No. 123046

IN THE
SUPREME COURT OF ILLINOIS

1550 MP ROAD LLC,

Plaintiff-Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 700,

Defendant-Appellant

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JOINT COUNCIL 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, RANDY CAMMACK, JOHN COLI, PATRICK W. FLYNN, FRED GEGARE, and JAMES T. GLIMCO,

Defendants.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-15-3300. There Heard on Appeal from the Circuit Court of Cook County Illinois, County Department, Law Division, No. 10 L 5979.

The Honorable Raymond W. Mitchell, Judge Presiding.

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NATURE OF THE CASE

In May of 2008, a lease purchase agreement ("LPA") was executed on behalf of Teamsters Local Union No. 726 ("Local 726"), an unincorporated association, by one of its officers without notice to, and without an affirmative vote of, Local 726's membership, as expressly required both by the Property of Unincorporated Association Act (765 ILCS 115/.01, *et seq*.) (the "Act" or "PUAA") and by the bylaws of Local 726. Although Local 726 was thus without any legal authority to execute the LPA, the appellate court affirmed the circuit court's holding that the LPA is a legally enforceable contract and not void *ab initio*. This appeal addresses whether the appellate court erred in holding that the LPA was an enforceable contract where the mandatory requirements of both the Act and Local 726's bylaws were not satisfied.

The appellate court also affirmed the circuit court's holding that a separate unincorporated association, Teamsters Local Union No. 700 ("Local 700"), is liable for Local 726's breach of the LPA, despite the fact that the only recognized exceptions to the general rule of successor non-liability under Illinois law do not apply here. This appeal addresses whether it was error for the appellate court to impose successor liability against Local 700 based upon the appellate court's newly-created exception, the substantial continuity test, which was previously limited in its application to federal labor laws (none of which are at issue here).

Finally, this appeal addresses whether the appellate court erred in holding that the LPA's liquidated damages clause was enforceable where it penalizes a breaching party by permitting recovery of both liquidated and actual damages, and/or where actual damages were neither uncertain nor difficult to prove.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court erred in finding that the LPA is an enforceable agreement and not void *ab initio* where Local 726 lacked the legal authority to enter into the LPA because, in violation of the Act and Local 726's bylaws, the membership of Local 726 was not given notice of the proposed transaction and did not vote to authorize Local 726 to enter into the LPA?

2. Whether the appellate court erred by expanding the only recognized exceptions to the general rule of successor non-liability under Illinois law to include a new and less stringent exception, the "substantial continuity test," which has heretofore been applied only in the limited context of federal labor law and has no application to the common law claims at issue here?

3. Whether the appellate court's ruling conflicts with Illinois precedent that a liquidated damages clause is unenforceable where it penalizes a breaching party by permitting recovery of both liquidated and actual damages, and/or actual damages are neither uncertain nor difficult to prove?

JURISDICTIONAL STATEMENT

Defendants appealed to the Appellate Court of Illinois ("appellate court") from the following orders entered by the Circuit Court of Cook County ("circuit court"): (i) the July 14, 2015 Order entering judgment in favor of plaintiff, 1550 MP Road LLC, and against defendants, Local 700 (counts I, II, and III) and John Coli ("Coli") (count VIII); and (2) the October 21, 2015 Order entering judgment against Local 700 and Coli on the same counts and denying defendants' post-judgment motions. Defendants filed a timely notice of appeal on November 19, 2015. R.V18, C4446-44485; *1550 MP Road LLC v. Teamsters Local Union No. 700, et al.*, No. 10 L 5979 (Cir. Ct. Cook County, July 14, 2015, mod. Oct. 21, 2015).

On November 13, 2017, the appellate court issued an Opinion, affirming in part (count I) and reversing in part (counts II, III and VIII), the decision of the circuit court. No petition for rehearing was filed. On December 13, 2017, Local 700 filed a motion for an extension of time to file a Petition for Leave to Appeal. This Court, by order entered on December 19, 2017, extended the time for Local 700 to file its Petition for Leave to Appeal to January 5, 2018. On January 5, 2018, Local 700 filed its Petition for Leave to Appeal with this Court. The Petition was allowed on March 21, 2018. *1550 MP Road LLC, v. Teamsters Local Union No. 700*, No. 123046. This Court has jurisdiction pursuant to Supreme Court Rule 315. Ill. S. Ct. R. 315.

STATUTES INVOLVED

This appeal involves the Property of Unincorporated Associations Act (the "Act" or "PUAA"). 765 ILCS 115/.01, *et seq*. (West 2010). Section one of PUAA, entitled "Power to own real estate" provides, in relevant part, that:

> Any unincorporated lodge or subordinate body of any society or order which is duly chartered by its grand lodge or body may take, hold, or convey real estate for its own use and benefit, by lease, purchase, grant, legacy, gift or otherwise, *** according to the register of the grand lodge or body.

765 ILCS 115/1 (West 2010).

Further, section 2 of PUAA entitled, "Procedure to effect acts of ownership over real estate" provides, in relevant part, that:

> The presiding officer of such lodge or subordinate body, together with the secretary or officer keeping the records thereof, may execute mortgages and execute or receive conveyances or leases of any real estate by or to such lodge or subordinate body when authorized by a vote of the members present at a regular meeting held by said lodge or subordinate body, after at least ten days' notice has been given to all members of said lodge or subordinate body by mailing a written notice of said proposed action to the last known address of all such members.
>
> All conveyances, leases or mortgages executed hereunder shall be in the name of the lodge, attested by the presiding officer and secretary or other officer in charge of the records, and shall have affixed the seal, if any, of such lodge or subordinate body.

765 ILCS 115/2 (West 2010).

STATEMENT OF FACTS

Local 726 and Governing Rules.

Local 726, at all relevant times, was a voluntary unincorporated association chartered by, and a local affiliate of, the International Brotherhood of Teamsters ("IBT"). S.R.V2, 396.[1] In 2009, Local 726 represented approximately 4,500 public sector employees in the State of Illinois. *Id*. at 397.

At all relevant times, as an unincorporated association, Local 726's acquisition or lease of real property was governed by the Act. Section 2 of the Act provides:

> The presiding officer of such lodge or subordinate body, together with the secretary or officer keeping the records thereof, may execute mortgages and execute or receive conveyances or leases of any real estate by or to such lodge or subordinate body when authorized by a vote of the members present at a regular meeting held by said lodge or subordinate body, after at least ten days' notice has been given to all members of said lodge or subordinate body by mailing a written notice of said proposed action to the last known address of all such members.
>
> All conveyances, leases or mortgages executed hereunder shall be in the name of the lodge, attested by the presiding officer and secretary or other officer in charge of the records, and shall have affixed the seal, if any, of such lodge or subordinate body.

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[1] The common law record on appeal (Volumes 1-18) will be cited as "R.V__, C___." The report of proceedings (Volumes 19-25) will be cited as "R.V__, ___." The six-volume supplemental record, prepared pursuant to stipulation of the parties and filed pursuant to leave of the appellate court, will be cited as "S.R.V__, ___." The appendix to this petition will be cited "A__."

765 ILCS 115/2 (West 2010).

Thus, pursuant to the express provisions of the Act, in order for an unincorporated association, such as Local 726, to lawfully enter into a contract for the sale or lease of real property, its members must vote to authorize that contract at a regular meeting of the membership after having been provided advance written notice of the proposed transaction. 765 ILCS 115/2 (West 2010). The Act further requires that such a lease or purchase agreement be signed by the presiding officer and the secretary of the association. *Id*.

Similar to the requirements of the Act, section 8(B) of Local 726's bylaws required the secretary-treasurer and president of the union to jointly execute all contracts. A. 39. Section 14(a)(8) of Local 726's bylaws further provided that the Local 726 executive board may lease or purchase property, but *only* after acquiring membership approval. A. 40.

The LPA was not jointly executed by the secretary-treasurer and president; notice was not given to the membership before the execution of the LPA; and membership approval was never sought or granted in connection with the LPA. R.V21, 28-29; R.V22, 66-68; R.V24, 171. As such, the LPA was not executed in conformance with the Act or Local 726's bylaws. *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2017 IL App (1st) 153300, ¶ 17;

A. 22. And there is no record of Local 726's membership waiving their rights to receive notice of, and vote on, the LPA.[2]

Nor did the parties follow the terms of the LPA itself pertaining to execution of the contract. The LPA stated:

> This lease is made and executed and is to be construed under the laws of the State of Illinois.

R.V1, C27. To the contrary, the LPA was signed on May 2, 2008, in derogation of the Act, without proper authorization or evidence thereof. See R.V1, C16; R.V21, 20.

LPA Negotiations and Execution.

In 2007, Local 726's secretary-treasurer, Thomas Clair ("Clair"), was introduced to plaintiff's sole member, Matthew Friedman ("Friedman"), and its co-manager, Mick Bess ("Bess"). R.V19, 153-56; R.V20, 196. Friedman had been involved in commercial real estate and development since 1984, and estimated that he had been involved in hundreds of real estate transactions for retail office and industrial real estate. R.V19, 146, 149. Clair, on the other hand, was a former truck driver for the City of Chicago with two years of community college and extremely limited real estate experience. R.V21, 2-3. Clair entered into negotiations with Friedman regarding a new lease for Local 726 entirely on his own. R.V21, 3.

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[2] In fact, defendants brought a third-party complaint against certain former officers of Local 726, alleging that those officers failed to obtain approval from Local 726's membership to enter into the LPA in violation of Local 726's bylaws and Illinois law. R.V2, C339-58.

Plaintiff retained sophisticated real estate counsel to prepare the LPA. R.V19, 181-82. Though styled as a 15-year "lease," the contract was designed and functioned as a 5-year lease. R.V20, 49; R.V21, 72. By the terms of the LPA, if Local 726 failed to purchase the property within 5 years, it would be required to pay an amount equal to 200% of the base rent for 10 years. R.V20, 49-50; S.R.V2, 423. Plaintiff acknowledged that this double-rent provision was both a "kicker" to compel Local 726 to "perform or move out" and a penalty "associated with not timely purchasing the property…" R.V20, 49-50; S.R.V2, 304. The double-rent penalty, if triggered, would result in Local 726 paying approximately $3,583,000 over 10 years *without* obtaining title to the property.[3] S.R.V2, 462. Comparatively, if Local 726 should fail to purchase the property, plaintiff's sole liability would consist of a $1.3 million mortgage (while retaining title to the property). R.V19, 192-93.

On May 2, 2008, Clair signed the LPA, which purported to obligate Local 726 to lease and purchase commercial property at 1550 South Mount Prospect Road, Des Plaines, Illinois ("1550 property" or the "premises"). R.V21, 20; see also S.R.V2, 419-33.[4] Clair signed the LPA without providing

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[3] The circuit court in its October 21, 2015 corrected order, determined that the double-rent provision should not be enforced. R.V18, C4440-41.

[4] Clair signed the LPA with limited or no knowledge regarding its terms. R.V21, 10-12, 16. As to the rent to be paid under the LPA, Clair knew only what Friedman had told him – that the rent "would be basically what [they] were paying at Teamsters City." R.V21, 9-10. However, this proved to be untrue as rent at the 1550 property was over $16,000 per month (including taxes and maintenance fees), as compared to approximately $11,000 per month at the old location. R.V20, 27-28; R.V23, 58-63.

written notice to the members of Local 726, as required by its bylaws and the Act, and without first obtaining the required approval through a vote of Local 726 membership authorizing him to sign the agreement, to expend funds, relating to the lease/purchase of the property, or to otherwise subject Local 726 and its members to liability. R.V21, 28-29; R.V24, 171. Notably, he also signed the LPA without notifying the executive board members and without obtaining their prior authorization at an executive board meeting. R.V24, 171-72.[5]

Clair testified that plaintiff requested, was given, and acknowledged receiving a copy of Local 726's bylaws prior to signing the LPA on May 2, 2008. R.V20, 221; R.V21, 56, 59-60. While Friedman claimed he could not recall asking for or seeing the bylaws, he acknowledged that he was unaware if Bess (plaintiff's co-manager) or plaintiff's counsel had received the Local 726 bylaws. R.V20, 48. Friedman further testified that although he was aware Local 726 was a labor union, he did not inquire if Local 726's membership had authorized the transaction. *Id.* at 48-49. Friedman maintained at trial that he failed to inquire about these documents, claiming that, over the course of his lengthy real estate career, it simply was not his

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[5] Between December 2007 and December 2008, none of the minutes from the monthly executive board meetings or from the multiple general membership meetings reflect any conversation regarding plaintiff's property or the LPA. R.V24, 171-72; S.R.V2, 397.

practice to review the governing documents of the entities with whom he did business. R.V19, 184.

The Executive Board Never Obtained Membership Authorization.

On May 8, 2008, nearly one week after Clair signed the LPA, Clair met with members of Local 726's executive board to ask that they sign a "Unanimous Consent of the Executive Board In Lieu of Meeting of the Executive Board of Teamsters Local Union Number 726" (hereinafter "UCR"), which they did. R.V21, 25. The meeting was not a formal executive board meeting and no minutes were taken such that they could later be read and approved by Local 726's membership. R.V22, 111. The membership of Local 726 was not present at the meeting, and was not advised of the LPA or the UCR.

Further, the record makes clear that Local 726's executive board believed it was voting *only* to authorize Clair to negotiate another office lease, not to purchase a building within five years for $2.1 million, or to pay a penalty for breach of nearly $3.6 million. R.V22, 58-59, 115-16. Clair did not reveal to the executive board any details of the LPA terms. R.V22, 59, 62, 112. Further, although the executive board members knew that Local 726 sought the "option" to purchase a building (R.V22, 40, 44, 56), they were never told that, as of May 8, Clair had already signed the LPA. R.V22, 61. The executive board members also had no idea of the building's purchase price. R.V22, 59, 62-63, 116.

The executive board never sought nor obtained approval from Local 726's membership authorizing either the expenditure of funds pertaining to the LPA or Local 726's entry into that agreement. R.V21, 28-29; R.V22, 67-68, 121. In addition, the terms of the LPA were never discussed at a membership meeting. R.V21, 28; R.V22, 66. Since no minutes were taken when the executive board met and signed the UCR on May 8, 2008, no executive board minutes announcing the transaction were read at any subsequent membership meetings. R.V22, 111.

IBT Imposition of Emergency Trusteeship Over Local 726 on August 3, 2009.

In 2008, the IBT initiated an investigation of the financial condition of Local 726 in light of its financial troubles.[6] On July 20, 2009, the Independent Review Board ("IRB") recommended that Local 726 be placed in trusteeship.[7] R.V23, 129-31; S.R.V6, 1283-1346. This was the second time

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[6] During the time-period at issue here, Local 726 was financially unstable. Its IRS filings reflect that Local 726 had negative $10,908 in assets at the beginning of 2006 and ended the year with just $10,199 in total assets, including $500 in cash on hand. S.R.V3, 662, 665. In 2007, Local 726 became insolvent, operating at a deficit of $250,064 and ending the year with total net assets of negative $239,865. *Id*. at 672. Its checking account showed a balance of just $500 and negative $91,997 in savings and cash investments. *Id.* at 675. In 2008, Local 726 remained insolvent, ending the year with total net assets of negative $2,026 (*id*. at 695), excluding over $220,000 in attorneys' fees, accounting fees, and rent incurred in 2008, but deferred until 2009. R.V23, 59-62.

[7] The IRB which was established by consent decree in *United States v. International Brotherhood of Teamsters*, has the authority to, among other things, recommend that local unions, like Local 726, be placed into trusteeship. 22 F. Supp. 2d 131, 132 (S.D.N.Y. 1998).

Local 726 had been recommended for trusteeship. R.V23, 20-21. In support of its recommendation, the IRB cited concerns about "financial malpractice" by Local 726's officers, including, among other things, breach of their fiduciary duties to an employee benefit plan, approving of improper loans to the Local, and misleading the IBT about Local 726's finances. S.R.V6, 1283-1346. IBT President, James Hoffa ("Hoffa"), acted promptly on the IRB recommendation, and placed Local 726 into an emergency trusteeship on August 3, 2009. R.V22, 179-80; S.R.V1, 206-08. Hoffa named Becky Strzechowski ("Strzechowski") as Trustee of Local 726 and charged her with the responsibility of running the affairs of Local 726. R.V24, 143; see also S.R.V1, 61-63.

Strzechowski promptly discharged the remaining officers of Local 726. R.V24, 157-58.[8] She exercised complete control of the business activities of Local 726 subject to the authority granted to her under the IBT constitution. R.V24, 143-44; S.R.V1, 63. Among the principal matters that came to Strzechowski's attention upon her review of Local 726's finances and business activities was the LPA.

[8] Former Local 726 officers John Falzone and Michael Marcatante were eventually barred from holding office in the IBT or any of its affiliates for approximately five years. R.V23, 19-20. Clair was permanently banned from holding office or membership with the IBT or any of its affiliates. *Id.*; R.V21, 67.

Local 726 Trustee Immediately Questions Validity of LPA.

Based on Strzechowski's understanding that under the IBT constitution she was authorized to pay only "properly incurred" debts (R.V24, 159-62), she refused to authorize the August rent payment until she examined the LPA. R.V24, 158-62. Unable to locate the lease, Strzechowski asked employees and former officers of Local 726 about it and was told by former officers that they did not know anything about the lease, that it was "Tom Clair's deal," and that they were not involved in the negotiations. *Id*. at 162.

Plaintiff provided Strzechowski with a copy of the LPA on August 4. *Id*. at 163. Based on her conversations with former officers, Strzechowski had doubts about Clair's authority to sign the agreement and Strzechowski promptly informed Friedman, and his real estate counsel, of her belief that the LPA was not properly authorized. R.V22, 164.

IBT Meets to Consider Continued Trusteeship for Local 726.

On September 17, 2009, the IBT held a hearing to determine whether Local 726's trusteeship should be continued. R.V22, 180-81. During that hearing, Strzechowski maintained that the LPA had been "made in secret without membership knowledge or approval and in violation of the Local's bylaws."[9] S.R.V1, 241. Following that hearing, in September and October

[9] On a related note, Local 726's outside counsel informed Friedman and his counsel of Local 726's position that the LPA had not been properly authorized and, as such, was unenforceable. R.V25, 6-7.

2009, Strzechowski met with plaintiff's representatives to negotiate a resolution of the LPA. R.V25, 5-11.

Local 726's Dissolution.

The IBT general executive board ("IBT GEB") voted to dissolve Local 726, as well as Teamster's Local Union 714 ("Local 714") (another public sector union), on or around December 1, 2009. S.R.V2, 317-19. That action was recommended because both Local 726 and Local 714 had troubled histories, including multiple investigations, mandated trusteeships and officer expulsions. R.V22, 225; R.V23, 12-15. It was further recommended that Local 700 be chartered as the exclusive public sector union in the State of Illinois. S.R.V2, 319, 398. Pursuant to the vote of the IBT GEB, the charters of Local 726 and 714 were revoked, and the local unions were dissolved on December 31, 2009. S.R.V2, 398, 401-02. A charter was then issued to Local 700 on December 31, 2009, and the memberships of Locals 726 and 714 were transferred to Local 700. *Id*. As the circuit court's opinion acknowledged, the overwhelming majority of the members of the IBT GEB that participated in the vote to dissolve Local 726 did not have knowledge of the LPA at the time of that vote. A. 11; R.V6, C1293; S.R.V6, 1355-56, 1359-60, 1363-64, 1367-68, 1371-72, 1375-76; S.R.V2, 401-02.

The IBT GEB's decision to revoke the charter of Local 726 was due to the fact that Local 726 faced an IRB investigation, had been placed in trusteeships, and its officers had been expelled. R.V22, 225; R.V23, 12-15.

The LPA was not addressed and did not factor into the IRB's recommendation to place Local 726 in trusteeship. S.R.V6, 1283-1346. The purpose of chartering Local 700 was to provide the memberships of those local unions with a single local that would better represent public employees in the State of Illinois. See R.V23, 133-34; S.R.V2, 331.

Following its dissolution, Strzechowski attempted to wind down the affairs of Local 726, including the resolution of the LPA. R.V24, 201. Local 726 reached agreement with plaintiff on December 22, 2009, to remove the LPA purchase obligation, and end the lease on May 31, 2011 (S.R.V2, 445; R.V25, 23), but plaintiff subsequently withdrew from that agreement. R.V26, 26-27.

On December 14, 2009, the IBT directed Strzechowski to turn over Local 726's assets, to the extent it had any, to Joint Council 25 of the International Brotherhood of Teamsters ("Joint Council") and, in turn, to Local 700. S.R.V2, 333. The assets transferred to Local 700, according to a 2009 audit of Local 726's books, amounted to $47,883, including $11,710 in its checking account. S.R.V2, 460. The audit also revealed that total net liabilities of $75,416 were transferred to Local 700. *Id*.

There was no continuity of management between Local 726 and Local 700, as not a single officer or director of Local 726 remained an officer or director of the newly formed Local 700. R.V24, 207-08; S.R.V2, 396. Nor was there significant continuity of employees between Local 726 and Local 700,

which exited trusteeship in January of 2012 with only two former Local 726 employees among its approximate thirty employees. R.V24, 208-09. Moreover, the former Local 726 members comprised a minority (less than 40%) of Local 700's membership. *Id.* at 207, 210-11. The remaining members of Local 700 were former Local 714 members. *Id.* at 210-11.

Local 700's Occupancy at the 1550 Property From January Through April 2010.

Local 700 occupied the 1550 property from January 2010 through April 30, 2010. S.R.V2, 396; R.V19, 209, 219. Although Local 700 disputed any obligations under the LPA, efforts were made to reach an accord with plaintiff pertaining to the LPA. R.V23, 151-52. On February 5, Local 700's counsel informed plaintiff's attorney that Local 700 was willing to rent and occupy the 1550 property on a monthly basis, without thereby impacting plaintiff's claims against Local 700. S.R.V6, 1378-79; R.V25, 34-37. In that regard, a rent/standstill agreement was proposed by Local 700's counsel that would have allowed Local 700 to continue to occupy the property on a month-to-month basis, to pay rent to plaintiff equal to the amounts required under the LPA, and for plaintiff to collect rent without waiving any rights regarding the enforcement of the LPA against Local 700. S.R.V6, 1383-84; R.V25, 38. Plaintiff never responded to that proposal.

By March 10, plaintiff began advertising the 1550 property to potential renters/buyers. S.R.V2, 348-51. Hearing no response to Local 700's proposed rent/standstill agreement, Local 700's trustee determined that Local 700

needed to find another office and made arrangements to move Local 700 elsewhere. R.V23, 152-53. On May 12, 2010, plaintiff served Local 700 with a "Notice of Default" under the LPA. S.R.V2, 363.

Local 700's Membership and Staff.

