a bench trial, a motion for a directed finding is governed by section 2-1110 of the Code of Civil Procedure. 735 ILCS 5/2-1110 (West 2014). Under that statute, the trial court must "weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence." *Id.* Thus, "the trial court does not view the evidence most favorably to the

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the other building tenants pay in taxes and, thus, cannot conclude, for example, that the total real estate taxes paid by the tenants is greater than 100% of the tax bill.

plaintiff but rather (1) determines whether the plaintiff has made out a *prima facie* case, then (2) weighs the evidence, including that which favors the defendant." *Zankle v. Queen Anne Landscaping*, 311 Ill. App. 3d 308, 311 (2000). "If, after weighing the evidence, the court decides that evidence necessary to [the] plaintiff's *prima facie* case has been negated, the court should grant the motion for a directed finding and enter judgment for the defendant." *Orbeta v. Gomez*, 315 Ill. App. 3d 687, 690 (2000). We will not reverse a trial court's ruling on a motion for a directed finding, unless it is contrary to the manifest weight of the evidence. *Id.*

¶ 55 An action under the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2014)) "is a special statutory proceeding, summary in its nature, in derogation of the common law, and a party seeking this remedy must comply with the requirements of the statute." (Internal quotation marks omitted.) *Eddy v. Kerr*, 96 Ill. App. 3d 680, 681 (1981). "The distinct purpose of the forcible entry and detainer proceeding is to determine only who should be in rightful possession." *Miller v. Daley*, 131 Ill. App. 3d 959, 961 (1985). Under the Act, it is the party asserting its right to possession who bears the burden of proof (*Harper Square Housing Corp. v. Hayes*, 305 Ill. App. 3d 955, 963 (1999)) and must establish its right to possession by a preponderance of the evidence. 735 ILCS 5/9-109.5 (West 2014); *Circle Management, LLC v. Olivier*, 378 Ill. App. 3d 601, 609 (2007).

¶ 56 At the 2014 trial, the trial court found that the issues centered on what constituted leasable ground floor space and the effect the lobby space, which had previously been a common area, had on the relevant calculations. It noted that it could not make any determination based on Peckham's testimony or by the stipulations as to the proper fractions to apply to the taxes and CAM calculations. It also determined that the lobby space constitutes leasable space that has to

be considered in the calculations. The trial court granted defendants' motion for a directed finding and entered judgment in their favor and against VPC.

¶ 57 We conclude that the trial court did not err in entering judgment in defendants' favor on the possession issue. The trial evidence consisted primarily of Peckham's testimony concerning the calculations of taxes and CAM assessed against defendants. The testimony was somewhat confusing, but it was clear that Peckham's use of the retail apportionment from the assessor to calculate defendants' tax obligation was not consistent with the lease. Although she testified that this method was advantageous to defendants, we agree with defendants that her calculation was not consistent with the lease formula. The tax fraction is: the leased premises square footage/leasable ground floor area. The fraction does not reference any *retail* area. Thus, Peckham's calculations are not based on lease.

¶ 58 VPC's failure to prove its case is also reflected in the fact that it did not attempt to debit defendants' account, as the lease required it to do, for the taxes and CAM payments. VPC's assertion that it would have been futile to do so is not well taken because there was no evidence presented, for example, that defendants actually instructed their financial institution to cease processing any such payments. Furthermore, we find forfeited VPC's argument that a tenant must attempt to cure a demand with the amount it believes is due and owing. See, *e.g.*, *Elizondo v. Medina*, 100 Ill. App. 3d 718, 721 (1981) (no error in finding that the defendant defaulted by not tendering rent, where it is well-settled that one must pay the entire rent that is due after a five-day notice has been given; fact that five-day notice demanded more than the plaintiff was entitled to receive did not invalidate the notice). VPC did not raise this argument below, and it is forfeited. Forfeiture aside, in light of VPC's failure to even attempt to first debit defendants' account, its cure argument is unavailing.

¶ 59 In summary, the trial court did not err in entering judgment in defendants' favor on the possession issue.