Local 700's membership, officers and staff come predominantly from sources *other than* Local 726. R.V24, 207, 210-11. In 2010, Local 700 represented on average approximately 11,500 employees. *Id.* at 210. Approximately 4,500 (less than 40%) were former Local 726 members. *Id*. at 211. The remaining members, approximately 6,800, were former Local 714 members. *Id*. at 211.

Between January 2010 and December 2011, Local 700 was managed by temporary trustees. S.R.V2, 398. When its new executive board took charge as of January 1, 2012, none of the newly-elected Local 700 officers had served as officers of Local 726 prior to its trusteeship. R.V24, 207-08; S.R.V2, 396.

Between January 2010 and December 2011, (*i.e.* during the time of its trusteeship), Local 700 offered employment to only three former Local 726 employees. R.V24, 216. As of January 2012 and going forward, Local 700 had close to 30 employees, only two of whom had ever been employed by Local 726. *Id*. at 208-09.

Lower Court Proceedings.

Plaintiff sued for breach of contract and sought liquidated damages specified in the LPA. R.V18, C4429. In count I, plaintiff claimed that Local 700 was liable for breach of the LPA under a theory of corporate successor

liability, contending that Local 726 had merged into Local 700, and that Local 700 was a mere continuation of Local 726. *Id.*; R.V4, C902-04. Following a bench trial, the circuit court found that the LPA was valid and enforceable, and that Local 700 was liable for Local 726's breach of the LPA, relying on the mere continuation and fraud exceptions to the rule against successor liability. R.V18, C4434-35. The circuit court found that the LPA damages provision was not a penalty clause and was enforceable, and granted plaintiff nearly $2 million in damages and over $320,000 in attorney fees and costs. *Id.* at C4445.

On appeal, Local 700 argued, in relevant part, that: (1) the LPA is void *ab initio* and, therefore, could not be enforced because it was not executed in compliance with the express provisions of the Act or Local 726's bylaws; (2) even if the LPA is not void *ab initio*, the circuit court erroneously imposed successor liability against Local 700; and (3) the LPA contains an unenforceable liquidated damages provision. *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2017 IL App (1st) 153300, ¶ 9; A. 21.

The appellate court held "that the LPA was an enforceable contract" and that "[l]ocal 726's failure to comply with its bylaws or with the Act did not render the LPA void *ab initio*." *Id.* at ¶ 10; A. 21. The appellate court further found that Local 700 was liable for breach of the LPA based on corporate successor liability principles and, therefore, affirmed the circuit court's judgment finding that Local 700 was liable to plaintiff for Local 726's

breach of the LPA. The appellate court reversed the circuit court's judgment that Local 700 was liable to plaintiff under the Fraudulent Transfer Act. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 90; A. 36.[10] Lastly, the appellate court affirmed the damages award, finding that the LPA contained a lawful liquidated damages provision. *Id.*

On January 5, 2018, plaintiff filed its Petition for Leave to Appeal to the Supreme Court of Illinois. The said Petition was granted on March 21, 2018.

ARGUMENT

I. STANDARD OF REVIEW.

The questions presented in this appeal involved various questions of law, including, without limitation, whether the LPA is valid and enforceable despite non-compliance with the express requirements of both PUAA and Local 726's bylaws, whether Local 700 can be held liable as the successor to Local 726 where none of the recognized exceptions to the general rule of successor non-liability under Illinois law apply, and whether the LPA contains an unenforceable liquidated damages provision. Questions of law, including those involving statutory construction, are subject to *de novo* review. *Solon v. Midwest Med. Records Ass'n, Inc.*, 236 Ill. 2d 433, 439

[10] Because the Fraudulent Transfer Act claims were pled in the alternative, and because the appellate court affirmed the circuit court's ruling on the successor liability claim, the appellate court's ruling on the fraudulent transfer issue did not impact Local 700 in terms of liability. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 62; A. 31.

(2010). Factual findings of the lower courts are subject to reversal where they were against the manifest weight of the evidence. *Baker v. Jewel Food Stores*, 355 Ill. App. 3d 62, 65 (1st Dist. 2005). The legal effect of those factual findings, however, are reviewed *de novo*. *Corral v. Mervis Indus., Inc.*, 217 Ill. 2d 144, 155 (2005).

II. THE LPA WAS VOID *AB INITIO* AND, THEREFORE, CANNOT BE ENFORCED AGAINST DEFENDANTS.

At common law, an unincorporated association could not lease or own real property. *Chicago Grain Trimmers Ass'n v. Murphy*, 389 Ill. 102, 107 (1945). In 1949, in abrogation of common law, the Illinois General Assembly enacted the Property of Unincorporated Associations Act, which permits unincorporated associations to lease or own real property, but only when the specific requirements of the Act are satisfied. Under section 2 of the Act, an unincorporated association may own or lease real property where: (1) both the principal officer and the secretary (or other officer who maintains the records) have executed the real property contract; and (2) the members of the unincorporated association have voted at a regular meeting to authorize the entry into a contract for real property after having received advance written notice of the proposed action. 765 ILCS 115/2 (West 2010). The Act allows for no exceptions to these stated requirements. *Id.*

The appellate court held that "it is undisputed that Local 726 is an unincorporated association and it did *not* comply with section 2 of the Act[.]" *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2017 IL App (1st)

153300, ¶ 17; A. 22 (emphasis added). Specifically, the appellate court found that the Act's requirements to provide written notice to the members of Local 726 and to hold a vote of Local 726's members to authorize the LPA were not met. *Id*. The appellate court additionally found that the Act's requirement that any lease must be signed by two officers of Local 726 was not satisfied.[11] *Id*.

Despite holding that the Act's requirements governing an unincorporated association ownership or lease real property were not satisfied, the appellate court nevertheless held that the LPA was not void *ab initio* and was enforceable. *Id*. The appellate court's decision clearly contradicts the plain language of the Act. In doing so, it entirely disregards and renders meaningless the explicit statutory requirements that an unincorporated association may lease or own real property only if written notice of the proposed transaction has been provided to the members, the members have voted to authorize such action, and the contract in question has been signed by two officers of the unincorporated association. Since, unlike corporate shareholders, members of unincorporated associations are not protected from individual liability for the association's conduct and actions, the Act's requirements represent important membership safeguards. If left to stand, the appellate court's decision would expose the individual

[11] The appellate court also held that the bylaws of Local 726, which contain requirements that parallel the Act's requirements for entry into any real property transaction, were not satisfied. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 17; A. 22.

members of an unincorporated association to personal liability even when a representative of that unincorporated association unilaterally signs a lease agreement in direct contravention of the requirements the General Assembly expressly included in the Act to guard against such a result.

The appellate court side-stepped the mandatory requirements of the Act based on its interpretation of this Court's decision in *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 296 (2010). But *K. Miller* does not support the appellate court's decision. To begin, *K. Miller* is inapposite to the circumstances here, as that case addressed "whether a contractual *term* is unenforceable as against public policy because of a statutory violation." *Id.* at 293 (emphasis added). The issue in this case is not whether a *term* of the LPA violates the provisions of the Act; rather, the question here is whether the LPA is enforceable where the Local 726 lacked the legal authority, and thus the capacity, to enter into a contract in the first place without compliance with the Act's requirements. Indeed, entirely absent from *K. Miller* is any suggestion that the General Assembly's explicit requirements for an unincorporated association to contract for real property, in derogation of common law, may be disregarded. In addition, the appellate court incorrectly determined that the balancing of competing public policy concerns supports its decision that the requirements of the Act may be ignored in order to render the LPA an enforceable contract.

A. The Appellate Court's Decision Fails To Give Effect To The Plain Language Of The Act In Violation Of Fundamental Principles Of Statutory Interpretation.

As the appellate court recognized, at common law, an unincorporated association was legally incapable of owning or leasing property. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 19; A. 22; see also *Chicago Grain Trimmers Ass'n*, 389 Ill. at 107. With the passage of PUAA,, the General Assembly set forth the specific conditions, which, if satisfied, permit an unincorporated association to own or lease real property in Illinois. In that regard, the Act expressly provides that, in order for an unincorporated association to own or lease real property, it must provide notice to its members of the proposed transaction, obtain authorization for the transaction through a vote of its members, and have both the principal officer and secretary of the unincorporated association execute the contract in question. 765 ILCS 115/2 (West 2010). In the absence of compliance with the General Assembly's requirements, the common law rule applies and the unincorporated association lacks the legal capacity to enter into a contract to own or lease real property. There is no dispute, as the appellate court found, that the requirements of the Act were not satisfied here. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 17; A. 22

By holding that the LPA is an enforceable agreement even though the express requirements of the Act have not been satisfied, the appellate court has read out of the Act the very requirements that the General Assembly

specified must be met for an unincorporated association, such as Local 726, to own or lease real property. That holding violated one of the most fundamental canons of statutory construction – *i.e.*, that courts should not interpret a statute in a manner that would render its terms meaningless. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232 (2001) (the court "must construe a statute so that each word, clause and sentence, if possible, is given a reasonable meaning and not rendered superfluous, avoiding an interpretation which would render any portion of the statute meaningless or void.") (citations omitted). By finding that the LPA was not void *ab initio* and is an enforceable contract even though the plain and unambiguous requirements of the Act have not been satisfied, the appellate court failed to give any meaning to the provisions of the Act that require notice to and a vote of the members, as well as the requirement that the lease be signed by two specified officers of the association. In short, the appellate court erroneously ignored these requirements even though there is nothing in the statute suggesting that an unincorporated association may enter into a contract for the sale or lease of real estate unless it has satisfied foregoing conditions. As this Court has held:

> It is a familiar rule of construction that statutes in derogation of the common law cannot be construed as changing the common law beyond what is expressed by the words of such statute or is necessarily implied from what is expressed. It is also a familiar rule of construction that, in construing statutes in derogation of the common law, it will not be presumed that an

> innovation thereon was intended further than that which is specified or clearly to be implied.

Bush v. Squellati, 122 Ill. 2d 153, 161–62 (1988).

Since the Act modified the common law rule that an unincorporated association lacks the legal authority to enter in a contract for real property only by allowing it to do so where the specific requirements of the Act have been met, and since it is undisputed that the requirements of the Act were not satisfied, there was simply no basis for the appellate court to conclude that Local 726 somehow entered into a binding lease agreement with the plaintiff. Local 726 lacked the legal capacity to enter into the LPA because it did not satisfy the statutory requirements that would have allowed it to do so.

Moreover, the appellate court's disregard of the express requirements of the Act was contrary to basic tenets of statutory construction that require courts to construe statutes in a way that gives effect to the intent of legislature as reflected in the plain language of the statute. *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 287 (2008) (the goal of statutory interpretation "is to ascertain and give effect to the intent of the legislature."); *Smith v. Board of Educ. of Oswego Cmty. High Sch. Dist.*, 405 Ill. 143, 148 (1950) (courts must not legislate but must give effect to the law as plainly written by legislature). Completely unexplained by the appellate court is how Local 726 had the authority or capacity to enter into the lease

agreement with the plaintiff where none of the plain and unambiguous requirements of PUAA were satisfied.

B. The Appellate Court's Reliance On *K. Miller* Does Not Support Its Position That The LPA Is An Enforceable Agreement.

In determining that the LPA is an enforceable agreement and not void *ab initio*, the appellate court relied exclusively on this Court's decision in *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284 (2010). Citing to *K. Miller*, the appellate court stated that, "[t]he failure to comply with the requirements of a statute does not automatically render a contract unenforceable or void *ab initio*." *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 17; A. 22. Instead, the appellate court concluded that, "[i]f the statute provides that a contract that violates the statute is unenforceable, then the contract is unenforceable." *Id.* But "[w]here, however, a statute is silent as to the consequences of a violation of statute, we must balance the public policy expressed in the statute against the countervailing policy in enforcing contractual agreements." *Id*. The appellate court next found that the Act is "silent" as to the consequences of non-compliance and then, based on its application of the above-described balancing test, determined that public policy considerations favor enforcing the LPA. *Id*. at ¶¶ 18-21; A. 22-23.

K. Miller is inapposite for a number of reasons. This Court's decision in *K. Miller* addressed whether a contract is enforceable where one of the

terms of the contract violates the provisions of a statute. It did not address the question here – *i.e.*, whether a contract is enforceable where one of the parties did not have the legal authority or capacity to enter into the contract. To determine whether the contract was enforceable in *K. Miller*, this Court turned to Section 178 of the Restatement (Second) of Contracts (1981), which sets forth the "rule regarding the unenforceability of a contractual *term* because of the violation of a statute or other public policy." *K. Miller Constr. Co.,* 238 Ill. 2d at 294. (emphasis added). Applying Section 178 of the Restatement, this Court noted:

> Pursuant to the Restatement, in considering whether a contractual ***term*** is unenforceable as against public policy because of a statutory violation, the first step is to examine the relevant statute itself. If the statute explicitly provides that a contractual ***term*** which violates the statute is unenforceable then, barring any constitutional objection, the ***term*** is unenforceable. Conversely, if it is clear that the legislature did not intend for a violation of the statute to render the contractual ***term*** unenforceable, and that the penalty for a violation of the statute lies elsewhere, then the contract may be enforced. But where the statute is silent, then the court must balance the public policy expressed in the statute against the countervailing policy in enforcing contractual agreements.

Id. at 293-94 (emphasis added). Because the statute at issue in *K. Miller* did not address the consequences where a contractual term violates the provisions of that statute, *K. Miller* held that the appellate court should have conducted a balancing test and considered the relevant facts and public policies before concluding that the contract was void. *Id*. at 298.

The issue before this Court is fundamentally different than the issue in *K. Miller*. The issue at hand is not whether a *term* of the LPA violates the provisions of the Act. Rather, the issue here is whether the LPA is enforceable where one of the contracting parties lacked the *legal authority* to enter into the agreement in the first place. Where a party does not have the legal authority to enter into a contract, as in this case, Illinois courts have not applied the balancing test articulated in *K. Miller*. Instead, Illinois decisions consistently follow the well-established rule that, "[a] contract executed by a party that does not have authority is void *ab initio*." *Siena at Old Orchard Condo. Ass'n v. Siena at Old Orchard, L.L.C.*, 2017 IL App (1st) 151846, ¶ 77, quoting *Alliance Prop. Mgmt., Ltd. v. Forest Villa of Countryside Condo. Ass'n*, 2015 IL App (1st) 150169, ¶ 29; see also *Illinois State Bar Ass'n Mut. Ins. Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 164 (1st Dist. 2004) (explaining that a contract is void *ab initio* where "one of the contracting parties exceeded its authority for entering into the pact"). Given that *K. Miller* does not address the issue here – *i.e.*, whether a contract is void under Illinois law where one of the contracting parties lacks legal authority to enter into the contract, the appellate court erred by applying the *K. Miller* balancing test instead of longstanding Illinois law that a contract is void *ab initio* where one contracting party lacks the legal authority or capacity to contract.

The appellate court's reliance on *K. Miller* is also erroneous for a separate and independent reason. The appellate court was incorrect in its determination that, like the situation in *K. Miller*, the Act here is "silent" as to the consequences of not meeting its requirements. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 18; A. 22. The statute at issue in *K. Miller* – the Home Repair and Remodeling Act (815 ILCS 513/15 (West 2006)) – required home remodeling contractors to give customers a written contract for remodeling work that costs more than $1,000. *K. Miller Constr. Co.*, 238 Ill. 2d at 286. But unlike the situation here, there was nothing at common law that prevented home remodeling contractors from entering into oral contracts for remodeling work in excess of $1,000. Contrary to the circumstance in *K. Miller*, unincorporated associations are not permitted to own or lease real property at common law. By providing the defined and limited conditions under which an unincorporated association may own or lease real property, the General Assembly *affirmatively* identified the *only* circumstances an unincorporated association is legally authorized to enter into a contract for real property. Thus, contrary to the appellate court's findings, the Act is not silent, but rather explicitly provides the only circumstances under which an unincorporated association has the legal authority to enter into an enforceable contract. Because PUAA authorizes unincorporated associations to enter into real property contracts under limited circumstances, where they otherwise would be without the legal authority to do so at common law, and

because the Act establishes the specific requirements for doing so, a balancing of public interests does not come into play.

C. Even If The *K. Miller* Balancing Test Were Applicable, Public Policy Considerations Favor Finding That The LPA Is Unenforceable.

Even if *K. Miller's* balancing test applied here (and it does not), the appellate court incorrectly concluded that public policy concerns favor enforcing the LPA. The Act's requirement that an unincorporated association may enter into an agreement to own or lease real property only where the members of the association are formally placed on notice and affirmatively vote in favor of the proposal provides a critical protection to association members. Unlike shareholders of a corporation or members of a limited liability company, members of an unincorporated association are liable for the debts and liabilities of the association. See *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1286 (5th Cir. 1994), citing *Progress Printing Corp. v. Jane Byrne Political Comm.*, 235 Ill. App. 3d 292 (1st Dist. 1992). Thus, in the absence of the protections afforded under the Act, the members of an unincorporated association, such as a union, would expose each individual member to personal liability for association debts and liabilities incurred without notice to the association's members, let alone their approval.

The appellate court's decision posits that the General Assembly's express requirements that protect members of unincorporated associations

from personal liability under real estate contracts as to which they have received no prior notice and have not authorized, are trumped by the need to enforce otherwise private contracts. *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 21; A. 23. But as this Court noted in *K. Miller*, the balancing of public policy concerns also involves considering the relevant facts related thereto. *K. Miller Constr. Co.,* 238 Ill. 2d at 298. Those facts show that plaintiff readily acknowledged that he had not taken steps to verify Clair's authority to bind the Local 726 (R.V20, 48-49), despite Illinois law mandating that it is the duty of a person dealing with an agent of an unincorporated association to ascertain the extent of the agent's authority or suffer the consequences for failing to do so. *Young v. Harbor Point Club House Ass'n*, 99 Ill. App. 290, 291 (3d Dist. 1901). In light of plaintiff's failure to meet its obligation to confirm Clair's authority, plaintiff should not be heard to argue that there is a public interest in enforcing an agreement that was executed without regard for the mandates of a statute specifically designed to protect members of unincorporated associations from liability under unauthorized real estate contracts that were entered into without notice to, or a vote of, the membership.

The appellate court found that there is nothing in the Act that suggests that the General Assembly intended to create protections for members of unincorporated associations, who otherwise would be personally liable for debts incurred in the name of the association. *1550 MP Road LLC*,

2017 IL App (1st) 153300, ¶ 19; A. 22-23. But that conflicts with the well-established principle of statutory construction that the best evidence of the legislature's intent is the language of the statute itself. *Bruso v. Alexian Bros. Hosp.*, 178 Ill. 2d 445, 451 (1997). Here, the Act explicitly requires that association members be given prior written notice of any proposed real property transaction and the opportunity to vote on whether the association should enter into the deal. 765 ILCS 115/2 (West 2010). The suggestion that these plain and unambiguous requirements of the Act are not intended as safeguards for the members of unincorporated associations ignores the obvious.

III. THE APPELLATE COURT ERRED AS A MATTER OF LAW IN IMPOSING SUCCESSOR LIABILITY ON LOCAL 700.

For the reasons described in section I of this brief, the LPA is void *ab initio* and unenforceable. As such, there is no basis for imposing liability against Local 700 for Local 726's breach of the LPA. But even if this Court finds that the LPA is an enforceable agreement, the appellate court erred in affirming the judgment against Local 700 because there is no basis for imposing successor liability against that separate unincorporated association.

In affirming the circuit court's decision holding that Local 700 is the successor in liability to Local 726, the appellate court departed from the limited exceptions to the general rule in favor of successor non-liability under Illinois law, and unjustifiably adopted a new, less stringent exception – the "substantial continuity test." That test, however, has never been adopted

under Illinois law and has been used exclusively to avoid the frustration of the requirements of federal labor law. See, *e.g.*, *Equal Emp't Opportunity Comm'n v. Local 638*, 700 F. Supp. 739, 745 (S.D.N.Y. 1988) (enforcing labor rights under collective bargaining agreements against successor employers); *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437, 452 (S.D.N.Y. 2000) (holding successor entities liable for their predecessor's discriminatory acts or unfair labor practices in violation of federal law).

The appellate court's novel application of the substantial continuity test to a common law liability, like breach of the LPA, is not only unwarranted, but as is demonstrated by the circumstances of this case, will have wide-ranging and unfair ramifications for members of unincorporated associations. Here, more than 60% of the members of Local 700 are *not* former members of Local 726 (*i.e.*, the entity that was supposedly bound by the LPA). R.V24, 207, 210-11. Nor did *any* of the members of Local 700 (even those who were formally Local 726 members) have an opportunity to vote for or against the LPA (which, as noted *supra*, was signed without membership authorization or even notice to the membership). R.V.22, 67-68, 121. Moreover, *none* of the members of Local 700 were responsible for the dissolution of Local 714 and/or 726, the creation of Local 700, the decision to transfer assets and/or liabilities from Local 726 to Local 700, or any other decision related to the LPA. Rather, as the appellate court recognized, those actions were taken by the IBT GEB. *1550 MP Road LLC*, 2017 IL App (1st)

153300; ¶¶ 42-44; A. 27-28. Yet, if the decision of the appellate court is allowed to stand, it is the individual members of Local 700 who will be unfairly saddled with liability under the LPA.

The appellate court decision attempts to justify this inequitable result, incorrectly stating that failing to adopt the substantial continuity test as to unincorporated associations "would eviscerate the integrity and purpose of contracting, would provide unincorporated associations an escape valve unknown to established contract law, and would serve no legitimate commercial purpose." *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 46; A. 28. But that conclusion is plainly wrong. Unincorporated associations, like Local 700, may still be held liable under Illinois successor liability law if the circumstances justify either of the two established exceptions to the general rule of successor non-liability: implied or express assumption of liability, and fraudulent purpose. These exceptions do not require continuity of ownership and provide an adequate framework to impose successor liability on an unincorporated association when warranted. In short, the very justification offered by the appellate court does not provide a basis for departing from controlling Illinois law, and its decision to do so should therefore be reversed.

A. There Is No Basis Under Illinois Law To Impose Successor Liability On Local 700.

Under well-established Illinois law there are *only* four exceptions to the general rule of successor non-liability: (1) implied or express assumption of liability, (2) *de facto* merger, (3) mere continuation, and (4) fraudulent

purpose. *Diguilio v. Goss Int'l Corp.*, 389 Ill. App. 3d 1052, 1060 (1st Dist. 2009). None of these exceptions apply to Local 700.