¶ 60 D. Attorney Fees

¶ 61 Defendants appeal from the trial court's denial of their attorney-fee petition, arguing that the trial court abused its discretion in denying the petition, where they were the prevailing party on the issues before the court. For the following reasons, we reject defendants' argument.

¶ 62 Ordinarily, the losing party in a lawsuit cannot be required to pay attorney fees to the winning party. *Bjork v. Draper,* 381 Ill. App. 3d 528, 543 (2008). However, contractual "fee-shifting" provisions for the award of attorney fees will be enforced by the courts, and we strictly construe such provisions. *Id.* at 543-44.

¶ 63 Where a lease is involved, "a party is entitled to an award of attorney fees under [a fee-shifting] provision only when she or he can demonstrate that the other party was compelled by the trial court to obey a condition of the lease." *Powers v. Rockford Stop-N-Go,* 326 Ill. App. 3d 511, 516 (2001). This is a fact-based inquiry, and we review the trial court's ruling for an abuse of discretion. *Id.*; see also *R.J. Management Co. v. SRLB Development Corp.*, 346 Ill. App. 3d 957, 971 (2004) ("[w]hether and in what amount to award attorney fees is within the discretion of the trial court, and the decision will not be disturbed on appeal absent an abuse of that discretion").

¶ 64 "A party can be considered a 'prevailing party' for the purposes of awarding fees when he [or she] is successful on any significant issue in the action and achieves some benefit in bringing suit [citation], receives a judgment in his favor [citation][,] or by obtaining an affirmative recovery." *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1992). "To qualify as a prevailing party, a plaintiff must succeed in

obtaining some relief from the defendant against whom attorney fees are sought." *Community Consolidated School District No. 54 v. Illinois State Board of Education*, 216 Ill. App. 3d 90, 94 (1991). A successful litigant is considered the prevailing party under a fee-shifting provision even if the judgment amount is below the amount claimed. *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 282 (2001). However, when a dispute involves multiple claims and both parties have won and lost on different claims, it may not be appropriate to find that either party is the prevailing party. *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007). See, *e.g.*, *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861 (2000) (where former employer sued former employee for breach of contract, trial court's determination not to award attorney fees was affirmed, because both parties were successful on significant issues in the case; the plaintiff received a judgment that the defendant breached the agreement, and the defendant succeeded on the damages claims—the plaintiff failed to prove any actual damages).

¶ 65 Here, section 17.01 of the lease agreement contains the following fee-shifting provision:

> "In the event of any action or proceeding brought by either party against the other under this Lease the *prevailing party* shall be entitled to recover from the other all costs and expenses including without limitation the reasonable fees of its attorneys in such action or proceeding, including costs of appeal, if any, in such amount at the court may adjudge reasonable." (Emphasis added.)

¶ 66 The trial court refused to award VPC possession of the premises, entering a directed finding in defendants' favor. However, it awarded VPC $199,488 for back due taxes and CAM, by adopting defendants' proposed formula (that they be calculated at a rate of 9.78%). The trial court denied the parties' cross-motions for attorney fees, finding that each party "prevailed on

some part of the controversy" (with defendants prevailing on the possession issue and with VPC prevailing "to a certain extent" as to the CAM issue), but that neither party substantially prevailed on any issue in the case.

¶ 67 Defendants argue that they were the prevailing party at trial. They assert that they prevailed on both issues before the court: possession and calculation of property taxes and CAM. Defendants note that, after the court denied VPC's claim for possession and found that defendants did not owe VPC anything as of the five-day notice, the secondary issues of taxes and CAM became relevant. The focus of the taxes and CAM issues were not, they note, whether *any* amounts were due, but, rather, the *rate* at which the payments were to be calculated. VPC's position was that property taxes be assessed to defendants at a rate of 49.9% and that CAM be calculated at a rate of 70%

¶ 68 Defendants note that their position has been that both taxes and CAM should be calculated as a portion of the leasable ground floor space, including the lobby, occupied by Giordano's, with a second calculation being the relation of the ground floor space to the entire building, or 9.78% of the taxes and CAM. The trial court adopted defendants' calculations. Thus, defendants maintain that they prevailed on the second issue. In sum, they assert that, because they prevailed on both issues, they are entitled to recover their reasonable attorney fees under the lease.