First, Illinois law is unequivocal that, in the absence of continuity of ownership, the *de facto* merger and the mere continuation exceptions are inapplicable under *any* circumstance. See, *e.g.*, *Diguilio*, 389 Ill. App. 3d at 1062; *Hoppa v. Schermerhorn & Co.*, 259 Ill. App. 3d 61, 66 (1st Dist. 1994); *Manh Hung Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1148-49 (1st Dist. 1982). Illinois courts have consistently rejected attempts to excuse the continuity of ownership requirement as a mere formality. See *Manh Hung Nguyen*, 104 Ill. App. 3d at 1148-49 ("[C]ontinuity of shareholders, rather than being a meaningless requirement in finding of *de facto* merger, is probably its most important element."); see also *State ex rel. Donahue v. Perkins & Will Architects, Inc.*, 90 Ill. App. 3d 349, 352-54 (1st Dist. 1980) (where the court declined to apply the mere continuation exception even though former owners had voting control but lacked continuing stock ownership). Thus, as a matter of Illinois law, the *de facto* merger and mere continuation exceptions do not apply to unincorporated associations, like Local 700, that do not have "owners."[12]

[12] The inapplicability of these exceptions to unincorporated associations is logical, since the general purpose of these exceptions is to prevent the original shareholder (or owner) from being able to "enjoy the continuing profits of the same business the corporation performed before the merger, but escape all possible losses that accumulated before merger." See *Manh Hung Nguyen*, 104 Ill. App. 3d at 1148. In the case of unincorporated associations, there is no shareholder or owner that is unjustly enjoying pre-merger profits and/or escaping pre-merger losses. Moreover, equating a union's members to owners

Illinois' other two exceptions to the general rule of successor non-liability – implied or express assumption of liability, and fraudulent purpose – do not require continuity of ownership. As previously noted, these exceptions provide the only framework to impose successor liability on an unincorporated association in Illinois, but neither exception applies here. First, the assumption of liability exception can be dismissed out of hand, because there is no contention that Local 700 agreed (implicitly or otherwise) to assume Local 726's liabilities (including the LPA).

On the other hand, the fraud exception to the general rule of successor non-liability requires a showing that the transaction at issue was done for the fraudulent purpose of escaping liability for the seller's obligations. *Diguilio*, 389 Ill. App. 3d at 1064. But there is no evidence of fraud here. There was certainly no fraud perpetrated by the members of Local 700, as there is no dispute that the "transaction at issue" (*i.e.* the dissolution of Local 726 and formation of Local 700) was not effectuated by Local 700 members, but by a vote of the IBT GEB. A. 11; S.R.V2, 398, 401-02. Nor can it be argued that the IBT GEB acted with fraudulent intent, as the trial court specifically found that at the time the board members voted to dissolve Local 726, the majority of the members "had no knowledge of the lease." A. 11-12. The IBT

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cannot be justified since, unlike stockholders in traditional business entities, union members are not owners of the local union and cannot share in any profits of the local union or assume its assets. See *In re General Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869, 876 (9th Cir. 2001).

GEB's vote to dissolve Local 726, therefore, could not have been designed or intended to avoid performance by Local 726 under the LPA such that the fraud exception would be applicable here.

In short, *none* of the long-standing exceptions to Illinois' general rule of successor non-liability were satisfied here. Were that not the case, the appellate court would not have applied a new exception to successor non-liability never before adopted under Illinois jurisprudence. There is no basis under Illinois law to impose successor liability on Local 700.

B. The Appellate Court Erred By Expanding Illinois Successor Liability Law And Adopting The Substantial Continuity Test, Which Has No Application To Commercial Liabilities Like The LPA.

The circuit court erroneously found that Local 700 was liable as Local 726's successor under the *de facto* merger, mere continuation and fraud exceptions to the rule of successor non-liability. A. 8-9. The appellate court chose to go in a different direction, premising its finding of successor liability on the substantial continuity test from *Local 638,* 700 F. Supp. 739 (S.D.N.Y. 1988), thus creating a new exception to the general rule of successor non-liability (apparently limited to unincorporated associations). *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 42; A. 27 ("the test employed in *Local 638* provides an appropriate framework for determining whether an unincorporated association, such as a labor union, may be liable under a theory of successor liability…").

The substantial continuity test is an exception to the general rule of successor non-liability when applied in the limited context of federal labor law. The labor policies on which labor law successorship principles were developed include protecting employees' free choice of bargaining representatives, assuring continuity of bargaining representatives on behalf of employees, preventing labor strife, and promoting stable bargaining relationships. See *generally* 5 ILCS 313/2 (Illinois Public Labor Relations Act); see also *In re Teamsters Local 890*, 265 F.3d at 874 ("Labor relations are governed by a unique set of labor relation laws that are designed in large measure to insure that the workers are represented by the collective bargaining representative of their choice.") For this reason, the concept of successorship, as it relates to enforcing or otherwise avoiding the frustration of federal labor laws, is less narrowly defined than successor liability in the context of common law claims. See *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 182-85 (1973). As the Supreme Court noted in *Golden State Bottling*, unlike successor liability in the common law context, "the perimeters of the labor-law doctrine of successorship… have not been so narrowly confined." *Id.* at 182 n.5.

Thus, although "the substantial continuity doctrine is well established in the area of labor law[,]…the labor law cases are particular to the labor law context and therefore have not been and cannot easily be extended to other areas of federal common law." *New York v. National Servs. Indus., Inc.*, 352

F. 3d 682, 686 (2d Cir. 2003) (emphasis added). Indeed, no court in Illinois or elsewhere has applied the substantial continuity test outside the federal labor law context, and the two cases cited by the appellate court invoking the substantial continuity test, *Equal Employment Opportunity Commission v. Local 638* and *Parker v. Metropolitan Transportation Authority*, both involve avoiding the frustration of federal labor-law policies. See *Local 638*, 700 F. Supp. at 745 (enforcing labor rights under collective bargaining agreements against successor employers); *Parker*, 97 F. Supp. 2d at 452 (holding successor entities liable for their predecessor's discriminatory acts or unfair labor practices in violation of federal law).[13]

Conversely, the instant case involves a common law breach of contract claim. Liability for the breach of a commercial agreement, like the LPA, does not implicate any important federal or state labor law policies that have previously justified the use of the substantial continuity test. While the appellate court notes that Illinois' "public policy strongly favors enforcement of private contracts," *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 46; A. 28, this policy has never before been found to be sufficient justification to

[13] The appellate court decision also points to *May Department Stores Co., Venture Stores Division v. N.L.R.B.*, which outlines various factors to consider in determining "substantial continuity." *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ n. 3; A. 36-37, citing *May Department Stores Co.*, 897 F.2d 221, 228 (7th Cir. 1990). Again, however, *May Department Stores* concerned successorship in the federal labor law context (namely, whether an employer had a duty to bargain with a post-merger union), and does not lend any support to the appellate court's application of the substantial continuity test to commercial liability claims.

depart from the existing successor liability framework in Illinois, which favors non-liability subject to the few, well-established exceptions previously recognized under Illinois law. Moreover, as mentioned, the appellate court's novel application of the substantial continuity test to common law contract claims runs directly contrary to federal case law recognizing that the parameters of the labor-law successorship are not as "narrowly confined" as successor liability in the common law context, and that the substantial continuity test "cannot easily be extended to other areas of federal common law." *Golden State Bottling Co.,* 414 U.S. at 182 n. 5; *National Servs. Indus., Inc.*, 352 F. 3d at 686.

The inapplicability of the substantial continuity test in the context of commercial liabilities is further demonstrated by the inequitable outcome here for the members of Local 700, more than 60% of whom are *not* former members of Local 726 (*i.e.*, the entity that was supposedly bound by the LPA). R.V24, 207, 210-11. Local 700 members do not enjoy any benefit from Local 726's assets being transferred to Local 700 by the IBT GEB, nor do they receive any of the profits derived from dues paid by former Local 726 members to Local 700. Indeed, it is well-established that union members cannot share in any profits of the local union or assume its assets, and any dues paid become property of the local union, not the individual members. See *In re General Teamsters, Warehousemen & Helpers Union, Local 890*, 265 F.3d 869, 876 (9th Cir. 2001). Nonetheless, if the appellate court's ruling is

upheld, unlike stockholders in a corporation, the members of Local 700 could be personally liable for breach of the LPA by application of principles of agency law. See *Joseph v. Collis*, 272 Ill. App. 3d 200, 208 (2d Dist. 1995). Such a result demonstrates why the appellate court's departure from Illinois law regarding successor non-liability was ill-conceived and should be corrected.[14]

IV. THE APPELLATE COURT ERRED IN FINDING THAT SECTION 14(B)(I) OF THE LPA IS AN ENFORCEABLE LIQUIDATED DAMAGES PROVISION.

The appellate court departed from well-established Illinois law by finding that the LPA's liquidated damages provision is enforceable. As this Court has previously instructed, "damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light

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[14] In any event, even assuming *arguendo* that the substantial continuity test could be applied in the context of commercial liabilities, the appellate court erred in finding that it was satisfied here. Setting aside the fact that there is no substantial continuity between the two entities for a variety of reasons (*e.g.*, there was no continuity of management or officer/directors between Local 726 and Local 700 (R.V24, 207-08; S.R.V2, 396), no significant continuity of employees between the two associations (R.V24, 208-09, 216), and Local 726 members comprised less than 40% of Local 700's membership (R.V24, 207, 211)), there also is no evidence that the successor, Local 700, had notice of the liabilities and obligations of the predecessor. See *Parker v. Metropolitan Transp. Auth.*, 97 F. Supp. 2d 437, 451–52 (S.D.N.Y. 2000). Indeed, although the appellate court points to certain members of the IBT GEB and IBT appointed trustees that had knowledge of the LPA, the circuit court correctly found that the majority of the IBT GEB (which dissolved Locals 714 and 726 and chartered Local 700) had no knowledge of the LPA. A. 11. More importantly, the *successor* here is Local 700 and its members. The appellate court fails to identify any evidence (because there is none) that demonstrates the members of Local 700 were aware of the potential liability under the LPA when they elected to join Local 700.

of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 29 (2006), quoting *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers*, Inc., 209 Ill. 2d 52, 71 (2004); see also Restatement (Second) of Contracts § 356 (1981).

The LPA's liquidated damages provision – which, by its own terms, permitted plaintiff to recover liquidated damages in the form of rent payments for the full term of the lease *in addition to* actual damages – served no purpose other than to penalize non-performance and to provide a windfall recovery for plaintiff. If such provisions are deemed enforceable, commercial landlords throughout Illinois will be permitted to require prospective lessees to accept lease provisions that permit recovery well beyond lost rental income and other actual damages incurred in the event the lessee breaches the lease. Nor would the impact of allowing such penalty provisions be limited to leasehold contacts. Permitting the appellate court's decision to stand would create a substantive shift in the law and would result in substantial adverse public policy ramifications. Accordingly, the appellate court's finding that the "liquidated damages" provision in the LPA is enforceable should be reversed. *Daley v. American Drug Stores, Inc.*, 294 Ill. App. 3d 1024, 1026 (1st Dist. 1998) (the appellate court's interpretation of the liquidated damages provision is entitled to *de novo* review).

A. Section 14B(i) Is An Unenforceable Penalty Under Well-Settled Illinois Law.

Section 14B(i) of the LPA is unenforceable on its face because it impermissibly penalizes a breaching party by permitting recovery of both liquidated and actual damages. In upholding this provision, the appellate court found that "section 14(B)(i) of the LPA did not enable plaintiff to recover actual damages from the breach in addition to liquidated damages." *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 83; A. 34-35. The plain language Section 14B(i) of the LPA agreement, however, directly refutes this conclusion. Section 14B(i) provides, in pertinent part, that:

> Landlord may terminate this Lease and the Term by giving Tenant written notice of Landlord's election to do so and the effective date thereof, in which event Landlord may forthwith repossess the Premises and be entitled to recover forthwith, ***in addition to any other sums or damages for which Tenant may be liable to Landlord***, as liquidated damages, a sum of money equal to the value of the Rent provided to be paid by Tenant for the balance of the Term. (Emphasis added).

On its face, therefore, Section 14(B)(i) purports to allow the non-breaching party to recover both its actual damages ("other sums or damages for which Tenant may be liable to Landlord"), as well as specified liquidated damages measured by the amount of rent that would be payable during the balance of the lease. Such provisions have long been held to be unenforceable penalties that serve no purpose other than to secure performance. Indeed, "[w]here a contract provides that the breaching party must pay all damages caused by the breach as well as a specified sum in addition thereto, the sum

so specified can be nothing but security for performance and, therefore, constitutes an unenforceable penalty." *H & M Driver Leasing Servs., Unlimited, Inc. v. Champion Int'l Corp.*, 181 Ill. App. 3d 28, 31 (1st Dist. 1989) (emphasis added); *Telenois, Inc. v. Village of Schaumburg*, 256 Ill. App. 3d 897, 902 (1st Dist. 1993) (same); *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 349 F. Supp. 2d 1114, 1116 (N.D. Ill. 2004) (contract was unenforceable because the liquidated damages were not in lieu of, but in addition to, actual damages).

Section 14B(i) violates this controlling principle of law, as it guarantees that plaintiff receives the full value of the entire term of the lease, in addition to "any other sums or damages" allegedly suffered by plaintiff. Under the appellate court's interpretation, this recovery would be permissible even if plaintiff failed to mitigate. If the appellate court's ruling is affirmed, commercial landlords can (and will) incorporate provisions in their leases that (1) require full payment upon breach of the rent payable for the life of the lease, and (2) entitle the commercial landlord "to any other sums or damages" beyond those payments. Without question, such provisions would place the landlord in a better position than if the lease had been fully performed. Allowing for this windfall recovery impermissibly departs from the well-settled law that a liquidated damages provision is unenforceable when the amount of liquidated damages does not bear a relation to the damages which might be sustained. *GK Dev., Inc. v. Iowa*

Malls Fin. Corp., 2013 IL App (1st) 112802, ¶ 49 (stating that a liquidated damages provision is only valid and enforceable when the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained).

B. Plaintiff's Actual Damages Are Not And Never Were Difficult To Ascertain Under The Lease; Accordingly Application Of The Liquidated Damages Provision Was Inappropriate.

The appellate court's application of the liquidated damages provision was inappropriate for the additional reason that damages sustained by plaintiff in this case were not difficult to calculate. Illinois law is clear: a liquidated damage clause may only be upheld when the actual damages resulting from a breach are difficult to determine. *Grossinger Motorcorp, Inc. v. American Nat'l Bank and Trust Co.*, 240 Ill. App. 3d 737, 749 (1st Dist. 1992) (a liquidated damages provision should only be enforced if "actual damages would be uncertain in amount and difficult to prove"). In the real estate context, damages are often readily ascertainable. *Hickox v. Bell*, 195 Ill. App. 3d 976, 987-88 (5th Dist. 1990) (holding that "it would not be difficult to calculate the rent and or profits generated during any party's possession of the premises. As a determination of actual damages in the event of breach of contract would not be difficult, we find as a matter of law that the liquidated damages clause is not enforceable.").

Indeed, the appellate court tacitly conceded that damages were easily ascertainable, finding that "the present value of future lost rent is an

appropriate measurement of a commercial lessor's damages." *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 88; A. 36. Given that it would not be difficult to calculate the lost rent and/or lost profits that, but for the breach, would have been received by plaintiff during Local 726's tenancy, the actual damages under the lease for any given month, and the entire lease term, were capable of being readily determined and further reduced by plaintiff's efforts to mitigate. Section 14B(i) was included in the LPA not because of any difficulty in determining damages, but instead to allow plaintiff to recover all of its future damages at the time of breach as a penalty to Local 726, rather than collecting damages as they actually accrue over the course of 14 years. Such a provision is unenforceable as a matter of law.

CONCLUSION

For the foregoing reasons, Defendant Teamsters Local No. 700 respectfully requests that this Court find that the LPA does not satisfy the requirements of the Property of Unincorporated Association Act and/or the bylaws of Local 700, and that as a result thereof, is void and unenforceable; that the general rule of successor non-liability precludes the imposition of liability against Local 700 for any breach of the LPA by Local 726; and that the liquidated damages clause of the LPA is unenforceable. Accordingly, defendant respectfully prays that the decision of the Illinois Appellate Court on each of these issues be reversed, and that this cause be remanded to the Circuit Court of Cook County for entry of judgment for defendant.

Dated: August 9, 2018

Respectfully submitted,

By: /s/ Richard J. Prendergast
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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 46 pages.

/s/ Richard J. Prendergast

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned, an attorney, certifies that **BRIEF OF DEFENDANT-APPELLANT** was electronically filed with the Clerk's Office of the Illinois Supreme Court and served upon:

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By: /s/ Richard J. Prendergast
TEAMSTERS LOCAL
UNION NO. 700

No. 123046

IN THE
SUPREME COURT OF ILLINOIS

1550 MP ROAD LLC,

Plaintiff-Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 700,

Defendant-Appellant

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JOINT COUNCEL 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, RANDY CAMMACK, JOHN COLI, PATRICK W. FLYNN, FRED GEGARE, JAMES T. GLIMCO, FRED GEGARE, and JAMES T. GLIMCO,

Defendants.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-15-3300. There Heard on Appeal from the Circuit Court of Cook County Illinois, County Department, Law Division, No. 10 L 5979.

The Honorable Raymond W. Mitchell, Judge Presiding.

APPENDIX TO BRIEF AND ARGUMENT OF DEFENDANT-APPELLANTS

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1550 MP Road LLC, Plaintiff, vs. Teamsters Local Union No. 700, International Brotherhood of Teamsters, Joint Council 25 of the International Brotherhood of Teamsters, Randy Cammack, John Coli, Patrick W. Flynn, Fred Gegare, James T. Glimco, Michael Haffner, Ken Hall, Terrence J. Hancock, Carroll E. Haynes, James P. Hoffa, C. Thomas Keegel, Brian Meidel, Frederick P. Potter, Jr., Brian Rainville, Fred Simpson, Thomas Stiede, and George Tedeskchi,[1] Defendants.	No. 10 L 5979 Calendar S Judge Raymond W. Mitchell

ORDER

This case is before the Court on the Defendants' post-judgment motions seeking to vacate a judgment entered after a bench trial. *See* 735 ILCS 5/2-1203. In response to those motions, the Court withdraws its July 14, 2015 Order and issues this order in its place.

The Court held a lengthy bench trial with the parties present in person and through counsel, testimony was taken and concluded with the Court having admitted certain exhibits into evidence and having heard arguments advanced on behalf of the parties. In making this judgment, the Court reviewed its notes and the exhibits offered and received into evidence; it listened to the witnesses and observed their manner and demeanor while testifying; and the Court considered witnesses' testimony in light of all the relevant admissible evidence.

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[1] The Circuit Court of Cook County Clerk's electronic docket listed several individuals as parties who were not in fact actual parties. In reliance on that information, the Court included those individuals in the caption in the original order so that the disposition would be as to all parties in the Clerk's record. Those individuals now have been removed from the caption.

C 94465

Findings of Fact

Plaintiff 1550 MP Road is an Illinois limited liability company that owns commercial property in Cook County. Teamsters Local Union Number 726 is a dissolved labor organization that operated in Illinois. Defendant International Brotherhood of Teamsters is a labor organization comprised of numerous local labor unions. Defendant Teamster Local Union Number 700 is a labor organization operating in Illinois.

In response to an inquiry from Local 726 looking for new space to house its offices, Plaintiff showed various properties to the Local's leadership. After they settled on one property (1550 Mount Prospect Road), Plaintiff purchased the property for $800,000 and proceeded to build out the property to the Local's specifications. In May 2008, Plaintiff's Manager Matthew Friedman and Local 726's Secretary Treasurer Thomas Clair entered into a lease-purchase agreement for the property. The terms of the agreement were negotiated between Friedman, Clair, Plaintiff's Co-Manager Mick Bess, and union member John Diaz, and the written contract was prepared by Plaintiff's attorney Jeffrey Rochman. Under the contract, Local 726 leased the property for five years. If Local 726 did not purchase the property by the end of the fifth year, it was required to pay an amount equal to 200% of the base rent for ten years.

Local 726 took possession of the property in January 2009 and paid rent until August 2009.

Separately, after an unrelated investigation into Local 726 revealed certain irregularities, Defendant IBT's General President imposed an emergency trusteeship over Local 726 in August 2009. Trustee Becky Strzechowski disputed the validity of the lease and refused to pay the August rent. From September to November, Plaintiff and Local 726's trustees attempted to reach a new lease agreement. In early December, Plaintiff learned that Local 726 was going to be dissolved. Plaintiff and Local 726's trustees continued to negotiate, but ultimately failed to agree.

On December 31, 2009, IBT's General Executive Board dissolved Local 726 and another labor organization, Local 714. Defendant Local 700 was chartered that same day, and the memberships for Local 726 and Local 714 were transferred to Local 700. Local 726's assets and liabilities were also transferred to Local 700, which initially operated a temporary trusteeship.

Local 700 occupied the property at 1550 Mount Prospect from January 2010 to April 30, 2010. Local 700 vacated the property at the end of April. In May 2010, Plaintiff served Local 700 with a notice of default demanding rent payments. Local 700 did not respond, so Plaintiff terminated the lease.

Plaintiff filed a 22-count verified complaint, claiming damages related to Local 700's alleged failure to perform under the lease. Count I alleges breach of contract against Local 700 under a theory of successor liability. Counts II and III allege violations of the Uniform Fraudulent Transfer Act against Local 700. The remaining counts allege tortious interference with contract claims against IBT, Joint Council 25, and individual members of the IBT General Executive Board or Joint Council 25 (collectively "the IBT Defendants").

Conclusions of Law

A. Validity of the Lease

The first issue is whether the lease between Plaintiff and Local 726 was valid and enforceable. Local 726's liability, and hence Local 700's liability, to Plaintiff rests on whether Local 726 was bound by and breached the terms of a valid and enforceable contract. Whether the lease between Local 726 and Plaintiff was valid and enforceable depends on several sub-issues including (1) whether Secretary Treasurer Thomas Clair had authority to enter into the contract on Local 726's behalf; (2) whether the lease is invalid under the Illinois Property of Unincorporated Associations Act; (3) whether the statute of frauds is a defense to Plaintiff's claim; and (4) whether an executive board resolution was a condition of the lease.

Clair's Ability to Enter into the Lease

Under Local 726's bylaws, both the Secretary Treasurer and President were required to sign all contracts entered into on behalf of Local 726. Thus, Clair did not have express authority to enter into the lease by himself. Clair had the power to bind Local 726 under the agreement, however, if he acted with apparent authority. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 34. Apparent authority "is the authority which a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." *Id.* Where a principal has created the appearance of authority in an agent, and another party has reasonably and detrimentally relied upon the agent's authority, the principal cannot deny it. *Id.*

Testimony shows that Clair had apparent authority to sign new leases without votes from the membership or authorization from the Executive Board. Two members of the Executive Board testified to Clair's authority to sign new leases, and Clair signed Local 726's prior lease, which the Local fully performed, by himself. Although Plaintiff may have "received" a copy of the Local's bylaws, the Defendants have not shown that Plaintiff had actual knowledge of the provision regarding lease authorization. Friedman testified that he had never reviewed the

governing documents for any entity that he worked with in his long real estate career.

In its post-judgment motion, Local 700 argues that the evidence at trial conclusively shows that Plaintiff knew or had reason to know that Clair lacked authority to enter into the lease. But, the evidence at trial was far from definitive. Friedman testified that he did not recall seeing the bylaws. Clair testified that he had no specific recollection of Friedman requesting a copy of the bylaws or of providing a copy of the bylaws to Friedman, Plaintiff's other manager Mick Bess, or Plaintiff's attorney. Clair testified that he might have given a copy of the bylaws to John Diaz, a member of Local 726 who was not Plaintiff's representative. The testimony did not convincingly establish that Plaintiff received a copy of the bylaws, and that as a result, Plaintiff knew or should have known that Clair did not have actual authority to enter in the lease on behalf of Local 726.

Clair's apparent authority is further supported by the Executive Board's "Unanimous Consent Resolution," which appears to expressly authorize and ratify Clair's actions with respect to the lease. The consent resolution demonstrates that Local 726 held out Clair as having the authority to enter into the lease on his own. Thus, Plaintiff reasonably relied on Clair's apparent authority when negotiating and executing the lease.

In addition to creating an appearance of authority, the Executive Board ratified the lease. Ratification, which may be express or inferred, "occurs where a principal attempts to seek or retain the benefits of the transaction." *Hofner v. Glenn Ingram & Co.*, 140 Ill. App. 3d 874, 883 (1st Dist. 1985). The consent resolution signed by the Executive Board specifically mentions the lease and authorizes Clair's actions. While not all members signed the resolution, there was still a majority in its favor. More importantly, Local 726 moved into the property and paid rent for seven months without any objection by the Executive Board or the membership, thereby retaining the benefit of the parties' agreement.

Effect of the Illinois Property of Unincorporated Associations Act

Local 700 argues that the lease is unenforceable because it was not executed in accordance with the Illinois Property of Unincorporated Associations Act. Local 700 did not plead the Act as an affirmative defense and raises the issue for the first time in its post-trial brief. "[A] statutory violation does not automatically render a contract unenforceable." *K. Miller Const. Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 296 (2010). Instead, the court looks to the statute to determine whether the statute expressly provides that a contract in violation of the statute is unenforceable. If the statute is silent, the court must balance the public policy expressed in the statute against public interests in enforcing contractual agreements. *Id.* at 294.

The Illinois Property of Unincorporated Associations Act enables unincorporated organizations to acquire, hold and convey real estate and to bring and defend actions concerning such real estate in the name of the organization, instead of the individual members. *See* 765 ILCS 115/0.01 et seq. Section 115/2 establishes the procedure by which unincorporated associations can contract for real estate, specifically stating that "the presiding officer . . . together with the secretary . . . may execute mortgages and execute or receive conveyances or leases . . . when authorized by a vote of members present at a regular meeting held by said lodge or subordinate body . . . " 765 ILCS 115/2. But, the Act does not explicitly say whether non-compliance with the statute renders a real estate contract with an unincorporated association unenforceable against that organization. As a result, the Court must balance the public policy expressed in the statute with the public interest in enforcing the lease.

The Act was passed by the legislature with the clear intent to give unincorporated associations a statutory basis for owning and leasing property, as previous common law did not allow unincorporated associations to do so. *See Chicago Grain Trimmers Ass'n v. Murphy*, 389 Ill. 102, 107 (1945) ("an unincorporated association, having no legal existence independent of members . . . is ordinarily incapable, as an organization, of taking or holding either real or personal property . . ."). Nothing in the language of the statute evidences an intent to give an unincorporated association a means of avoiding a written lease agreement, knowingly entered into by an association's officer, ratified by the association's governing body, and supported by the association's membership.

Public policy strongly favors enforcing the lease. Illinois "recognizes a public policy favoring the enforcement of contracts . . ." *Royal Extrusions Ltd. v. Continental Window and Glass Corp.*, 349 Ill. App. 3d 642, 651 (1st Dist. 2004); *See also City of Chicago v. Chicago Fiber Optic Corp.*, 287 Ill. App. 3d 566, 573 (1st Dist. 1997) ("public policy strongly favors the freedom to contract"). In fact, "where a contract is illegal or against public policy, a court will not, at the urging of one of the parties, set it aside after it has been executed, because to give such relief would injure and counteract the public good." *Id.* Plaintiff and Local 726 entered into the lease with the reasonable expectation that it would be enforceable. Union members held several meetings in the new space with almost no objection. The union's executive board ratified Clair's signing of the lease, and the union paid rent for several months. Local 726 was in the position to comply with any union procedural requirements, not Plaintiff, yet Plaintiff would bear all of the cost here if the lease was not enforced. The public interests in enforcing this lease agreement clearly outweigh any public policy against it.

Statute of Frauds

Local 700 also challenges the validity of the lease under the statute of frauds, arguing that Clair, as Local 726's agent, needed written authorization to enter into the lease. The statute of frauds provides that "[n]o action shall be brought to charge any person upon any contract for the sale of lands . . . unless such contract . . . shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 740 ILCS 80/2. Local 700 did not plead the statute of frauds as an affirmative defense, so the argument is waived. But even reaching the merits, the argument has no moment.

The purpose of the statute of frauds is not to enable parties to "repudiate contracts that they have in fact made." *Haas v. Cravatta*, 71 Ill. App. 3d 325, 329 (2d Dist. 1979). There is no doubt that Local 726 entered into and intended to be bound by the lease. Moreover, "the statute of frauds was not designed or intended to afford an opportunity for escape from the fundamental principle that no one shall be permitted to found a claim upon his own iniquity or take advantage of his own wrong." *Loeb v. Gendel*, 23 Ill. 2d 502, 504 (1961). Local 726 failed to follow the specifics of its own bylaws, and now it is attempting to use its failure to take advantage of the statute of frauds, despite clearly accepting and performing under the contract for several months. Plaintiff should not be punished for Local 726's failure to obtain proper written authorization for Clair's actions. Plaintiff asked for and reasonably relied on the consent resolution, which purportedly authorized the lease. To permit Local 700 to use the statute of frauds in this case on these facts would perpetrate a fraud–not avoid it.

Even if the statute of frauds was an appropriate defense, the consent resolution satisfies the statute. If an agent's signature is unauthorized, the statute of frauds is satisfied where the principal later ratifies the agent's actions in writing. *Prodromos v. Poulous*, 202 Ill. App. 3d 1024, 1029 (1st Dist. 1990). "Ratification must be of the same nature as which would be required for conferring authority in the first place," and "the document . . . must show that the principal fully understood that ratification included the contract at issue." *Id.* Here, the written consent resolution specifically mentions the lease at 1550, and it expressly authorizes and ratifies Clair's actions. The consent resolution also expressly states that "the Union" ratifies and authorizes his actions. The Local's bylaws do require authorization from the union membership for new leases, but the membership was on notice as there were several membership meetings held in the new hall, with nearly uniform satisfaction with the property. That Local 726 intended to ratify Clair's action is only further supported by the fact that Local 726 moved into the property and began paying rent.

In its post-judgment motion, Local 700 argues that ratification could only be obtained through a written document showing that the members in fact authorized

the lease, such as approved membership meetings. The phrase "of the same nature as which would be required for conferring authority in the first place" simply means that ratification must be in writing; it does not require the writing to satisfy the bylaws. Local 700 cites *Prodromos v. Howard Savings Bank*, 295 Ill. App. 3d 470 (1st Dist. 1998) in support. However, in *Prodromos v. Howard Savings*, the plaintiff sued to enforce an employment contract that the defendant's board of directors never signed, relying instead on meeting minutes that stated that only two of the board members had approved an employment contract, without any reference to which contract had been approved or its essential terms. Here, the consent resolution was signed by members of the Executive Board and acknowledges that the Union ratified and authorized Clair's actions. Moreover, Plaintiff is not relying on the consent resolution to establish the existence or terms of the lease, which the parties do not deny.

Local 700 further asserts that by moving into the property and paying rent, Local 726 created a month-to-month tenancy and did not ratify the lease. But, Local 700 relies exclusively on cases in which the court determined that these actions created a month-to-month tenancy where the parties had oral leases or no lease at all. None of these cases addressed the issue of whether members of an organization can assent to a written lease, approved in writing on the organization's behalf by the organization's executive board. *See Kachigian v. Minn,* 23 Ill. App. 3d 722 (1st 1974); *Marr v. Ray*, 151 Ill. 340 (1894); *Seaver Amusement Co. v. Saxe*, 210 Ill. App. 289 (1st Dist. 1918); *Delphi Indus., Inc. v. Stroh Brewery Co.*, 945 F.2d 215 (7th Cir. 1991) (where parties have a "parol" agreement voidable under the statute of frauds, a month-to-month tenancy is created).

Effect of the Executive Board Resolution

Finally, Local 700 argues that obtaining a valid consent resolution was a necessary "condition" of the lease, and that the consent resolution, provided in violation of Local 726's bylaws, made the lease invalid. However, the lease provision calling for the resolution is a warranty, not a necessary condition of the lease. The provision states specifically that "Tenant warrants that the execution hereof has been authorized . . . and evidence of same shall be provided upon the execution hereof." This warranty provision, created for the benefit of Plaintiff, could be waived by Plaintiff. *See Midway Park Saver v. Sarco Putty Co.,* 2012 IL App (1st) 110849, ¶20 ("Parties to a contract can waive provisions placed in the contract for their benefit . . ."). As such, the validity of the consent resolution under Local 726's bylaws has no effect on the validity of the lease.

Because the lease was valid and enforceable against Local 726, Local 726 breached the lease when it failed to make the August 2009 rent payment and is liable to Plaintiff for that breach.

B. Successor Liability for Local 726's Breach

For Local 700 to be liable for Local 726's breach, successor liability must exist between the organizations. Illinois courts have not directly addressed whether a labor union can be liable as the successor of another labor union. However, in other jurisdictions, courts have imposed liability on successor labor organizations by applying successor liability in the context of collective bargaining agreements, discriminatory acts, and unfair labor practices. *Local Union Number 5741 v. National Labor Relations Board*, 856 F. 2d 733, 736 (6th Cir. 1989); *Parker v. Metropolitan Transportation Authority*, 97 F. Supp. 2d 437, 451 (S.D.N.Y. 2000); *Local 1, Broadcast Employees v. International Brotherhood of Teamsters*, 461 F. Supp. 961, 983 (E.D. Pa. 1978).

The general rule is that an entity that purchases the assets of another entity is not liable. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶86. Successor nonliability developed as a means of protecting bona fide purchasers from unassumed liability. *Vernon v. Schuster*, 179 Ill. 2d 338, 345 (1997). Yet, the courts have created exceptions to the general rule, imposing liability

> (1) where there is an express or implied agreement of assumption of liability; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations.

Workforce Solutions, 2012 IL App (1st) 111410, ¶86. These exceptions are guided by the equitable principal of protecting creditors from the potentially harsh impact of the dissolution of a debtor entity. *Vernon*, 179 Ill. 2d at 345 (citing *Tucker v. Paxson Machine Co.*, 645 F. 2d 620, 623 (8th Cir. 1981)). Three of the exceptions are applicable here.

Local 700 was unquestionably the result of a consolidation or merger of Local 714 and Local 726. IBT created Local 700 by combining Local 714 and Local 726 without significantly changing either union. The former General Secretary Treasurer of IBT described Local 700 as a "consolidation of the former Local Union No. 714 and Local Union No. 726" in a 2009 letter. Additionally, Local 726 and Local 700's respective tax forms and financial documents use the terms "merger" and label Local 700 the "successor" to Local 726.

Local 700 also qualifies as a continuation of Local 726. The purpose of the continuation exception is to prevent an entity from avoiding liability through "a mere change in form without a significant change in substance." *Vernon*, 179 Ill. 2d at 345-46 (quoting *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 296 (Md.

Ct. Spec. App. 1989)). Illinois courts determine whether a successor entity constitutes a continuation by analyzing similarity in ownership of the two entities. *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052, 1062 (1st Dist. 2009). But, this type of analysis is not aptly transferable to a labor union because it does not have "owners" in the same way as a corporation or other business entity. When addressing the continuation exception, other jurisdictions apply a more general test, which focuses on (1) whether there has been "substantial continuity" between the entities and (2) whether the successor had notice of the liability in question. *Equal Employment Opportunity Commission v. Local 638*, 700 F. Supp. 739, 743 (S.D.N.Y. 1988). Here, there were no significant substantive changes made when Local 700 was formed. The same IBT constitution and officials governed both unions. Nearly every Local 726 member joined Local 700, which not only accepted Local 726's collective bargaining agreements and liabilities (with the exception of the lease), but also occupied the 1550 property for several months and paid rent. Finally, IBT had notice of Local 726's lease through its trustees, John Coli and Becky Strzechowski.

Local 700 exhibited the necessary intent to defraud 1550, and therefore, the fraud exception applies here too. Unlike Illinois' mere continuation exception, successor liability through fraud does not require similar identity of ownership. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 509 (2d Dist. 2010). The fraud exception analysis focuses on whether the entities acted with intent to defraud or avoid an obligation. *Id.* Strzechowski's comments about the lease's "crushing liability" and the unions' actions, namely transferring assets without receiving reasonably equivalent value and engaging in lease modification negotiations after IBT decided to dissolve Local 726, show intent to avoid Local 726's obligations under the lease. Additional evidence of intent to escape liability and support for the fraud exception is discussed below in the context of Plaintiff's fraudulent transfer claims.

C. Transfer of Local 726's Assets to Local 700

As Local 726's successor, Local 700 is liable for any damages that flow from Local 726's breach of the lease. But, Plaintiff also alleged that Local 726 violated the Uniform Fraudulent Transfer Act as a means of recovering damages directly from Local 700. At trial, Plaintiff introduced evidence that Local 726 fraudulently transferred its assets, including its collective bargaining agreements, to Local 700 for no value.

Under Section 5(a) of the Uniform Fraudulent Transfer Act, a transfer is fraudulent if the debtor makes the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor." 740 ILCS 160/5(a). Under Section 6(a), a transfer is fraudulent if the debtor makes the transfer "without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . " 740 ILCS 160/6(a). If a transfer is in fact voidable, the debtor's creditor is entitled

to recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claims, whichever is less, and judgment may be entered against the transferee or the person for whose benefit the transfer was made. 740 ILCS 160/9(b)(1).

Here, Local 726's assets were intentionally transferred to Local 700 to avoid Local 726's obligations under the lease. Testimony at trial established that Local 726 had been considering renegotiation, litigation, or bankruptcy to avoid the lease debt for some time. Coli later recommended the dissolution of Local 726 and the creation of Local 700. Strzechowski, with full knowledge of the Local's pending dissolution, continued to negotiate with Plaintiff for lease end dates well past when Local 726 was to be dissolved. When Coli assumed trusteeship over the new Local 700 in December, he transferred all of Local 726's assets, including cash, furniture, and collective bargaining agreements, to Local 700, while deliberately rejecting the lease agreement. All talk of bankruptcy or negotiation of the lease abruptly ceased just days after a proposed agreement between Local 726 and Plaintiff failed. Local 726 was left with no assets, received no equivalent value in exchange, and was dissolved.

Local 700 argues that it could not receive "a reasonably equivalent value" when the collective bargaining agreements were transferred to Local 700 because they have no value. The value of the collective bargaining agreements, however, is found in the "mandatory" union dues which the Local receives. Much like accounts receivable, union dues are convertible to cash at future dates and are assets with significant value that can be transferred. The in-house counsel for Local 700 testified that even before they were the authorized bargaining agent under the collective bargaining agreements, Local 700 saw the value in the agreements and was actively trying to maintain Local 726's collective bargaining agreements.

Local 700 further asserts that Local 726's collective bargaining agreements, along with its tangible property and cash, cannot be "transferred" within the meaning of the Act because Local 726's rights in the agreements and other assets were "extinguished." Yet, these assets were clearly transferred. A vast majority of members consented to the transfer of their collective bargaining agreements to Local 700, with only a few members rejecting it. Documents admitted at trial further demonstrate that Local 700 received substantial assets in the form of cash, investments, and tangible property from Local 726. To say that Plaintiff cannot recover these assets from Local 700 because they must be administered "only in the interests of the employees," would permit unions to avoid liability on any agreement they no longer view as favorable to them. Locals enter into contracts, like leases, and perform those contracts by making payments with Local assets, including union dues. It follows that Plaintiff can recover damages for Local 726's failure to perform such a contract from those same assets.

As a result, the transfer of Local 726's assets, including the collective bargaining agreements, to Local 700 was fraudulent under the Act and provides Plaintiff with an alternate basis of recovery. Local 726 transferred assets in excess of the amount owed to Plaintiff; consequently, Plaintiff is entitled to recover its damages, as the lesser of the two values, from Local 700.

D. Liability for Intentional Interference with the Lease

To recover against the IBT Defendants for intentional interference with contractual relations, Plaintiff must prove (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contractual relationship; (3) the defendant's intentional and unjustified inducement of breach of the contract; (4) a subsequent breach by the other caused by the defendant's wrongful conduct; and (5) damages. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1st Dist. 1998).

Here, Plaintiff established that the lease was valid and enforceable. It is also clear that the IBT Defendants acted intentionally when IBT induced Local 726's breach. IBT chose to dissolve Local 726 and thereby interfere with Local 726's ability to perform under the lease. And evidence presented at trial shows that the IBT Defendants had both actual and constructive knowledge of the lease when IBT dissolved Local 726. General President Hoffa had at least constructive knowledge through his agent Strzechowski as trustee. Coli clearly had actual knowledge, but most other General Executive Board members had no knowledge of the lease.

Thus, the issue is whether the IBT Defendants' decision to dissolve Local 726 falls within a "privilege." Acts of interference are considered privileged where a defendant acts to protect an interest of equal or greater value than the plaintiff's contractual rights. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 157 (1989). Here, IBT is bound by a fiduciary duty to act in the best interest of its members under the IBT constitution, a valid contract between IBT and its Locals. *See United Association of Journeymen & Apprentices v. Local 334*, 452 U.S. 615, 620-23 (1983). Weighing the Plaintiff's contractual rights under the lease against IBT's fiduciary duty to act in the best interest of its locals, it is clear that the IBT Defendants' actions fall within a privilege. *HPI Health*, 131 Ill. 2d at 157 (citing *Swager v. Couri*, 77 Ill. 3d 173, 191 (1979)).

According to the Illinois Supreme Court, however, that is not the end of the analysis, because the Plaintiff may still recover for an intentional interference with contract if the decision to dissolve Local 726 was unjustified or malicious. *Id.* at 158.[2] Unjustified actions include unlawful conduct or acts unrelated to the

[2] This is the analytic framework established by our Supreme Court in *HPI Health*. Although a bit redundant, the framework captures the essential elements of the tort, but seems to confuse the competing burdens of proof relative to the elements versus the

privileged party's protected interest. *Id.* In analyzing whether acts of interference are justified, courts in Illinois and elsewhere have considered a number of factors, including the following:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties[.]

Restatement (Second) of Torts § 767 (cited approvingly by *Roy v. Coyne*, 259 Ill. App. 3d 269, 277 (1st Dist. 1994)). In weighing these factors in light of the evidence at trial, it is clear that the IBT Defendants acted in connection with a protected privilege and can have no liability because, among other reasons, they had limited knowledge of the lease and only a modest level of involvement. This is true for each IBT Defendant, except Coli.

Coli stands apart. Coli's actions are unjustified and not protected by privilege precisely because he orchestrated an unlawful act: a scheme to defraud a creditor. Testimony and evidence illustrate that Coli played an integral role in all stages of Local 726's dissolution and the subsequent fraudulent transfer of its assets.[3] Coli did this with actual knowledge of the lease and an expressed desire to avoid the financial obligation. Conversely, the other IBT Defendants were only remotely involved, if at all. Coli is liable for his own actions under long-standing law that an individual is liable for his own tortious conduct. *See e.g. Veteran Supply Co. v. Swaw*, 192 Ill. App. 3d 286, 291 (1st Dist. 1989); *Miller v. Simon*, 100 Ill. App. 2d 6, 10 (1968). The proofs at trial demonstrate that Coli's actions caused Plaintiff's damages. To the extent that he accomplished those acts through the General Executive Board, he can still be held liable. *See e.g. Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012). Coli made the presentation to the General Executive Board and urged that they vote to dissolve Local 726. As trustee of the newly created Local

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affirmative defense of privilege and justification. *See Roy v. Coyne*, 259 Ill. App. 3d 269, 277 (1st Dist. 1994); *see also* Polelle & Ottley, *Illinois Tort Law* § 11.01 at 11-3, 11-4. The evidence against Coli, however, is so overwhelming that the Court need not resolve the issue because regardless of which party bears the burden, Coli's actions were demonstrated to be unjustified.

[3] Although the tortious interference claims against individual Joint Council members, including Coli, were dismissed before trial, Coli played numerous roles and participated in the transaction at various stages. His liability stems from his own conduct, not as a member of the Joint Council. Indeed, Coli appeared and answered Count VIII through counsel. He moved for summary judgment, introduced evidence at trial, and his counsel argued against liability in closing argument.

700, Coli unilaterally chose to accept all of the assets of Local 726 while repudiating its most significant liability, the 1550 lease. Even more telling, Coli alone decided to the abandon the 1550 property and to move Local 700 into a nearby office owned by Teamsters Local 727, another union local controlled by Coli and his son. By that action, Coli exposed the members of Local 700 to the continuing obligation under the lease at issue here while incurring a new additional obligation at the Local 727 office space. That action was plainly against the interest of the members of Local 700 and is wholly unjustified.

E. Damages

The final matter to be resolved is the appropriate amount of damages. Plaintiff's damages are dependent on several provisions in the lease and whether Plaintiff was obligated to mitigate its damages.

Enforceability of the Double-Rent Provision

The first issue with respect to damages pertains to Section 9 of the lease, which provides that Local 726 must pay double the base rent for the remaining ten years of the lease if it fails to purchase the property on the last day of the lease's fifth year. The parties dispute whether this "double-rent provision" is an unenforceable liquidated damages provision. In order to constitute a valid and enforceable liquidated damages provision, the double-rent provision must be: (1) agreed upon by both parties with the intention of settling damage arising from a breach, (2) for an amount bearing a reasonable relationship to damages that may be sustained, and (3) concerning a breach that actual damages would be difficult to prove. *GK Development, Inc. v. Iowa Malls Financing Corp.*, 2013 IL App (1st) 112802, ¶49 (citing *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004)). Here, the enforceability of the double-rent provision hinges on whether the total rent due thereunder bears a reasonable relationship to the Plaintiff's potential damages in the event Local 726 failed to purchase the property.