¶ 69 VPC responds that, while the trial court granted defendants a directed finding on the possession issue, it awarded VPC $199,448.20 on the rent claim and, therefore, VPC is the prevailing party. VPC contends that, once defendants sent the email stating that they would stop the auto-debits from being processed if VPC attempted to take more than the base rent, VPC was forced to pay the amounts due to avoid losing its lease to eviction and forced to assume this

action to recover the taxes and CAM due and owing. VPC urges that it successfully sought and received payments from defendants because of the judgment in this case and that defendants should not benefit from the attorney fees provision when they substantially breached the lease by refusing to pay the taxes and CAM, along with rent.

¶ 70 We conclude that, although we find error with some of the trial court's findings, we agree with its finding that neither party substantially prevailed in this case and, therefore, attorney fees to defendants were not warranted. Defendants prevailed on the possession issue (a finding we affirm) and essentially prevailed on the CAM issue, but they did not prevail with respect to the property taxes. We concluded above that the trial court erred in adopting defendants' proposed calculation, and we agreed with VPC's reading. Given that defendants have won and lost on different claims, the trial court did not abuse its discretion in denying them attorney fees. *Peleton*, 375 Ill. App. 3d at 227.

¶ 71 III. CONCLUSION

¶ 72 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed in part and reversed in part and the cause is remanded for application of the proper formulas.

¶ 73 Affirmed in part and reversed in part; cause remanded.

¶ 74 JUSTICE McLAREN, concurring in part and dissenting in part.

¶ 75 I concur in the majority's disposition with the exception of the calculation of the real property taxes; I dissent as to that calculation.

¶ 76 Section 7.02(c) of the lease provides:

> "The Real Property Taxes may be imposed by the applicable governmental authorities on the entire Development depicted in Exhibit A hereto, or on a portion thereof including the

> Leased Premises. The percentage of the total Real Property Taxes applicable to said Development to be paid by Tenant hereto shall be equal to a fraction the numerator of which is the square footage of the Leased Premises and the denominator of which is the total of the square feet of leasable area on the ground floor level of the Development."

¶ 77 The majority finds the lease unambiguous in its allocation of property taxes. See *supra* ¶ 48 ("the lease unambiguously provides;" "Section 7.02(c), again, specifies how the taxes are to be calculated"); ¶ 49 ("the lease unambiguously provides that the equation containing the fraction applies only in cases where the assessment is for the entire property"); ¶ 50 ("the court ignored the lease's terms, which, although harsh, are clear"). However, by its very nature, this lease is ambiguous as to the allocation of property taxes. Further, the actions of the parties, and the actions and interpretations of the trial court and this court, demonstrate that this lease was far from unambiguous.

¶ 78 The very first sentence of section 7.02(c) dictates that a governmental authority may choose the method used to impute taxes to the "leased premises." A third party, not party to the lease, has the option to determine the first step in the calculation of defendants' tax liability—whether to impose the property taxes on the entire development or on a portion of it, including the leased premises. The majority barely acknowledges this, noting in a footnote that, where the assessment is only for a portion of the property, "the lease is silent as to the proper apportionment between the tenants. Thus, where the assessor does not apportion taxes to provide a figure for ground floor retail space, the lease offers no guidance." *Supra* ¶ 49 n. 9. Apparently, the majority concludes that it does not require much discussion, as it is "an issue on which the parties did not focus." *Id*.

¶ 79 However, it is relevant to this case. Here, the property manager testified that, for tax year

2011, she initially received a tax bill on the entire building, which resulted, by her calculation, in defendants' share of $108,100.54. She then requested an itemized assessment from the assessor, breaking out the commercial and residential aspects of the assessment; that resulted in a bill for defendants of $35,078.63. See *supra* ¶ 15. Thus, a second level of ambiguity is introduced: the property manager can accept the assessor's method of taxing or request an alternative method. We now have two entities that have input as to the basic method of apportioning the tax: the assessor and the property manager. Who gets to decide which bill is used? Do defendants have any say in the matter? On what basis is the decision to be made? Remember, this is just the first step—the creation of the tax bill. How is this clear and unambiguous? For the 2011 tax year, the assessor provided two tax bills, and the property manager came up with two possible apportionments for defendants: 70.48% of the total tax ($108,100.54) and 22.87% ($35,078.63). Defendants came up with 9.7%, the trial court with 9.78%. The majority here agrees with VPC that the proper percentage is 49.9% and finds that the lease "unambiguously provides" for this calculation (*supra* ¶ 48). How is this so?