The double-rent provision not only requires Local 726 to pay significantly more than the fifth-year purchase price of the property and more than double the Plaintiff's loan amount, but also allows the Plaintiff to retain ownership of the property. This recovery far exceeds any potential actual damages Plaintiff could foreseeably incur, and enforcement of the clause results in an unenforceable windfall for the Plaintiff. *GK Development*, 2013 IL App (1st) 112802, ¶57. Additionally, Friedman himself likened the provision to a holdover penalty and admitted that he intended the damages to secure performance. As a matter of public policy, provisions that are penal in nature or intended to secure performance of an option through a threat are unenforceable. *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st Dist. 2004). Consequently, the double-rent provision will not be enforced and Plaintiff's damages must be based on the normal rents due

under the lease for the period of the lease following the fifth-year obligation to purchase.

Liquidated Damages in the Event of Default

The lease provides for liquidated damages in the event of tenant default. Section 14(B)(i) applies where the lease is terminated by Plaintiff and provides for damages in an amount "equal to the value of the Rent provided to be paid by Tenant for the balance of the Term." The parties agree that Section 14(B)(i) applies here; however, they dispute the meaning of "value" and the appropriate discount rate to be applied. Section 14(B)(i) does not provide a method for calculating value, but Section 14(B)(ii) does. Section 14(B)(ii) applies in the event that Plaintiff terminates Local 726's possession of the leased property and provides for liquidated damages equal to the "present value of the rent." It then specifies that "such present value is to be computed on the basis of a per annum yield on U.S. Treasury obligations maturing closest to the Expiration Date calculated on the date specified" in the termination notice.

Given the proximity of the two liquidated damages provisions in the contract, Plaintiff's expert Michael Goldman applied the Treasury obligation formula from Section 14(B)(ii) to determine the value of the rent under Section 14(B)(i), assuming the double-rent provision was unenforceable. Applying this method, Goldman determined that Plaintiff's liquidated damages, with prejudgment interest through the trial date, amount to $1,945,653. This sum, however, does not include the $51,200 owed to Plaintiff for the four-month period during which Local 700 occupied the property without paying rent before Plaintiff terminated the lease. Plaintiff's total damages are thus $1,996,853.

Local 700 urges a method of calculating value that deducts mortgage payments and other property-related expenses from the monthly rental payments owed and requires an offset for the fair market rental value of the remainder of the lease. But, Local 700's method is flawed in several respects. First, the lease does not indicate in any manner that the amount of rent owed was dependent on Plaintiff's mortgage payments or property-related expenses. Thus, Plaintiff's obligations to others are irrelevant for purposes of calculating the "value" of the rent. Second, the sentence in Section 14(B)(i) that states "[i]f the fair market rental value of the Premises . . . for the balance of the Term exceeds the value of the rent provided to be paid by the Tenant for the balance of the term, Landlord shall have no obligation to pay to Tenant the excess of any part thereof or credit such amount" does not require an offset for the fair market value. It merely provides that in the event the fair market value for the remainder of the lease exceeds the value of the rent Local 726 agreed to pay for that period, Local 726 was not entitled to apply that excess value towards the amount owed by Local 726 to Plaintiff.

In the alternative, Local 700 challenges the validity of Section 14(B)(i), asserting that it is an unenforceable liquidated damages provision that exceeds Plaintiff's actual damages. Local 700 has the burden of proving that the provision is a penalty where, as here, there is nothing on the face of the contract that suggests the provision is a penalty. *Paramount Pictures Distributing Corp. v. Gehring*, 283 Ill. App. 581, 596 (1936). The liquidated damages sought under Section 14(B)(i) meet each of the three requirements for liquidated damages set forth above.

First, Plaintiff included the provision in the lease to allow it to recoup the expenses it initially incurred in purchasing and building out the property (solely for Local 726's use); to account for uncertainty in the real estate market; and to account for its inability to calculate the potential cost of refinancing the mortgage. That neither party could specifically recall discussing the provision does not prove lack of intent to settle on a sum of damages. Moreover, 14(B)(i) does not permit Plaintiff to seek either liquidated or actual damages, as Local 700 contends. Instead, it permits Plaintiff to recover the value of the rent for the remainder of the term following default and any other amounts for which Local 726 is liable to Plaintiff.

Second, the amount sought is reasonable and bears a relation to the actual damages that Plaintiff sustained. Section 14(B)(i) does not set a fixed dollar amount irrespective of when default occurs during the course of the lease. *GK Development*, 2013 IL App (1st) 112802, ¶ 73 ("The element common to most liquidated damages clauses that get struck down as penalty clauses is that they specify the same damages regardless of the severity of the breach.") (citations omitted). Instead, it incorporates a calculation method which requires Local 726 to pay damages in an amount commensurate to the value of the rent due for the remainder of the lease. Local 700 contends that Plaintiff's actual damages are approximately $1 million less than the liquidated damages provision provides for, but does not take into consideration Plaintiff's loss of the property itself as a result of Local 726's default.

Lastly, Section 14(B)(i) fixes damages that would otherwise be uncertain and difficult to prove. At the time of contracting, Plaintiff had incurred substantial up-front costs in obtaining property specifically for Local 726 without knowing what the value of that property may be at any point in the future and could not predict the potential cost of refinancing his mortgage if Local 726 defaulted under the lease.

Plaintiff's Duty to Mitigate Damages

The final issue with respect to damages is whether Plaintiff had a duty to mitigate its damages in light of the liquidated damages provision in the lease. Although addressed by other states, Illinois courts have yet to decide whether a non-breaching party has a duty to mitigate damages when the parties have agreed to liquidated damages in a commercial lease. Under Section 5/9-213.1, a landlord

must take "reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1.

Here, the Plaintiff clearly made reasonable efforts to mitigate his damages; therefore, it is unnecessary to resolve the issue of whether Section 5/9-213.1 applies to commercial leases with a liquidated damages provision. *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 31 (2d Dist. 1993) (holding that determination of whether or not a landlord's attempt to mitigate are reasonable is a question of fact). Plaintiff not only attempted to renegotiate the original lease terms with Local 700, but also hired a brokerage firm to help lease or sell the property at a reduced price before Local 700 vacated. These actions certainly constitute the necessary reasonable effort mandated by Section 5/9-213.1. *See Danada Square LLC v. National Management Co.*, 392 Ill. App. 3d 598, 609 (2d Dist. 2009) (finding a landlord's unwillingness to negotiate with a suitable, potential tenant unreasonable mitigation efforts); *Kallman v. Radioshack Corp.*, 315 F.3d 731, 740 (7th Cir. 2002) (finding a landlord's efforts were not reasonable because she failed to hire a real estate broker in a timely manner and bargained for higher rental rates with prospective tenants).

F. Attorney Fees & Costs

Plaintiff seeks $291,473.82 in attorney fees and $30,293.85 in costs pursuant to the lease, which provides that "Tenant shall pay all attorneys fees and costs incurred by Landlord in enforcing the terms and provisions of this Lease." Plaintiff's petition is supported by an affidavit from its principal attorney, along with comprehensive time records and billing summaries from each of the three firms with which counsel was associated during the course of the litigation. Plaintiff's petition and supporting documentation are sufficient to demonstrate that the attorney fees and costs Plaintiff seeks are reasonable.

Defendants object to the petition on several grounds. Defendants first assert that Plaintiff should not be entitled to recover the fees and costs Plaintiff incurred with respect to the tort claims against Local 700 and the other Defendants on the basis that those fees and costs were not incurred "in enforcing the terms and provisions" of the lease. These fees and costs, however, are sufficiently related to Local 726's default under the lease and Plaintiff's efforts to recover damages pursuant to the lease.

Defendants further assert that Plaintiff is not entitled to recover $11,900 in expert witness fees. While statutes permitting a prevailing party to recover "costs" of litigation have been interpreted to exclude expert witness fees, the language of the lease governs here. That language permits recovery of all costs incurred in enforcing the terms and provision of the agreement and thus has a broader meaning. To successfully enforce the lease through litigation, Plaintiff had to

obtain an expert witness on damages. That expert's testimony was instrumental in Plaintiff's ability to secure judgment and recover under the lease. As a result, Plaintiff is entitled to recover its expert witness fees as a cost of enforcement.

In their post-judgment motion, Defendants argued that the Court should have held an evidentiary hearing on Plaintiff's fee petition. The Defendants' written objections, however, did not raise any issue on which testimony or other evidence would aid the Court. Indeed, the fee-shifting provision in the lease is very broad, such that even now in their post-judgment motion, the Defendants have failed to articulate with any specificity the issues to be probed at an evidentiary hearing. Further, in awarding attorney fees, the Court considered factors including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there was a reasonable connection between the fees charged and the litigation. The Court is permitted to use its own knowledge and experience to assess the time required to complete particular activities. *Harris Trust & Sav. Bank v. American Nat'l Bank & Trust Co.*, 230 Ill. App. 3d 591, 595 (1st Dist. 1992). Significantly, Defendants have never offered any affidavit or other evidentiary proffer from an expert (or anyone else) challenging the reasonableness of the fees sought by Plaintiff. Indeed, Plaintiff's counsel's affidavit attesting to the reasonableness of his fees went unrebutted.

C 4481

Judgment

The Court is mindful that its decision here imposes a financial burden that may ultimately be borne by the hardworking men and women of Teamsters Local 700. But to sanction a contrary result would be a death knell for contract rights—a far worse result for working men and women. If today the law allowed a labor leader to unilaterally repudiate a contractual obligation under a lease, what would keep an employer from doing the same tomorrow under a labor contract? In its most basic sense, every contract is a promise or set of promises that the law will enforce irrespective of whim or conflicting human desire.

For all these reasons, it is therefore ORDERED:

(1) A judgment is entered on Counts I, II, and III in favor of Plaintiff 1550 MP Road, LLC, and against Defendant Teamsters Local Union No. 700, in the amount of $1,996,853 in damages (including prejudgment interest) and attorney fees and costs of $321,767.67 totaling $2,318,620.67, plus post-judgment interest.

(2) A judgment is entered on Count VIII in favor of Plaintiff 1550 MP Road, LLC, and against Defendant John Coli, in the amount of $1,996,853 in damages (including prejudgment interest), plus post-judgment interest and costs.

(3) A judgment of no liability is entered on the remaining counts against the remaining defendants.

(4) Defendants' post-judgment motions are DENIED.

(5) This is a final order that disposes of the case in its entirety.

ENTERED, Judge Raymond W. Mitchell

OCT 21 2015

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

2017 IL App (1st) 153300
Appellate Court of Illinois,
First District,
FIRST DIVISION.

1550 MP ROAD LLC, Plaintiff–Appellee,
v.
TEAMSTERS LOCAL UNION NO. 700; International Brotherhood of Teamsters; Joint Council 25 of the International Brotherhood of Teamsters; Randy Cammack; John Coli; Patrick W. Flynn; Fred Gegare; James T. Glimco; Michael Haffner; Ken Hall; Terrence J. Hancock; Carroll E. Haynes; James P. Hoffa; C. Thomas Keegel; Brian Meidel; Frederick P. Potter, Jr.; Brian Rainville; Fred Simpson; Thomas Stiede; and George Tedeskchi, Defendants–Appellants.

No. 1–15–3300
|
November 13, 2017

Synopsis

Background: Lessor brought action for breach of contract against labor union's new local branch that was the purported corporate successor of original lessee, which was a local branch that the union had dissolved and which was an unincorporated association. After a bench trial, the Circuit Court, Cook County, Raymond W. Mitchell, J., found that the lease and purchase agreement (LPA) at issue was valid and enforceable, that new branch was liable for dissolved branch's breach of the LPA, that transfers of dissolved branch's assets to new branch were fraudulent transfers under the Uniform Fraudulent Transfer Act, and that new branch's trustee, who had been appointed by labor union's review board, was personally liable for tortious interference with the LPA. New branch and trustee appealed.

Holdings: The Appellate Court, Pierce, J., held that:

[1] sufficient evidence supported finding that dissolved branch's secretary-treasurer and principal officer had apparent authority to enter into the LPA, even though he lacked actual authority to bind branch to the LPA;

[2] as matter of apparent first impression, new branch was liable under a theory of successor liability for breach of the LPA;

[3] no transfer of an asset by a debtor existed under the Uniform Fraudulent Transfer Act when labor union decided to dissolve branch and merge it into new branch;

[4] actions by new branch's trustee were privileged so as to preclude claim that he tortiously interfered with the LPA;

[5] LPA's liquidated-damages provision was not an unenforceable penalty for nonperformance; and

[6] LPA's liquidated-damages provision bore a reasonable relationship at the time of contracting to the actual damages that lessor might have sustained in the event of a breach.

Affirmed in part and reversed in part.

***449** Appeal from the Circuit Court of Cook County, No. 10 L 5979, The Honorable Raymond W. Mitchell, Judge Presiding.

Attorneys and Law Firms

Richard J. Prendergast, Ltd. (Richard J. Prendergast, Michael T. Layden, Dierdre A. Close, and Brian C. Prendergast, of counsel), and Jacobs, Burns, Orlove & Hernandez (Sherrie E. Voyles and Brandon Anderson, of counsel), both of Chicago, for appellants.

Law Office of Richard K. Hellerman, P.C., of Chicago (Richard K. Hellerman, of counsel), for appellee.

OPINION

PRESIDING JUSTICE PIERCE delivered the judgment of the court, with opinion.

***748** ¶ 1 BACKGROUND

¶ 2 In May 2008, plaintiff 1550 MP Road LLC entered into a lease and purchase agreement (LPA) with Teamsters Local Union No. 726 (Local 726), an unincorporated association. The LPA was executed by Thomas Clair, the Secretary–Treasurer and principal officer of Local 726.

Local 726's executive board was aware of the negotiation of the LPA, its scope, and the reasons for entering into it. After the LPA was executed, the board passed a resolution approving the LPA. Local 726, however, executed the agreement without complying with its bylaws, which called for Local 726's members to be notified and vote to authorize the agreement. Local 726 ***450** ****749** took possession of the premises in January 2009.

¶ 3 In February 2008, while the LPA was being negotiated, the International Brotherhood of Teamsters (International) initiated an investigation of its affiliate, Local 726. The International requested that John Coli, an International vice president, a member of the International's General Executive Board, a member of Joint Council 25 of the International Brotherhood of Teamsters (JC25), and president of Teamsters Local Union No. 727 (Local 727), investigate the financial condition of Local 726. Approximately two weeks after the LPA's execution, Coli, who had been given a copy of the LPA during his investigation, wrote to the International with assurances that cost-cutting measures were being implemented to improve Local 726's financial condition. Coli did not mention the LPA in his letter.

¶ 4 The International's Independent Review Board was conducting its own investigation of Local 726.[1] In June 2009, it issued a report recommending that Local 726 be placed into trusteeship. James P. Hoffa, the International's president, imposed an emergency trusteeship over Local 726 and appointed Becky Strzechowski as trustee with full control over the business activities of the local. Strzechowski viewed the LPA as a financial drain on Local 726. Strzechowski met with plaintiff to discuss modification of the LPA, but the parties failed to reach an agreement. In September 2009, the International voted to continue Local 726's trusteeship.

¶ 5 The International's General Executive Board met in December 2009. Coli proposed dissolving Local 726 and Teamsters Local Union No. 714 (Local 714) (which was also under trusteeship) and transferring the membership, assets, and liabilities of the two locals to a newly-chartered local, Teamsters Local Union No. 700 (Local 700). After dissolution of the two locals, new Local 700 would consist of essentially all of Local 726's members and the public sector members of Local 714. Shortly thereafter, the International's General Executive Board, including Coli, voted to revoke the charters of Local 726 and Local 714 and charter a new public employee union, Local 700, to establish a single local that would better represent their interests. Coli was appointed Local 700's trustee. The International advised Coli that "initially, [Local 700] will be structured as a consolidation of former [Local 714] and [Local 726]." The International transferred all of Local 726's membership, books, documents, property, and funds to Local 700. According to a 2009 audit, total assets of $47,883 and total liabilities of $123,299 were transferred to Local 700.

¶ 6 Local 726 was dissolved on December 31, 2009. On January 1, 2010, Local 700 occupied the space formerly occupied by Local 726 in the subject premises. Although the plaintiff and Strzechowski had engaged in negotiations to modify the LPA prior to Local 726's dissolution, Coli, Local 700's trustee, rejected any liability under the agreement signed by Local 726. Coli was adamant that "he would do nothing for [plaintiff]" that would result in Local 700 remaining in the premises or performing under the LPA. Local 700 advised plaintiff that it had taken possession of the premises and offered to create a month-to-month tenancy. Local 700 tendered a rent check, but plaintiff did not cash or deposit the ***451** ****750** check. Plaintiff and Local 700 continued to negotiate through April 2010 but failed to reach any agreement. At the end of April 2010, Coli moved Local 700's business operations to another building owned by Local 727's pension fund.

¶ 7 Plaintiff sued for breach of contract and sought damages specified in the LPA. In count I, plaintiff claimed that Local 700 was liable for the breach of the LPA under a theory of corporate successor liability because Local 726 merged into Local 700 and that Local 700 was a mere continuation of Local 726. In the alternative, plaintiff claimed in counts II and III that Local 700 was liable to plaintiff because Local 726's transfer of its assets, including its collective bargaining agreements (CBAs), to Local 700 was a fraudulent transfer under sections 5(a) and 6(a) of the Uniform Fraudulent Transfer Act (Fraudulent Transfer Act) (740 ILCS 160/5(a), 6(a) (West 2014)). In the remaining counts, plaintiff claimed that Coli, the International, JC25, and certain individual Teamster officials were liable for tortious interference with the LPA, with count VIII directed at Coli.

¶ 8 Following a bench trial, the circuit court found that (1) the LPA was valid and enforceable; (2) Local 700 was

liable for Local 726's breach of the LPA under the merger, mere continuation, and fraud exceptions to the theory of successor corporate nonliability; (3) Local 700 was liable for Local 726's breach of the LPA because Local 726's transfer of its assets, including its CBAs, was a fraudulent transfer under the Fraudulent Transfer Act; and (4) Coli was personally liable for tortious interference with the LPA. Judgment was entered in favor of the International, JC25, and the remaining Teamsters officials. The circuit court granted plaintiff nearly $2 million in damages and over $320,000 in attorney fees and costs.

¶ 9 On appeal, defendants[2] argue that (1) the LPA is void *ab initio* and cannot be enforced because it was not executed in conformity with either Local 726's bylaws or the Property of Unincorporated Associations Act (Act) (765 ILCS 115/0.01 *et seq.* (West 2010)), (2) if the LPA is not void *ab initio*, then it is invalid and unenforceable because Clair lacked apparent authority to enter into the agreement, (3) the circuit court erroneously imposed corporate successor liability against Local 700, (4) a CBA is not a transferable asset for the purposes of the Fraudulent Transfer Act, (5) Coli is not liable for tortious interference with the LPA, and (6) the LPA contains an unenforceable liquidated damages provision.

¶ 10 We find that the LPA was an enforceable contract. Local 726's failure to comply with its bylaws or with the Act did not render the LPA void *ab initio*. Furthermore, Clair acted with apparent authority when executing the LPA, and Local 726's executive board ratified the LPA. We further find that Local 700 was liable for breach of the LPA based on corporate successor liability principles. We therefore affirm the circuit court's judgment finding that Local 700 was liable to plaintiff for Local 726's breach of the LPA. We reverse the circuit court's Fraudulent Transfer Act judgments in favor of plaintiff because there was no transfer of an asset by a debtor within the meaning of the Fraudulent Transfer Act, and even if there was, plaintiff failed to prove the actual value of the CBAs at issue here. We reverse the circuit court's judgment against Coli for tortious interference with a contract because, as a member of the International's ***452** ****751** General Executive Board and as Local 700's trustee, Coli's conduct was privileged. Finally, we affirm the circuit court's damages award in favor of plaintiff because the LPA contained an enforceable liquidated damages provision.

¶ 11 ANALYSIS

¶ 12 A. Enforceability of the LPA

¶ 13 1. Property of Unincorporated Associations Act and Local 726's Bylaws

[1] ¶ 14 First, we address defendants' argument that the LPA is void *ab initio* and cannot be enforced because it was not executed in conformity with the Act or with Local 726's bylaws. Defendants contend that because the union's members never voted to authorize the LPA, and because the LPA was not signed by the requisite number of union officers, Local 726 could not enter into the LPA. Defendants rely primarily on *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass'n*, 2015 IL App (1st) 150169, 400 Ill.Dec. 177, 47 N.E.3d 1142, to argue that "a contract is void *ab initio* where one of the parties exceeded its authority to enter into the subject agreement." In the circuit court, defendants raised an affirmative defense challenging the enforceability of the LPA by asserting that it was entered into without the membership's approval but did not specifically plead a violation of the Act as an affirmative defense. Defendants raised an argument that the LPA did not comply with the Act for the first time in their posttrial motion.

[2] ¶ 15 On appeal, plaintiff contends that defendants have forfeited any argument under the Act by failing to raise it prior to trial. In response, defendants argue that the enforceability of the LPA was before the circuit court by virtue of defendants' arguments that Local 726's members were neither given notice of the LPA nor voted to approve it, and defendants therefore pleaded facts that would form a defense under the Act. See *Huszagh v. City of Oakbrook Terrace*, 41 Ill. 2d 387, 389, 243 N.E.2d 831 (1968) (finding that it is the facts of defense that must be alleged, not matters of law, and that "the question of whether a contract is void as contrary to statute or public policy is one of law"). Furthermore, defendants argue that when a party challenges the validity of a contract as being against public policy, a challenge to the validity of the agreement is not waived by failing to plead it. See *Berge v. Berge*, 366 Ill. 228, 230–31, 8 N.E.2d 623 (1937). We agree with defendants that there has been no forfeiture of an argument on appeal that the LPA is void due to Local

726's failure to comply with the Act. Furthermore, even if defendants had forfeited an argument under the Act on appeal, forfeiture is a limitation on the parties, not on the courts. *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill. 2d 507, 514, 203 Ill.Dec. 454, 639 N.E.2d 1273 (1994).

¶ 16 Turning to the merits of defendants' argument, we find that Local 726's failure to satisfy the requirements of the Act or its bylaws prior to entering into the LPA does not render the LPA void *ab initio*. First, the Act provides that "[a]ny unincorporated lodge or subordinate body of any society or order which is duly chartered by its grand lodge or body may take, hold, or convey real estate for its own use and benefit, by lease, purchase, grant, legacy, gift or otherwise, * * * according to the register of the respective grand lodge or body." 765 ILCS 115/1 (West 2010). The Act further provides:

> "The presiding officer of such lodge or subordinate body, together with the secretary or officer keeping the records ***453** ****752** thereof, may execute mortgages and execute or receive conveyances or leases of any real estate by or to such lodge or subordinate body when authorized by a vote of the members present at a regular meeting held by said lodge or subordinate body, after at least ten days' notice has been given to all members of said lodge or subordinate body by mailing a written notice of said proposed action to the last known address of all such members.
>
> All conveyances, leases or mortgages executed hereunder shall be in the name of the lodge, attested by the presiding officer and secretary or other officer in charge of the records, and shall have affixed the seal, if any, of such lodge or subordinate body." 765 ILCS 115/2 (West 2010).