¶ 80 The majority here rightly affirms the trial court's denial of fees to both parties. A trial court's decision on the issue of fees is entitled to great weight and will not be reversed absent a clear showing that it abused its discretion. *DeGraff v. Kaplan*, 109 Ill. App. 3d 711, 715 (1982). However, the majority also concludes that the property tax clause of the lease was *unambiguous*. If that is so, there could be no *bona fide* dispute regarding taxes and, by definition, defendant's interpretation regarding taxes could not have been made in good faith. Defendants would have been in clear breach of contract, and VPC should have been awarded fees. How could the trial court have not abused its discretion where defendants had no *bona fide* dispute under the unambiguous words of the lease? The majority fails to address, let alone attempt to explain, this

patent contradiction in its findings.

¶ 81 There is an ambiguity in the phrase "the denominator of which is the total of the square feet of leasable area on the ground floor level of the Development." The ambiguity lies in whether the language includes only the retail space located on the ground floor or the entire ground floor (retail space plus the lobby). I submit that the most reasonable interpretation is that the denominator should exclude the non-retail area on the first floor (the lobby); this interpretation is the most reasonable because defendants do not have any rights to the non-retail area on the first floor, and their tax liability should not be affected by premises that are not part of the leased premises. The lobby has been leased by a third party; thus, it is *not* leaseable (or useable) by defendants. Section 7.02(a) of the lease provides that "Tenant shall pay all real property taxes on the Leased Premises during the Lease Term." I wish to emphasize that the term "leased premises" relates to: (1) the specific premises leased exclusively to defendants; and (2) the Common Areas benefitting the exclusive premises. The lease does not provide that defendants shall also pay a portion of the real property taxes of the upstairs tenant.

¶ 82 When more than one interpretation of a document is reasonable, the document is deemed ambiguous. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568 ¶ 14. There are apparently at least three interpretations of the lease provision as to apportionment of real estate taxes that itself has two alternative bases for calculation (the entire development *or* a portion thereof). I submit that, at minimum, there are two reasonable interpretations of the lease language. The most reasonable interpretation is to multiply the assessment portion delineated by the assessor as retail by the ratio of the leased premises/the retail space excluding the lobby area. I submit that this interpretation is consistent with the assessor's imputation of taxes, as I doubt the lobby was included in the assessment of the retail space. The lobby area is outside the leased

premises of defendants and is not leaseable, as it is encumbered by a different lease with a different tenant. The interpretation that I propound is more reasonable, as it reconciles the alleged difference in the language that the majority claims is clear in order to actually apportion the CAM and the taxes differently by not including the lobby in the former but including it in the latter. The lobby is not leased by defendants, and could not have been leased during the period of time in question, as it was leased to a different tenant for a different use.

¶ 83 This is also the interpretation offered by the property manager and subsequently agreed to by the parties in a fourth amendment to the lease that is not at issue here. Normally, we apply the usual rules of contract construction: for example, give effect to the intent of the parties, determine the intent from the plain language of the contract, resolve any ambiguities against its drafter. See *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 164-66 (2002). However, the intent of the parties to the lease is hardly relevant to the parties in the lawsuit. Naper Place and Giordano's, the original landlord and tenant, are gone. Defendants were sublessees of Giordano's, while VPC is successor-in interest to Giordano's. My interpretation is more relevant to the actual parties involved.

¶ 84 As the lease provision is vague and ambiguous, leading to many possible interpretations, the majority is incorrect in claiming that the clause is unambiguous. The majority's interpretation of the property tax clause is not the only one, let alone the best one. Therefore, I dissent from that portion of the disposition.