Local 726's bylaws contained similar requirements: the signatures of both the Secretary–Treasurer and the President were required on all contracts, and notice and membership authorization was necessary in connection with the lease or purchase of real estate.

[3] **[4]** **[5]** ¶ 17 Here, it is undisputed that Local 726 is an unincorporated association and it did not comply with section 2 of the Act or its bylaws in connection with the LPA; it did not provide written notice to its members of the LPA, and it did not hold a vote of its members to authorize the LPA. Furthermore, the statutory language requires the signature of two officers, and Clair was the only Local 726 officer who signed the LPA. But the failure to comply with the requirements of a statute does not automatically render a contract unenforceable or void *ab initio*. See *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 296, 345 Ill.Dec. 32, 938 N.E.2d 471 (2010). If the statute provides that a contract that violates the statute is unenforceable, then the contract is unenforceable. *Id.* at 293, 345 Ill.Dec. 32, 938 N.E.2d 471. Where, however, a statute is silent as to the consequences of a violation of the statute, we must balance the public policy expressed in the statute against the countervailing policy in enforcing contractual agreements. *Id.* at 294, 345 Ill.Dec. 32, 938 N.E.2d 471. Furthermore, where the statute does not prescribe a particular consequence for noncompliance and noncompliance does not implicate a constitutional right, we are guided by our supreme court's observation that it may be appropriate to "determin[e] whether a particular set of circumstances justifies a court's exercise of its equitable powers to ameliorate the [void *ab initio*] doctrine's sometimes harsh results." *Perlstein v. Wolk*, 218 Ill. 2d 448, 467, 300 Ill.Dec. 480, 844 N.E.2d 923 (2006). We find this guidance particularly compelling here, where the subject matter of the contract (a commercial lease purchase agreement) is otherwise legitimate and contractually binding.

¶ 18 The Act is silent as to the consequences for noncompliance. Defendants argue that "[the Act] is *not* silent, but rather explicitly provides the *only* means by which an unincorporated association may enter into an enforceable contract." But defendants' argument reads into the statute the term "enforceable," a term the legislature did not use. The statutory language, as written, *is* silent as to the consequences for noncompliance.

¶ 19 Therefore we must balance the public policy expressed in the Act against the countervailing policy of enforcing contractual agreements. The parties acknowledge that prior to the Act, an unincorporated association was legally incapable of owning property in its own name. *Chicago Grain Trimmers Ass'n v. Murphy*, 389 Ill. 102, 107, 58 N.E.2d 906 (1945). Defendants argue that "the Act is expressly designed to authorize unincorporated associations to ***454** ****753** enter into real estate contracts where they otherwise would be without the power to do so under common law." Defendants further contend that the Act provides important protections to association members who are liable for the debts and liabilities of the association. Defendants, however, cite no

authority to support their position that our legislature intended to provide those protections, as opposed to simply enabling unincorporated associations to execute or receive conveyances of real estate in the name of the association. We find nothing in the language of the Act that suggests that the legislature intended to remedy existing problems with the manner in which unincorporated associations owned, leased, or conveyed real property. Instead, a plain reading of the Act indicates that the legislature intended to empower unincorporated associations to execute or receive conveyances of real property in the association's name, and made no statement as to the effect of noncompliance with the notice or signatory provisions of the Act. As such we see no sound reason to exempt an unincorporated association from ordinary public policy considerations favoring enforcement of contracts or from general contract principles.

¶ 20 "Traditionally, and in keeping with the principle of freedom of contract, this court has been reluctant to declare a private contract as void as contrary to public policy." *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 299, 305 Ill.Dec. 617, 856 N.E.2d 422 (2006) (citing *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 57, 282 Ill.Dec. 160, 805 N.E.2d 1177 (2004)). Our supreme court has long held that:

> " 'In considering whether any contract is against public policy it should be remembered that it is to the interests of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts. Agreements are not held to be void, as being contrary to public policy, unless they be clearly contrary to what the constitution, the statutes or the decisions of the courts have declared to be the public policy or unless they be manifestly injurious to the public welfare.' " *Id.* at 300, 305 Ill.Dec. 617, 856 N.E.2d 422 (quoting *Schumann–Heink v. Folsom,* 328 Ill. 321, 330, 159 N.E. 250 (1927)).

[6] ¶ 21 Here, we find nothing expressed in the Act that would lead us to conclude that the public policy embodied in the Act (an association's ability to own and convey real estate in its own name) outweighs our state's preferred policy of enforcing otherwise legal private contracts entered into for legitimate purposes. There is nothing in this transaction that dictates a conclusion that enforcing the LPA results in manifest injury to the public welfare and should be declared void *ab initio*. Therefore, we find that an unincorporated association's failure to comply with Act when executing or conveying an interest in real property does not, on its own, render the contract void *ab initio*.

[7] ¶ 22 We further find that *Alliance* is distinguishable. There, the question was whether a condominium board could enter into a 36–month management contract when the condominium association's governing documents only permitted the board to enter into contracts for 24 months or less. *Alliance*, 2015 IL App (1st) 150169, ¶ 26, 400 Ill.Dec. 177, 47 N.E.3d 1142. We found that the management contract was void because the board lacked authority to enter into the agreement: the Condominium Property Act required the board to comply with its own bylaws, and the board had no authority to disregard the plain language of its governing documents. *Id.* ¶¶ 30–33. The primary distinction between ***455 **754** *Alliance* and the situation before us is that the bylaws in *Alliance* specifically prohibited the board from entering into a 36–month management contract, rendering the management contract void *ab initio*. Here, nothing in Local 726's bylaws prohibited it from entering into lease or purchase agreements generally, and defendants make no argument that the LPA contained terms that were specifically prohibited by Local 726's governing documents. As we discussed, Local 726's failure to comply with the Act does not, on its own, render the LPA void. Similarly, the failure of Local 726 to comply with the notice, membership authorization, and signatory provisions of its bylaws do not render the agreement void *ab initio*, especially where there is no evidence that Local 726 ever sought membership approval for any earlier lease, or that it ever complied with the two officer signature requirement. We therefore conclude that the LPA is not void *ab initio* by virtue of Local 726's failure to comply with the Act or its bylaws.

¶ 23 2. Clair's Authority to Enter Into the LPA

[8] ¶ 24 Next, defendants argue that, even if the LPA was not void *ab initio*, the LPA is unenforceable because Clair lacked actual or apparent authority to enter into the LPA on his own. Defendants assert that the circuit court found that "although [p]laintiff may have 'received' a copy of the Local's bylaws, the [d]efendants have not shown that [p]laintiff had actual knowledge of the provision regarding lease authorization." Defendants contend that the circuit

court's finding that Clair had apparent authority to enter into the LPA was erroneous because plaintiff had a duty to investigate the scope of Clair's authority, and the circuit court improperly "placed the burden on [d]efendants to prove that they took adequate steps to equip [plaintiff] with actual knowledge that Clair lacked express authority to enter into the LPA."

¶ 25 Plaintiff responds in part by arguing that Clair had authority to make contracts on behalf of Local 726 because he was Local 726's principal officer, and therefore plaintiff was dealing with Clair as a principal, not as an agent.

[9] ¶ 26 It has long been recognized that "a corporation acts through its president, and through him executes its contracts and agreements, and an act pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body." *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 317, 48 N.E. 154 (1897). "As a general rule a party dealing with the president of a corporation is entitled to assume that he has authority to make contracts for the corporation which are within the scope of its corporate powers and which do not violate any statute or rule of public policy." *Vulcan Corp. v. Cobden Machine Works*, 336 Ill. App. 394, 400, 84 N.E.2d 173 (1949). However, it has also been long held that when a party challenges a president's authority to enter into the contract, then it is "necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same." *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 480, 79 N.E. 172 (1906).

¶ 27 Here, Clair was Local 726's Secretary–Treasurer and its principal officer. Local 726's bylaws vested Clair with authority to "supervise, conduct and control all of the business and affairs of [Local 726], its officers and employees." The bylaws, however, required the signatures of both the Secretary–Treasurer and the President on all contracts, including leases, ***456 **755** as well as notice and membership authorization in connection with the lease or purchase of real estate. It is undisputed that Clair believed that he had individual authority to execute the LPA and that he held himself out to plaintiff as having that authority. But under the terms of Local 726's bylaws, Clair did not possess either express or implied actual authority to individually execute the LPA on behalf of Local 726. We find that Clair lacked actual authority to bind Local 726 to the LPA.

[10] **[11]** **[12]** ¶ 28 We next consider whether there was sufficient evidence from which the circuit court could conclude that Clair acted with apparent authority. The question of whether an agency relationship exists and the scope of the purported agent's authority are questions of fact. *Thomas v. Weatherguard Construction Co.*, 2015 IL App (1st) 142785, ¶ 48, 397 Ill.Dec. 395, 42 N.E.3d 21. We review the circuit court's findings of fact under the manifest weight of the evidence standard. *Id.* A factual finding is against the manifest weight of the evidence only where the opposite result is clearly evident or where the factual finding is unreasonable, arbitrary, or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252, 269 Ill.Dec. 80, 779 N.E.2d 1115 (2002).

¶ 29 We find that there is sufficient evidence in the record to support the circuit court's finding that Clair had apparent authority to enter into the LPA. We first note that defendants do not fully acknowledge the circuit court's factual findings regarding the plaintiff's knowledge of Clair's authority to enter into the LPA. The circuit court's written order states:

> "In its post-judgment motion, Local 700 argues that the evidence at trial conclusively shows that [p]laintiff knew or had reason to know that Clair lacked authority to enter the lease. But, the evidence at trial was far from definitive. Friedman testified that he did not recall seeing the bylaws. Clair testified that he had no specific recollection of [Matthew Friedman, the sole member and co-manager of plaintiff] requesting a copy of the bylaws or of providing a copy of the bylaws to Friedman, [p]laintiff's other manager Mick Bess, or [p]laintiff's attorney. Clair testified that he might have given a copy of the bylaws to John Diaz, a member of Local 726 who was not [p]laintiff's representative. *The testimony did not convincingly establish that [p]laintiff received a*

> *copy of the bylaws, and that as a result, [p]laintiff knew or should have known that Clair did not have actual authority to enter into the lease on behalf of Local 726.*" (Emphasis added.)

¶ 30 A complete reading of the circuit court's factual findings shows that it found that defendants did not establish that Friedman knew, or was in possession of information that would indicate that he should have known, that Clair lacked actual authority to sign the LPA.

[13] [14] [15] [16] [17] ¶ 31 "Apparent authority is the authority that a reasonably prudent person would naturally suppose the agent to possess, given the words or conduct of the principal." *Siena at Old Orchard Condominium Ass'n v. Siena at Old Orchard, L.L.C.*, 2017 IL App (1st) 151846, ¶ 80, 412 Ill.Dec. 440, 75 N.E.3d 420 (citing *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 432, 164 Ill.Dec. 631, 583 N.E.2d 547 (1991)). " '[A]n agent may bind his principal by acts which the principal has not given him *actual* authority to perform, but which he *appears* authorized to perform.' " (Emphases in original.) *Loncarevic & Associates, Inc. v. Stanley Foam Corp.*, 2017 IL App (1st) 150690, ¶ 36, 411 Ill.Dec. 110, 72 N.E.3d 798 (quoting ***457** ****756** *Lundberg v. Church Farm, Inc.*, 151 Ill. App. 3d 452, 461, 104 Ill.Dec. 309, 502 N.E.2d 806 (1986). "A principal that places an agent in a situation where the agent may be presumed to have authority to act is estopped as against a third party from denying the agent's apparent authority." *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 390, 160 Ill.Dec. 773, 577 N.E.2d 1344 (1991). It is the words or conduct of the principal, not those of the alleged agent, which establish an agent's authority. *Wesly v. National Hemophilia Foundation*, 2017 IL App (3d) 160382, ¶ 40, 413 Ill.Dec. 141, 77 N.E.3d 746. Furthermore, "[w]here parties silently stand by and permit an agent to act [on] their behalf in dealing with another in a situation where the agent may be presumed to have authority, the parties are estopped from denying the agent's apparent authority as to third persons." *Mateyka v. Schroeder*, 152 Ill. App. 3d 854, 864, 105 Ill.Dec. 771, 504 N.E.2d 1289 (1987).

¶ 32 At trial, Friedman testified that the renovation plans and estimated costs for the premises had been shared with Local 726 and that Local 726 approved the plans and costs before the LPA was executed. Friedman also testified that John Falzone (Local 726's president), Kenneth Brantley (Local 726's vice president), John Hurley (Local 726's recording secretary), and Michael Marcatante (a Local 726 trustee) all visited the property prior to the execution of the LPA. Clair and Diaz introduced Falzone, Brantley, Hurley, and Marcatante to Friedman as members of Local 726's executive board. Friedman testified that "[t]hey thought [the premises] was great, perfect fit. The only comment I got was the office manager needed an office in the front of the building, make sure that happens." Friedman stated that he met with Local 726 representatives approximately 15 to 20 times between the time Local 726 started looking for property and the execution of the LPA and that Clair was at most, but not all, of the meetings. Additionally, Clair testified that Local 726's executive board had already given him authorization and approval to sign the LPA. In light of all of the evidence, the circuit court, as the trier of fact, could reasonably conclude that Local 726 held Clair out as having the authority to sign the LPA, especially considering that a majority of Local 726's executive board visited the premises, made favorable statements, and continued to permit Clair to spearhead the effort to secure a new headquarters for Local 726.

[18] ¶ 33 Furthermore, we find that the LPA would be enforceable even if Clair lacked apparent authority to bind Local 726 because the executive board clearly intended to ratify the LPA. "Ratification of an unauthorized act is equivalent to an original authorization and confirms that which was originally unauthorized." *Yugoslav–American Cultural Center, Inc. v. Parkway Bank & Trust Co.*, 289 Ill. App. 3d 728, 738, 224 Ill.Dec. 840, 682 N.E.2d 401 (1997). "Since the rationale behind the doctrine of ratification is that the person ratifying obtains a benefit through the actions of someone who is acting in his behalf, then ratification will be found '[a]s long as the principal has full knowledge of the facts and has the choice of either accepting or rejecting the benefits of the transaction.' " *Id.* (quoting *Swader v. Golden Rule Insurance Co.*, 203 Ill. App. 3d 697, 704–05, 148 Ill.Dec. 793, 561 N.E.2d 99 (1990)).

¶ 34 Here, a majority of Local 726's executive board members signed a consent resolution on May 8, 2008, six days after Clair executed the LPA. The consent resolution specifically resolved that "[Local 726] ratifies the actions previously taken by the officers of [Local 726] or any one of them acting alone, in connection with the [LPA] and all

actions taken incidental ***458** ****757** thereto pertaining to the [LPA]." It is clear that Local 726 intended to ratify the LPA. Although there is nothing in the record to suggest that the executive board gave notice to Local 726's members of the consent resolution or held a vote of its members to authorize the consent resolution, by executing and delivering the consent resolution to plaintiff, the executive board clearly purported to act on behalf of Local 726's members, specifically acknowledged the LPA, and resolved to be bound by it. Furthermore, Local 726 accepted the benefits of the LPA by moving in to the premises and paying the monthly rent called for in the LPA until its dissolution.

¶ 35 Finally, as noted above, there was no evidence in the record that Local 726 ever enforced its own requirements that its members authorize a lease prior to execution or that Local 726's leases be signed by both the Secretary–Treasurer and President. Defendants make no argument that the members of Local 726 voiced any objection to or took any action to contest the actions of Clair or the executive board in order to avoid being bound by the LPA. Under all of these circumstances, we find that Local 726 held Clair out as having the authority to execute the LPA, and then ratified Clair's execution of the LPA on its behalf. Based on Local 726's conduct, plaintiff had no reason to believe that Clair lacked authority to bind Local 726 under the LPA, or that Local 726 did not intend to be bound by the LPA.

¶ 36 In sum, Local 726 entered into a valid and enforceable agreement with plaintiff. Local 726's executive board held Clair out as having the authority to execute the LPA on behalf of Local 726 and ratified the LPA. We conclude that Local 726 was bound by the terms of the LPA.

¶ 37 B. Whether Local 700 Is Liable for a Breach of the LPA

¶ 38 Next, defendants argue that the circuit court erred in imposing successor liability on Local 700 for breach of the LPA. Defendants contend that the general rule is that an entity that purchases the assets of a company is not liable for the predecessor's liabilities unless an exception applies. Defendants argue that the *de facto* merger and "mere continuation" exceptions to the general rule do not apply here. Defendants contend that there was no continuity of ownership between Local 726 and Local 700 because labor unions do not have owners in the same way that corporations or other business entities do. Defendants further argue that Local 700's and Local 726's use of the term "merger" in certain internal audit and IRS filings were "used for descriptive purposes only and were not intended to convey that these entities had, in fact, merged." Defendants, however, do not address a letter from the International to Coli in which the International also referred to Local 700 as a "consolidation" of Local 726 and Local 714. Finally, defendants argue that there was no evidence that the International dissolved Local 726 to fraudulently escape Local 726's obligations.

[19] ¶ 39 "The doctrine of successor corporate nonliability provides that when a corporation purchases the assets of another corporation, the purchaser is generally not liable for the debts or liabilities of the seller." *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 86, 364 Ill.Dec. 778, 977 N.E.2d 267. Four exceptions, however, have been developed to protect the rights of corporate creditors following dissolution: " '(1) where there is an express or implied agreement of assumption [of liability]; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller ***459** ****758** corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations.' " *Id.* (quoting *Pielet v. Pielet*, 407 Ill. App. 3d 474, 508, 347 Ill.Dec. 403, 942 N.E.2d 606 (2010)). Here, defendants essentially argue that successor liability cannot apply to labor unions on the basis of a *de facto* merger or under a "mere continuation" theory because there will never be continuity of ownership, since a labor union's members do not "own" the labor union in the same way that a corporation's shareholders "own" the corporation. The circuit court observed that "Illinois courts determine whether a successor entity constitutes a continuation by analyzing similarity in ownership of the two entities[, b]ut this type of analysis is not aptly transferable to a labor union because it does not have 'owners' in the same way as a corporation or other business entity."

¶ 40 In *Vernon v. Schuster*, 179 Ill. 2d 338, 345, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997), our supreme court discussed the rationale behind the "mere continuation" exception:

> " 'The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of the reach of the predecessor's

creditors. * * * To allow the predecessor to escape liability by merely changing hats would amount to fraud. Thus, the underlying theory of the exception is that, if a corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability.' " *Id.* at 346, 228 Ill.Dec. 195, 688 N.E.2d 1172 (quoting *Baltimore Luggage Co. v. Holtzman*, 80 Md.App. 282, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989)).

¶ 41 Although numerous Illinois courts have addressed successor liability for corporations, the parties have not identified, nor have we found, any Illinois decision that addresses successor liability for unincorporated associations. The circuit court therefore looked to federal law on the issue of successor liability in the context of labor union mergers. In *Equal Employment Opportunity Commission v. Local 638*, 700 F.Supp. 739 (S.D.N.Y. 1988), the federal district court had to determine whether Local 28 of the Sheet Metal Workers' International was the successor to Local 10 of the Sheet Metal Workers' International, and therefore whether Local 28 was liable for Local 10's violation of federal court orders prohibiting racial and ethnic discrimination. The federal district court discussed the principles of successorship in labor law and examined the relationship between the two unions (*id.* at 741–43): whether there was substantial continuity of the former Local 10 as merged into Local 28 (*id.* at 743–44) and whether Local 28 had notice, prior to the merger, of Local 10's general obligations and liabilities (*id.* at 744–45), and the federal policies at stake (*id.* at 745–46). The district court concluded that there was a merger and that Local 28 "inherited all assets, operations, records and property of Local 10, including over $200,000 in value, membership rolls, and collective bargaining agreements." *Id.* at 743. Furthermore, Local 28 absorbed all of Local 10's members. *Id.* There was evidence that Local 28 had pre-merger notice of Local 10's liabilities by virtue of an audit. *Id.* at 744. Finally, the district court found that respect for the federal courts and protections for employees were important federal policies that favored finding successor liability. *Id.* at 745–46.

[20] ¶ 42 We agree with the circuit court that the test employed in *Local 638* provides an appropriate framework for determining whether an unincorporated association, ***460** ****759** such as a labor union, may be liable under a theory of successor liability for the liabilities of a dissolved association. We find that the factors to be considered when determining successor liability of a dissolved association include: (1) the relationship between the dissolved and successor associations, (2) whether there was substantial continuity of the dissolved association after a merger or consolidation, (3) whether the successor association had notice of the dissolved association's liabilities, and (4) whether there are important state policies that would be affected by declining to impose successor liability. See also *Parker v. Metropolitan Transportation Authority*, 97 F.Supp.2d 437 (S.D.N.Y. 2000) (adopting four-factor test set forth in *Local 638* for determining successor liability between labor unions). [3]

[21] ¶ 43 Applying this framework, we find that the circuit court correctly concluded that Local 700 was liable for breach of the LPA under a theory of successor liability. First, the International consolidated the functions of Local 714 and Local 726 into Local 700 by simultaneously revoking the charters of Local 714 and Local 726 and issuing a new charter to Local 700. It is undisputed that C. Thomas Keegel, the International's Secretary General, instructed Coli, trustee of Local 700, that Local 700 "will be structured as a consolidation of former [Local 714] and [Local 726]." There was evidence that the International simultaneously dissolved Local 714 and Local 726 and created Local 700 so that Local 700 would acquire and continue the dissolved locals' operations. Although defendants claim that there was no merger and that the use of the terms "merger" and "consolidation" were merely for "descriptive purposes," defendants cannot escape the common sense conclusion that the practical effect of the International's actions was to consolidate Local 726's (and part of Local 714's) membership, operations, functions, and duties and transfer those membership, operations, functions, and duties to the newly-chartered Local 700.

¶ 44 Second, there was sufficient evidence that there was substantial continuity of Local 726's operations, identity, and functions when it merged into Local 700. The International transferred all of Local 726's members, books, documents, property, and funds to Local 700. Local 700 obtained all of Local 726's assets, including cash, automobiles, office equipment, and furniture, and liabilities consisting of payroll liabilities, loans due to former officers, scholarship commitments, and automobile loans. Importantly, Local 726 was the exclusive collective bargaining representative for public sector employees in certain collective bargaining units. Upon revocation of the charter, the International

transferred Local 726's collective bargaining agreements to Local 700, and Local 700 assumed responsibility as the exclusive representative for the affected bargaining units, an integral and essential function previously held by Local 726. Furthermore, Local 700 informed plaintiff that as of January 1, 2010, the day after Local 726 ***461** ****760** was dissolved, that Local 700 "[had] taken possession of, and has occupied the [p]remises," and tendered the rent due under the LPA (which plaintiff did not accept). Finally, there was testimony suggesting that after January 1, 2010, Local 700 would have acted as the collective bargaining representative under any of former Local 726's collective bargaining agreements, even though Local 700 waited until March 2010 to file petitions before the Illinois Labor Relations Board seeking formal recognition as the authorized collective bargaining representative under former Local 726's collective bargaining agreements. Not only had Local 700 absorbed Local 726's business operations, assets, and liabilities and become the successor representative of the public sector employees covered in collective bargaining units negotiated by Local 726, Local 700 occupied the very office space that Local 726 had occupied under the LPA. There was sufficient evidence before the circuit court to establish a substantial continuity of Local 726's operations, identity, and functions after it merged into Local 700.

¶ 45 Third, there is no dispute that those responsible for creating Local 700 and Local 700's trustee had notice of Local 726's obligations under the LPA at the time of the International's self-described "merger" and "consolidation" in December 2009. There was evidence that the LPA was given to JC25 as part of its investigation into Local 726 in May 2008. Strzechowski testified at the International's September 17, 2009, hearing that the LPA imposed "a multi-million dollar liability on Local 726 that will inevitably bankrupt this Local unless some other means is found to avoid this crushing financial burden." The International's November 2009 report and recommendation regarding the continuation of Local 726's trusteeship called the LPA "an unconscionable and unauthorized lease-purchase agreement for a building which imposes a multi[-]million dollar liability that the Local cannot afford and which exceeds the fair market value of the building." Clearly, the record contains abundant evidence that the authorized entities involved in the investigation, revocation, and dissolution of Local 726 and the simultaneous creation of successor Local 700 were keenly aware of the LPA and Local 726's obligations under it.

[22] ¶ 46 Finally, we find that there are important state interests that favor finding that Local 700 was the successor to Local 726's obligations under the LPA. As discussed, our state's public policy strongly favors enforcement of private contracts. Allowing an unincorporated labor association to avoid its obligations under an enforceable contract through the International's dissolution and simultaneous transfer of the local's entire operation to a newly-chartered local operating under the same International umbrella, would eviscerate the integrity and purpose of contracting, would provide unincorporated associations an escape valve unknown to established contract law, and would serve no legitimate commercial purpose.

¶ 47 We find that there was an adequate basis for the circuit court to conclude that Local 700 was the successor to Local 726 and, therefore, liable for breach of the LPA. The circuit court properly entered judgment in favor of plaintiff on count I because the LPA was a valid and enforceable contract and Local 700 was liable under a theory of successor liability.

¶ 48 C. The Uniform Fraudulent Transfer Act

[23] ¶ 49 The circuit court found, in the alternative, that Local 700 was liable to plaintiff because Local 726 fraudulently transferred its assets, including its CBAs, to Local 700 for no value. The circuit court found that "Local 726's assets were intentionally ***462** ****761** transferred to Local 700 to avoid Local 726's obligations under the [LPA]." The circuit court further found that "Local 726 had been considering renegotiation, litigation, or bankruptcy to avoid the [LPA] debt for some time." The circuit court observed that Coli recommended dissolving Local 726 and forming Local 700. Furthermore, the circuit court found that "Strzechowski, with full knowledge of [Local 726's] pending dissolution, continued to negotiate with [p]laintiff for lease end dates well past when Local 726 would be dissolved." Upon dissolution of Local 726, Coli became the trustee of Local 700 and "transferred all of Local 726's assets, including cash, furniture, and CBAs, to Local 700, while deliberately rejecting the lease agreement." The circuit court further found that "the value of [a CBA] * * * is found in the 'mandatory'

union dues which the Local receives. Much like accounts receivable, union dues are convertible to cash at future dates and are assets with significant value that can be transferred."

¶ 50 On appeal, defendants argue that the circuit court erred by finding that a CBA is a transferable asset for the purposes of the Fraudulent Transfer Act (740 ILCS 160/1 (West 2014)). Defendants argue that Local 726's CBAs were not assets that could be transferred. Defendants contend that under the Illinois Public Labor Relations Act, public sector members of Local 726 have "the right of self-organization, and may form, join or assist any labor organization, [and] to bargain collectively through representatives of their own choosing." 5 ILCS 315/6(a) (West 2014). Defendants argue that union dues and fair share payments "shall be paid to the exclusive representative" chosen by the union members (5 ILCS 315/6(f) (West 2014)), and therefore the payment of dues is subject to the election of the union's members. Defendants contend that unions have no right to the receipt of union dues, and therefore Local 726 could not transfer any right to its members' union dues to Local 700. Defendants cite *In re General Teamsters, Warehousemen & Helpers Union Local 890*, 225 B.R. 719 (Bankr. N.D. Cal. 1998) to argue that CBAs do not entitle a union to the receipt of any union dues or any money.

¶ 51 Plaintiff responds that, regardless of the voluntary nature of a union member's membership in a local union, here, "well over 95% of the Local 726 members in fact became Local 700 members and, as of January 1, 2010, paid their dues to Local 700." Plaintiff contends that Hoffa testified at trial that union dues were mandatory for members if those members wished to have the union represent them under the CBAs. Plaintiff asserts that Local 700 received value from Local 726 in the form of union dues paid by former members of Local 726.

[24] ¶ 52 "The Uniform Fraudulent Transfer Act was enacted to enable a creditor to defeat a debtor's transfer of assets to which the creditor was entitled." *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 16 ; 740 ILCS 160/5 (West 2008) ; see also *Rush University Medical Center v. Sessions*, 2012 IL 112906, ¶ 20, 366 Ill.Dec. 245, 980 N.E.2d 45. "The purpose of the [Fraudulent Transfer] Act is to 'invalidate otherwise sanctioned transactions made with a fraudulent intent.' " *Sharif*, 2014 IL App (1st) 133008, ¶ 16 (quoting *In re Marriage of Del Giudice*, 287 Ill. App. 3d 215, 218, 222 Ill.Dec. 640, 678 N.E.2d 47 (1997)).

¶ 53 Section 2(b) of the Fraudulent Transfer Act defines "asset" as the "property of a debtor," except for certain exclusions ***463** ****762** that do not apply here.[4] 740 ILCS 160/2(b) (West 2014). "Debtor" is defined as "a person who is liable on a claim." 740 ILCS 160/2(f) (West 2014). "Property" is broadly defined as "anything that may be the subject of ownership." 740 ILCS 160/2(j) (West 2014).

¶ 54 Under section 5(a) of the Fraudulent Transfer Act:

> "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." 740 ILCS 160/5(a) (West 2014).

¶ 55 Section 6(a) of the Fraudulent Transfer Act provides:

> "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." 740 ILCS 160/6(a) (West 2014).

¶ 56 When a transfer is voidable under the Fraudulent Transfer Act, "the creditor may recover judgment for the value of the asset transferred * * * or the amount

necessary to satisfy the creditor's claim, whichever is less." 740 ILCS 160/9(b) (West 2014). The creditor may obtain a judgment against "(1) the first transferee of the asset or the person for whose benefit the transfer was made; or (2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee." 740 ILCS 160/9(b)(1)–(2) (West 2014). Whether a CBA meets the definition of an "asset," or whether a "transfer" has occurred for the purposes of the Fraudulent Transfer Act, involve questions of statutory interpretation, which are questions of law reviewed *de novo*.

¶ 57 Neither party provides us with any argument as to whether a CBA satisfies the definition of "asset" under section 2 of the Fraudulent Transfer Act. Nor has either party directed our attention to any case law that addresses whether CBAs (and the dues that accrue to the exclusive bargaining agent as a result) are assets of a local union for purposes of the Fraudulent Transfer Act. Furthermore, the parties do not address other significant issues, such as whether this was a "transfer" by a "debtor" for the purposes of the Fraudulent Transfer Act, since it was the International, not Local 726, that dissolved Local ***464 **763** 726 and transferred Local 726's membership, books, documents, property, and funds to Local 700. Nor do the parties address whether finding Local 700 liable under successor liability principles precludes a finding that Local 726's assets were fraudulently transferred to Local 700—in other words, if Local 700 absorbed Local 726 assets and liabilities, was there a "transfer" for the purposes of the Fraudulent Transfer Act where the transferee is already liable for the debts of the predecessor under principles of successor liability?

¶ 58 We find, under the circumstances of this case, that there was no "transfer" of an asset by a "debtor" as required to impose liability on Local 700 under the Fraudulent Transfer Act. First, as discussed above, the International decided to merge and consolidate Local 726 and Local 714 into new Local 700. There was no "transfer" for purposes of the Fraudulent Transfer Act because Local 700 absorbed all of Local 726's assets and liabilities. Second, even assuming that a transfer occurred, there was no transfer by a debtor because Local 726—the "debtor"—did not transfer any of its assets. Instead, the International, pursuant to its authority over its affiliated locals, transferred Local 726's assets and liabilities to Local 700 as part of its dissolution of Local 726 and consolidation with Local 714 into the newly chartered Local 700. Plaintiff does not contend that the International is liable under the Fraudulent Transfer Act, and as we discuss in more detail below, there was nothing improper about the International's deliberate decision to revoke Local 726's charter and issue a new charter to Local 700. Therefore, assuming *arguendo* that a transfer occurred, the transfer was not made by a debtor. We conclude that, as a matter of law, under the circumstances before us, Local 700 was not liable to plaintiff under the Fraudulent Transfer Act.

¶ 59 Additionally, it is not clear that a CBA (and the future right to collect dues that accrue to the exclusive bargaining agent as a result) is an "asset" for the purposes of the Fraudulent Transfer Act. We find *In re General Teamsters, Warehousemen & Helpers Union Local 890*, 225 B.R. 719 (Bankr. N.D. Cal. 1998) informative. *Local 890* involved a creditor's objection to Local 890's reorganization plan under chapter 11 of the Bankruptcy Code. The creditor argued that Local 890's plan was noncompliant with the Bankruptcy Code because the membership dues to which Local 890 was entitled under its CBAs should have been included in the liquidation analysis. *Id.* at 733. The bankruptcy court rejected the creditor's argument for a variety of reasons and found that the chapter 7 liquidation value of the CBAs was zero. First, the CBAs could not be enforced by Local 890 against any member and thus had questionable economic value to Local 890. *Id.* Second, although the court acknowledged that the CBAs were "property of the debtor's bankruptcy estate under 11 U.S.C. § 541(a) [(1994)]," the CBAs were not capable of liquidation under chapter 7—the chapter 7 trustee would have been responsible for operating Local 890's business, but federal labor law protected the union members' right to elect their own representatives. *Id.* at 734. The trustee, therefore, could only operate Local 890 if the members consented. The same would be true if the trustee attempted to sell or transfer the collective bargaining rights to a third party. *Id.*

¶ 60 *Local 890* casts substantial doubt on whether a CBA is an "asset" of a dissolved unincorporated union for purposes of the Fraudulent Transfer Act because it calls into question whether a CBA is an asset ***465 **764** that can be transferred and, if a CBA can be transferred, whether the dues that accrue to the exclusive bargaining agent in the future have value for creditors. *Local 890* holds that a CBA is "property" of the debtor's estate under bankruptcy law, but it is incapable of valuation.

A bargaining agent may hold legal title to a CBA but equitable title lies with the bargaining unit members. In other words, dues that accrue to the exclusive bargaining agent under a CBA are, on their own, an insufficient basis for valuation because the members control and select the bargaining agent. And furthermore, a CBA cannot be conveyed by the bargaining representative because the members dictate who their representative is and would not be obligated to recognize a transferee as their bargaining representative. *Local 890*, however, does not squarely address the situation here, where the issue is not whether a CBA is capable of being liquidated for value for the benefit of creditors, but instead whether the dues that accrue to the exclusive bargaining agent in the future should be considered when determining the value of a transferred asset for the purposes of the Fraudulent Transfer Act.

[25] ¶ 61 But, even assuming that a CBA (and the right to future dues) is a transferable asset under the Fraudulent Transfer Act, we would still conclude that Local 700 is not liable to plaintiff under the Fraudulent Transfer Act because there is no evidence that plaintiff actually proved the value of the CBAs at issue here. Plaintiff does not direct our attention to any evidence to support a conclusion that plaintiff proved the value of the CBAs at trial. Under the Fraudulent Transfer Act, a creditor is entitled to a judgment against a debtor's transferee for the lesser of the value of asset transferred or the amount necessary to satisfy the claim. Here, plaintiff presented no evidence, and the circuit court made no finding, as to the precise value that should be placed on any or all of the CBAs that Local 726 was a party to and that were absorbed by Local 700. In the circuit court, the parties addressed the CBAs in a general fashion and referred to them as "assets," but there was no evidence presented at trial as to the number of CBAs Local 726 was a party to, the number of members in any related bargaining unit, or the term of any CBA. The mere fact that a CBA may generate some corresponding future dues payment does not, in itself, provide evidence of value or lend itself to a reliable mathematical calculation sufficient to sustain a money judgment against the transferee. Here, the only "value" evidence relating to an asset transfer was an audit report stating that $47,883 in assets and $123,299 in liabilities were transferred from Local 726 to Local 700. And merely arguing that Local 700 received dues under CBAs negotiated by Local 726, provides nothing more than speculation and conjecture regarding the value of a CBA, if any. The possible receipt of dues in the future says nothing about the value of the purported asset transferred sometime in the past. Plaintiff did not prove the value of a transferrable asset at the time of transfer, which is required, to support a monetary judgment against the debtor's purported transferee under the Fraudulent Transfer Act.

¶ 62 In sum, the evidence does not support finding that the debtor, Local 726, fraudulently transferred assets where it was dissolved by the International and the International thereafter transferred the assets, liabilities, and functions of the dissolved local to a successor local union. And, under these facts, even assuming a fraudulent transfer, where there is a failure of proof regarding the value of the transferred asset a judgment against the debtor's transferee cannot stand. We therefore reverse the circuit court's judgments ***466** ****765** on counts II and III finding Local 700 liable to plaintiff under the Fraudulent Transfer Act. We further note that, as plaintiff acknowledged at oral argument, plaintiff suffers no prejudice since it pled its Fraudulent Transfer Act claims in the alternative to its now-affirmed successor liability claim against Local 700.

¶ 63 D. Coli's Liability for Tortious Interference With the LPA

[26] ¶ 64 Next, defendants argue that the circuit court erred in finding Coli liable for tortious interference with the LPA. The circuit court found that the defendant Teamsters officers, in voting to dissolve Local 726, did so with limited to no knowledge of the LPA, and that this decision was privileged because these defendants had a fiduciary duty to act in the best interest of their members. The circuit court found, however, that Coli tortiously interfered with the LPA because he "orchestrated" a "scheme to defraud" plaintiff, evidenced by his involvement in all stages of Local 726's dissolution and his expressed refusal to perform under the LPA. Defendants contend that Coli could not have acted alone in dissolving Local 726, and that Coli did not induce the other International General Executive Board members to vote in favor of dissolution based on his own objections to the LPA. Defendants argue that Coli was appointed trustee of Local 700 after the International dissolved Local 726, so Coli's postdissolution conduct has no bearing on plaintiff's claim that he tortiously interfered with the LPA by causing the dissolution. Defendants further contend

that Coli was justified in rejecting the LPA "given the questions surrounding its validity, the unfair burden it would impose on Local 700 members[,] * * * and his obligation to act in the best interest of the members of Local 700."

[27] ¶ 65 To prevail on a claim of tortious interference with a contract, the plaintiff must plead and prove: (1) the existence of a valid and enforceable contract between the plaintiff and another, (2) the defendant's awareness of this contractual relation, (3) the defendant's intentional and unjustified inducement of a breach of the contract, (4) a subsequent breach by the other, caused by the defendant's wrongful conduct, and (5) damages. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 154–55, 137 Ill.Dec. 19, 545 N.E.2d 672 (1989).

[28] **[29]** ¶ 66 Defendants' arguments focus on whether Coli's conduct was privileged. When determining whether a defendant's inducement of a breach of contract was unjustified, Illinois courts "recognize a privilege * * * where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights." *Id.* at 157, 137 Ill.Dec. 19, 545 N.E.2d 672. A common example of this privilege is where corporate officers and directors use their business judgment and discretion on behalf of a corporation. *Id.* The privilege does not, however, extend to conduct that is "totally unrelated or even antagonistic to the interest which gave rise to [the] privilege." *Id.* at 158, 137 Ill.Dec. 19, 545 N.E.2d 672. Whether a privilege exists is a question of law that we review *de novo*. See, *e.g.*, *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 25, 188 Ill.Dec. 765, 619 N.E.2d 129 (1993).

¶ 67 We find that Coli is entitled to the same privilege that the circuit court afforded the other defendant Teamsters officials. The circuit court found that Coli's conduct was not privileged, since he "orchestrated an unlawful act: a scheme to defraud a creditor." We disagree.

¶ 68 Regarding Coli's conduct before Local 726 was dissolved, the evidence showed ***467** ****766** that Coli was acting in his capacity as president of JC25 and as a member of the International's General Executive Board. In February 2008, the International, aware of Local 726's financial problems, tasked Coli with investigating the financial condition of Local 726 and reporting to the International the steps taken to correct any perceived irregularities. During his investigation, Coli worked with Clair to evaluate Local 726's finances and to implement cost-saving measures to save the Local. Although Coli knew that Clair had executed the LPA approximately one week earlier, he did not mention this in his May 14, 2008, letter to the International outlining reforms that Local 726 was implementing to improve its financial condition.

¶ 69 During this same period, Local 726 was also being investigated by the Independent Review Board. The review board issued a report on July 20, 2009, that recommended placing Local 726 into trusteeship "because the Local is not being conducted in accordance with the International's Constitution and the Local's Bylaws and the Local has engaged in financial malpractice." The report did not mention the LPA. The review board found several instances where Local 726's officers were in breach of their fiduciary duties in connection with certain unauthorized loans from its pension fund. The review board also took issue with the officers' attempts to repay loans from the pension fund with the proceeds of personal loans secured by Local 726's assets, in violation of Local 726's bylaws; failures to keep proper records of meetings; and the failure to create reports accurately reflecting Local 726's financial condition. The report identified two occasions where Clair had "misled the International regarding steps the Local had taken to improve its financial affairs." Specifically, the report noted that Coli's May 14 letter stated that a reduction of officer and business agent salaries had been implemented, but that Clair had not in fact reduced those salaries. The report reflected additional reasons for imposing a trusteeship related to financial disclosures and numerous unauthorized waivers of membership dues.

¶ 70 A reading of the review board's report makes clear that as of July 2009, the International was aware of serious managerial and financial problems plaguing Local 726 resulting in the International imposing an emergency trusteeship in early August 2009. Strzechowski was appointed as Local 726's trustee. She immediately met with plaintiff to discuss the LPA, and addressed the LPA during the International's September 17, 2009, hearing on whether to continue Local 726's trusteeship. Strzechowski also discussed Local 726's mismanagement of its pension fund and other financial improprieties. On November 23, 2009, the International's hearing board recommended continuing the trusteeship, finding that Local 726's "finances are in shambles, and significant

liabilities that were never disclosed to the membership or to the International continued to be discovered, even after the emergency trusteeship was imposed." The LPA was just one of the many factors presented to the International's hearing board for its consideration.

¶ 71 The International's General Executive Board met from December 1 to December 3, 2009. Coli made a brief presentation but did not mention the LPA. The General Executive Board voted to revoke the charters of Local 714 and Local 726 and to form Local 700. The parties do not direct our attention to any transcript of that hearing, and other than presenting evidence of what Coli did not say, they do not provide us with a sufficient understanding of what the International considered prior to voting to dissolve Local 726. ***468** ****767** The circuit court found that the International's General Executive Board members had little to no knowledge of the LPA when they voted to dissolve Local 726. It is also undisputed that Coli was one of several members voting on the fate of Local 726.

¶ 72 Regarding Coli's postdissolution conduct, Coli was appointed trustee of Local 700 in January 2010. Shortly after Local 700's charter became effective he met with plaintiff and informed plaintiff that "he would do nothing for [plaintiff]," and rejected plaintiff's offer to sell the premises to Local 700 for cost. In April 2010, Coli moved Local 700 out of the premises and into a building owned by Local 727's pension fund. Coli and his son were officers of Local 727's pension fund.

¶ 73 Every action taken by Coli was done in his capacity as either an officer of the International, president of JC25, or as trustee of Local 700. Each action had a legitimate business purpose and was in furtherance of Coli's fiduciary duty as an International trustee, member of JC25, and as trustee of Local 700. Although the circuit court concluded that Coli orchestrated a scheme to defraud a creditor, there is no evidence that Coli alone had the power to place Local 726 under trusteeship, revoke its charter, and dissolve Local 726. Coli alone could not and did not transfer the local's functions to or charter Local 700. The circuit court found that actions taken by the defendant Teamsters officers were made with limited to no knowledge of the LPA, which can only be viewed as conclusive evidence that the International, in dissolving Local 726, acted with knowledge of serious problems facing Local 726 as a result of its leadership's "financial malpractice," including being a party to the LPA, and other repeated breaches of their fiduciary duties. It was the dissolution of Local 726 that caused Local 726 to breach the LPA. After dissolution, Coli, as trustee of Local 700, took the position that Local 700 did not enter into, and had no obligations under, the LPA. Although we have ruled Local 700 is liable as a successor entity, Coli's position was not tortious. The record does not support a conclusion that Coli's conduct was substantially different than that of the other defendant Teamsters officers. His conduct was in the exercise of his fiduciary duty and business judgment and therefore falls within the same privilege afforded the other defendant Teamsters officers. We therefore reverse the circuit court's judgment on count VIII finding that Coli was liable for tortiously interfering with the LPA.

¶ 74 E. Enforceability of Section 14(B)(i) of the LPA

[30] ¶ 75 Finally, defendants argue that the circuit court erred in calculating plaintiff's damages because section 14(B)(i) of the LPA contains an unenforceable liquidated damages provision. We disagree.

¶ 76 Section 2 of the LPA, titled "Rent," contains a formula for calculating the monthly rent: monthly rent was one twelfth of the "Annual Base Rent," which equaled the product of the final development cost, $1,434,214, and 10.5%, for a first year base rent of $150,592. Annual Base Rent increased each year by 2% during the 15–year term of the LPA. Section 14(B) sets forth plaintiff's remedies in the event of the lessee's default. Section 14(B)(i) provided in part:

> "Landlord may terminate this Lease and the Term by giving Tenant written notice of Landlord's election to do so and the effective date thereof, in which event Landlord may forthwith repossess the Premises and be entitled to recover forthwith, in addition to any other sums or damages for which Tenant may be liable to Landlord, as liquidated damages, ***469** ****768** a sum of money equal to the value of the Rent provided to be paid by Tenant for the balance of the Term."

¶ 77 Section 14(B)(i) did not provide any method for calculating "the value of the Rent provided to be paid." Section 14(B)(ii) provided that plaintiff "may terminate the right of Tenant to possession without terminating this Lease" by giving written notice. Local 726 would then be obligated:

> "[T]o pay the present value of the rent (at the then current rates therefor) for the period from the date stated in the notice terminating possession to the Expiration Date (such present value to be computed on the basis of a per annum yield on U.S. Treasury obligations maturing closest to the Expiration Date calculated on the date specified in said notice) * * *."

¶ 78 At trial, plaintiff called Michael Goldman, a certified public accountant and certified valuation analyst, to testify as an expert in the field of valuation. Goldman calculated the present value of the rent payments that would have been made under the LPA starting in June 2010 (the first month following plaintiff's termination of the LPA) through 2023. Goldman calculated the applicable discount rate to be applied to the monthly rent payments called for under the LPA by looking to the discount rate set forth in section 14(B)(ii). He concluded that the present value of the lost rent from June 2010 through the end of the lease term was $1,839,019. Goldman did not perform any lost profits analysis and only calculated the net present value of rent payments called for under the LPA. [5]

[31] ¶ 79 "Whether a contractual provision for damages is a valid liquidated damages provision or is an unenforceable penalty clause is a question of law that is reviewed *de novo*." *GK Development, Inc. v. Iowa Malls Financing Corp.*, 2013 IL App (1st) 112802, ¶ 44, 378 Ill.Dec. 239, 3 N.E.3d 804 (citing *Penske Truck Leasing Co. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 454, 244 Ill.Dec. 218, 725 N.E.2d 13 (2000)).

[32] **[33]** ¶ 80 No fixed rule applies to all liquidated damages provisions, and courts must evaluate each one on its own facts and circumstances. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 16, 352 Ill.Dec. 52, 952 N.E.2d 1278 (citing *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423, 286 Ill.Dec. 431, 813 N.E.2d 1124 (2004)). When a contract provision specifies damages, we must determine whether the provision amounts to an enforceable liquidated damages provision or an unenforceable penalty. *GK Development*, 2013 IL App (1st) 112802, ¶ 47, 378 Ill.Dec. 239, 3 N.E.3d 804 (citing *Checkers Eight Ltd. Partnership v. Hawkins*, 241 F.3d 558, 562 (7th Cir. 2001)). To make that determination, we are guided by section 356 of the Restatement (Second) of Contracts, which provides:

> "Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty." Restatement (Second) of Contracts § 356 (1979).

[34] **[35]** **[36]** ¶ 81 Three elements must be present in order for a liquidated damages clause to be enforceable: "(1) the parties intended to agree in advance to the settlement of damages that might arise from the ***470 **769** breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove." (Internal quotation marks omitted.) *Jameson Realty Group*, 351 Ill. App. 3d at 423, 286 Ill.Dec. 431, 813 N.E.2d 1124. We look to the time of contracting, not the time of the breach, to determine whether actual damages would be uncertain or difficult to prove. *Id.* A liquidated damages provision that operates as a penalty for nonperformance or as a threat to secure performance is unenforceable. *Id.*

¶ 82 Defendants first contend that section 14(B)(i) of the LPA serves no purpose other than to penalize nonperformance because it provides that in the event of a default, plaintiff is "entitled to recover forthwith, in addition to any other sums of damages for which Tenant may be liable to Landlord, as liquidated damages, a sum of money equal to the value of the Rent provided to be paid by Tenant for the balance of the Term." We disagree.

¶ 83 The plain language of section 14(B)(i) allows plaintiff to "recover forthwith, *in addition to any other sums or damages* for which Tenant may be liable to Landlord, as liquidated damages, a sum of money equal to the value of

the Rent provided to be paid by Tenant for the balance of the Term." (Emphasis added.) The use of the phrase "in addition to any other sums or damages" means that the recoverable "sums or damages" under this provision are for losses incurred by plaintiff that were different or distinct from the loss caused by the nonpayment breach. The LPA contained several provisions under which Local 726 might owe plaintiff damages. Section 5(B), titled "Condition of Premises," included a provision that Local 726 "shall keep the [p]remises and all appurtenances in good repair in and clean and healthful condition * * * at Tenant's expense." Section 7, titled "Alterations," provided that upon termination of the LPA term, either by a default or at the end of the lease term, plaintiff could direct Local 726 to remove all alterations or additions and return the premises in the same condition as at the commencement of the LPA, excepting ordinary wear and tear, "at Tenant's sole cost and expense." Section 17 provided that Local 726 would pay all attorney fees and costs incurred by plaintiff in enforcing the LPA. It is clear that section 14(B)(i)'s use of the phrase "in addition to any other sums or damages" sought to capture any sums or damages that Local 726 owed plaintiff under the LPA that would otherwise not be included in the liquidated damages provision. We find that section 14(B)(i) of the LPA did not enable plaintiff to recover actual damages from the breach in addition to liquidated damages.

¶ 84 Furthermore, we find that defendants' reliance on *H&M Driver Leasing Services, Unlimited, Inc. v. Champion International Corp.*, 181 Ill. App. 3d 28, 129 Ill.Dec. 808, 536 N.E.2d 858 (1989) unpersuasive. There, the parties entered into a contract whereby the plaintiff would lease truck drivers to the defendant as needed. *Id.* at 30, 129 Ill.Dec. 808, 536 N.E.2d 858. The parties agreed that the defendant would not hire any of the plaintiff's drivers until at least one year after the agreement terminated. *Id.* The parties' contract provided that:

> "In the event that [defendant] does hire any of the drivers in violation of the terms of this Agreement, then [defendant] shall pay to [plaintiff] all costs and expenses, including attorney's fees incurred by [plaintiff] in enforcing the provisions of this Agreement including injunctive relief. [Defendant] also agrees ***471** ****770** to pay $10,000.00 liquidated damages to [plaintiff], *plus any and all actual damages resulting to [plaintiff].*" (Emphasis in original and internal quotation marks omitted.) *Id.*

¶ 85 We observed that the contract "expressly provided that the $10,000 'liquidated damages' was recoverable in addition to 'any and all actual damages' resulting from the breach," which "imposed a clear penalty which cannot be enforced." *Id.* at 31, 129 Ill.Dec. 808, 536 N.E.2d 858. There, the liquidated damages provision was unenforceable because it clearly sought to secure the defendant's performance and sought to provide plaintiff with actual damages for the breach in addition to a $10,000 penalty. Here, as we explained, section 14(B)(i) does not provide plaintiff with the right to recover actual damages for the breach in addition to a penalty.

[37] ¶ 86 Defendants further argue that the liquidated damages provision in section 14(B)(i) was not reasonable at the time of contracting and therefore does not bear a relation to the damages that plaintiff might sustain. Defendants contend that plaintiff's "actual damages" were the profits it expected to make under the LPA, which would have been the rental payments minus mortgage and real estate taxes, and which would not have been difficult to calculate at the time of contracting.

¶ 87 We again disagree. Although defendants argue that section 14(B)(i), at the time of contracting, did not bear any relation to damages plaintiff might sustain, defendants fail to explain what damages were foreseeable, or how those damages should be calculated. On appeal, defendants provide no citations to the record to show what plaintiff's "actual" damages were, and provide no argument as to what damages could have reasonably been anticipated at the time of contracting. Any argument that section 14(B)(i)'s "did not bear a relation to the damages plaintiff might sustain" requires some argument as to what plaintiff, at the time of contracting, could or should reasonably have expected damages to be. Nor have defendants advanced any developed argument supported by citations to the record that, at the time of contracting, the amount of plaintiff's actual damages would be certain or easy to prove. Obviously, if these damages were ascertainable and easy to prove the parties could have so provided in the agreement. Having failed to advance and develop any such argument, defendants have forfeited

their substantive challenge to the enforceability of section 14(B)(i) of the LPA.

[38] **[39]** **[40]** ¶ 88 Forfeiture aside, the present value of future lost rent is an appropriate measurement of a commercial lessor's damages. Here, the LPA provided for monthly rent payments based on a formula designed to recoup plaintiff's initial development costs. The Annual Base Rent comprised 10.5% of those development costs, increasing annually by 2%. Therefore, for plaintiff to recoup the initial development costs (irrespective of any unanticipated market forces) would take about 10 years of the LPA's 15–year term. The liquidated damages provision in part accounts for plaintiff's substantial initial development costs, and thus bears a reasonable relation to damages that plaintiff would sustain in the event of a breach. Additionally, assuming that a tenant vacates a leased premises, the landlord is still entitled to rent under the terms of the lease, unless and until the landlord relets the premises, thus mitigating his damages. Here, at the time of contracting, the parties agreed to fix plaintiff's damages to the present value of the rent due, as of the date of the breach, for the remainder of the lease term. This is not unreasonable since, in the event of a breach, that is exactly what plaintiff would ***472** ****771** be entitled to. And in the event of a breach, the landlord's duty to mitigate damages would arise —either the tenant would be entitled to a setoff for any actual mitigation or the tenant would be absolved from paying damages if the landlord failed to take reasonable steps to mitigate. Nothing in the section 14(B)(i) damages provision precluded defendants from seeking such a setoff, and here, the circuit court specifically found plaintiff did attempt to mitigate damages. We find that the liquidated damages provision in section 14(B)(i) bore a reasonable relationship to the actual damages the plaintiff might sustain in the event of a breach. We affirm the circuit court's award of damages in favor of plaintiff.

¶ 89 CONCLUSION

¶ 90 For the foregoing reasons, we find that the LPA was a valid and enforceable agreement, and that Local 700 was liable to plaintiff for Local 726's breach of the LPA under a theory of successor liability. We therefore affirm the circuit court's judgment in favor of plaintiff on count I. We reverse the circuit court's Fraudulent Transfer Act judgments in favor of plaintiff on counts II and III because there was no transfer of an asset by a debtor within the meaning of the Fraudulent Transfer Act, and even if there was, plaintiff failed to prove the actual value of the CBAs at issue here. We reverse the circuit court's judgment in favor of plaintiff on counts II and III. We further find that Coli is not liable for tortious interference with the LPA because his conduct was privileged. The circuit court's judgment in favor of plaintiff and against Coli on count VIII of the complaint is reversed. Finally, section 14(B)(i) of the LPA is an enforceable liquidated damages provision, and the circuit court's damages award of $1,996,853, and for postjudgment interest and costs is affirmed.

¶ 91 Affirmed in part and reversed in part.

Justices Harris and Simon concurred in the judgment and opinion.

All Citations

2017 IL App (1st) 153300, 91 N.E.3d 444, 418 Ill.Dec. 743

Footnotes

1 The Independent Review Board was established by consent decree in *United States v. International Brotherhood of Teamsters*, 22 F.Supp.2d 131 (S.D.N.Y. 1998). The board has the authority to, among other things, recommend that local unions be placed into trusteeship.

2 Although this appeal was nominally filed on behalf of all of the defendants listed in the caption, the only defendants that advance any argument are Local 700 and John Coli.

3 We also believe that these factors are consistent with a number of factors used by the National Labor Relations Board when considering an employer's duty to bargain with a post-merger union. See, *e.g.*, *May Department Stores Co., Venture Stores Division v. National Labor Relations Board*, 897 F.2d 221, 228 (7th Cir. 1990) (observing that the Board compares pre- and post-merger unions for continuity by looking to the "structure, administration, officers, assets, membership, autonomy, by-laws, size, and territorial jurisdiction, [citation] with an eye toward changes in the rights and obligations of

the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer" (internal quotation marks omitted)).

4 Property excluded from the definition of "asset" includes "(1) property to the extent it is encumbered by a valid lien; (2) property to the extent it is generally exempt under laws of this State; or (3) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." 740 ILCS 160/2(b)(1)–(3) (West 2014).

5 Defendants raise no argument on appeal challenging Goldman's qualifications as an expert or the methods he employed in reaching his calculations.

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BY-LAWS

of the

STATE AND MUNICIPAL
TEAMSTERS, CHAUFFEURS,
AND HELPERS UNION,
LOCAL No. 726
Affiliated with the I.B. OF T.

Affiliated with
Central Conference of Teamsters
Teamsters Joint Council No. 25

1645 W. JACKSON BLVD.
Room 603
CHICAGO, IL 60612
Phone (312) 666-577[illegible]
Fax (312) 666-7581

February, 2005

Section 7
PRESIDENT'S DUTIES

(A) It shall be the duty of the President who shall be a full time Business Agent to preside at membership meetings of this Local Union and to preserve order therein. He shall appoint all committees and shall also have the right to serve on all committees by virtue of his office, and in general, shall perform all duties incident to the office of President, and such other duties as may be assigned by the Local Union Executive Board, principal executive officer, or membership from time to time.

(B) The President shall decide all questions of order, subject to an appeal to the membership. If a valid objection has been taken by an interested member, which appeal shall be determined by a majority vote to the members present and voting. The President shall cast the deciding vote when a tie occurs on any question, shall announce the result of all votes and enforce all fines and penalties, and shall have the power to call special meetings as provided in Section 19(B).

Section 8
DUTIES OF THE PRINCIPAL EXECUTIVE OFFICER

(A) The Secretary-Treasurer who shall be a full time Business Agent shall be the principal executive officer of this organization. He shall, in general, supervise, conduct and control all of the business and affairs of the Local Union, its officers and employees. He shall have charge and supervision of all the officers and employees of the Local Union, including elected Business Agents. The principal executive officer shall also have charge of all labor controversies involving the Local Union.

(B) The principal officer, subject to the provisions of Article XXIII, Section 3 of the International Constitution, together with the President shall sign all official documents, deeds, mortgages, bonds, contracts, or other instruments, all checks on bank accounts, and perform such other duties as the International Constitution, these Bylaws or law may require of him.

(C) The principal officers in conjunction with the President shall have the authority to disburse or order the disbursement of all monies necessary to pay the bills, obligations and indebtedness of the Local Union, which have been properly incurred as provided herein. He shall have the authority to pay current operation expenses of the Local Union, including rents, utilities and maintenance of the Union Hall, and salaries and expenses of employees.

(D) The principal officer shall have authority to interpret these Bylaws and to decide all questions of law thereunder, between meetings of the Local Union Executive Board.

(E) The principal officer shall preside at meetings of the Local Union Executive Board, shall enforce the International Constitution, these Bylaws and the rules of order adopted by this union and shall ensure that all officers perform their respective duties. He shall also have the right to serve on all committees by virtue of his office.

Section 9
DUTIES OF THE VICE PRESIDENT

It shall be the duty of the Vice President to preside at Local Union membership meetings in the absence of the President. He shall perform such other duties and render such assistance as may be directed by the principal executive officer or by the President and shall be a full-time Business Agent, and assist in keeping order, and in the absence of the President, preside at the meetings of the Union and assist the Warden.

tion and secure an audit of the books of this organization by a certified public accountant at least once a year;

(5) On behalf of the Local Union, its officers, employees or members, initiate, defend, compromise, settle, arbitrate or release or pay the expenses and costs of any legal proceedings or actions of any nature if, in its judgment, it shall be necessary or desirable to protect, preserve, or advance the interests of the organization;

(6) Fill all vacancies in office which occur during the term of such office for the unexpired term, in the manner provided in Article XXII, Section 9 of the International Constitution;

(7) Transact all business and manage and direct the affairs of the Local Union between membership meetings except as may otherwise be herein provided; delegate when necessary any of the above powers to any officer for specific and temporary purposes and on condition that the action of such officer or agent be ratified by the Local Union Executive Board; the Local Union Executive Board shall designate other officers for the President or Secretary-Treasurer for the purpose of signing checks to pay bills or to exercise any other functions of their offices in the event that either shall refuse to act or shall become ill or otherwise incapacitated;

(8) Lease, purchase or otherwise acquire in any lawful manner for and on behalf of the organization, any and all real estate or other property, rights and privileges, whatsoever deemed necessary for the prosecution of its affairs, and which the organization is authorized to acquire, at such price or consideration and generally on such terms and conditions as it thinks fit, and at its

discretion pay therefor either wholly or partly in money or otherwise; specific authorization at a membership meeting shall be required for such expenditures, excepting for routine expenditures not of a substantial nature;

(9) Sell or dispose of any real or personal estate, property, rights or privileges belonging to the organization whenever in its opinion the Local Union's interests would thereby be promoted, subject to approval (except as to form) at a membership meeting;

(10) Create, issue and make deeds, mortgages, trust agreements, contracts, and negotiable instruments secured by mortgage or otherwise as provided by resolution of the membership, and do every other act or thing necessary to effectuate the same;

(11) Create trusts, the primary purpose of which is to provide benefits for the members or their beneficiaries, and terminate and effectuate the same, all subject to approval (except as to form) by the membership;

(12) Appoint trustees of Health and Welfare or Pension Trust Funds negotiated directly by the Local Union;

(13) Determine the membership which shall vote on agreements and strikes, and the composition of other membership meetings, and adopt rules and regulations concerning the conduct thereof not inconsistent with the International Constitution or these Bylaws;

(14) Determine the manner in which referendums shall be held, subject to review and modification by the General President, as permitted by Article VI, Section 1(h) of the International Constitution;

(15) Affiliate this Local Union with Joint Council No. 25 and Central Conference, and, in addition to these, such other subordinate bodies of the International

Union and Bylaws of this Union, that I will, at all times, by example, promote harmony and preserve the dignity of this Union. I also promise that at the close of my official term, I will promptly deliver any money or property of this Union in my possession to my successor in office.

(B) The right to assume office or hold office or position in the Local Union, as distinguished from accrued or vested benefits, shall never be deemed a property right, but shall be a personal privilege and honor only. Any action taken by an officer in good faith and within the scope of his authority and power under these Bylaws shall not be the basis for any personal liability against such officer.

(C) All officers of the Local Union must, as a condition of holding office, execute all necessary forms required by law to be filed with any federal or state agency either for and on behalf of the Local Union or as an officer or employee thereof, but accidental default shall not be considered a violation of the duty imposed by this Section.

(D) All officers in the performance of their duties shall adhere to the terms of these Bylaws and the International Constitution.

(E) The officers, Business Agents, Stewards and other representatives of this Local Union occupy position of trust in relation to the Local Union and its members as a group and are, therefore, accountable to the membership with respect to the performance of their duties in handling funds and property of the Local Union. The failure or refusal by an officer, Business Agent, Steward or other representative of this Local Union, upon demand of the Local Union Executive Board or of any individual member for good cause, to render a proper and adequate accounting or explanation respecting the performance of his duties in handling funds and property of the Local Union shall

constitute a ground for charges under Article XIX of the International Constitution on which trial shall be had under the provision set forth in Section 20 hereof.

(F) The elected officers and Business Agents of this Local Union shall be delegates to other subordinate bodies and Conventions thereof, by virtue of their office or elected position. The Principal Executive Officer shall have first priority. After the principle officer, the remaining delegates shall be selected from the salaried elected officers and elected Business Agents (if any) in the following priority: President, Secretary-Treasurer, Vice President, Recording Secretary, Trustee in order of number of votes received in the most recent election; elected Business Agents in order of number of votes received in the most recent election.

Section 16
EXPENSES AND AUTOMOBILES

(A) Allowances

Recognizing that the officers and representatives of this organization do not work regularly scheduled hours and receive no compensation for overtime or premium pay; also recognizing that such individuals are required to pay varying amounts for lodgings and meals depending upon the city to which they travel, which amounts are sometimes less, but more often more than the allowances given them; and recognizing that they must participate in cultural, civic, legislative, political, fraternal, educational, charitable, social and other activities in addition to their specific duties as provided in the Constitution and these Bylaws, that such activities benefit the organization and its members and that the time spent in such activities is unpredictable and unascertainable, such officers and representatives may be granted an allowance (both for in-town and out-of-town

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 765. Property
Real Property
Act 115. Property of Unincorporated Associations Act

765 ILCS 115/0.01
Formerly cited as IL ST CH 30 ¶82.9

115/0.01. Short title

Currentness

§ 0.01. Short title. This Act may be cited as the Property of Unincorporated Associations Act.

Credits

Laws 1949, p. 597, § 0.01, added by P.A. 86-1324, § 266, eff. Sept. 6, 1990.

Formerly Ill.Rev.Stat.1991, ch. 30, ¶ 182.9.

765 I.L.C.S. 115/0.01, IL ST CH 765 § 115/0.01
Current through P.A. 100-665 of the 2018 Reg. Sess.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 765. Property
Real Property
Act 115. Property of Unincorporated Associations Act

765 ILCS 115/1
Formerly cited as IL ST CH 30 ¶183

115/1. Power to own real estate

Currentness

§ 1. Power to own real estate. Any unincorporated lodge or subordinate body of any society or order which is duly chartered by its grand lodge or body may take, hold, or convey real estate for its own use and benefit, by lease, purchase, grant, legacy, gift or otherwise, may borrow money and execute and deliver notes or bonds and mortgages on real property owned by such unincorporated lodge or subordinate body to secure the same in and by the name and number of the lodge or subordinate body according to the register of the respective grand lodge or body.

Credits
Laws 1949, p. 597, § 1. Amended by P.A. 83-388, § 27, eff. Sept. 16, 1983.

Formerly Ill.Rev.Stat.1991, ch. 30, ¶ 183.

765 I.L.C.S. 115/1, IL ST CH 765 § 115/1
Current through P.A. 100-665 of the 2018 Reg. Sess.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 765. Property
Real Property
Act 115. Property of Unincorporated Associations Act

765 ILCS 115/2
Formerly cited as IL ST CH 30 ¶184

115/2. Procedure to effect acts of ownership over real estate

Currentness

§ 2. Procedure to effect acts of ownership over real estate. The presiding officer of such lodge or subordinate body, together with the secretary or officer keeping the records thereof, may execute mortgages and execute or receive conveyances or leases of any real estate by or to such lodge or subordinate body when authorized by a vote of the members present at a regular meeting held by said lodge or subordinate body, after at least ten days' notice has been given to all members of said lodge or subordinate body by mailing a written notice of said proposed action to the last known address of all such members.

All conveyances, leases or mortgages executed hereunder shall be in the name of the lodge, attested by the presiding officer and secretary or other officer in charge of the records, and shall have affixed the seal, if any, of such lodge or subordinate body.

Credits
Laws 1949, p. 597, § 2.

Formerly Ill.Rev.Stat.1991, ch. 30, ¶ 184.

765 I.L.C.S. 115/2, IL ST CH 765 § 115/2
Current through P.A. 100-665 of the 2018 Reg. Sess.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 765. Property
Real Property
Act 115. Property of Unincorporated Associations Act

765 ILCS 115/3
Formerly cited as IL ST CH 30 ¶185

115/3. Power to sue and defend

Currentness

§ 3. Power to sue and defend. Such lodge or subordinate body in and under its own name and number has the power to sue and be sued, complain and defend in all actions concerning its real estate.

Credits
Laws 1949, p. 597, § 3.

Formerly Ill.Rev.Stat.1991, ch. 30, ¶ 185.

765 I.L.C.S. 115/3, IL ST CH 765 § 115/3
Current through P.A. 100-665 of the 2018 Reg. Sess.

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