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Illinois Official Reports

Appellate Court

***Mufaddal Real Estate Fund, LLC v. Vara School Professionals, Inc.*,**
2024 IL App (3d) 220499

Appellate Court Caption	MUFADDAL REAL ESTATE FUND, LLC, Plaintiff-Appellant and Cross-Appellee, v. VARA SCHOOL PROFESSIONALS, INC.; RICHARD DRAMATO; VIVIAN DRAMATO; ALPHONSO AMATO; and AUDREY AMATO, Defendants (Vara School Professionals, Inc.; Richard Dramato; Vivian Dramato; and Audrey Amato, Defendants-Appellees and Cross-Appellants).
District & No.	Third District No. 3-22-0499
Filed	June 28, 2024
Decision Under Review	Appeal from the Circuit Court of Will County, Nos. 20-L-367, 20-L-459; the Hon. John C. Anderson, Judge, presiding.
Judgment	Affirmed in part and reversed in part.
Counsel on Appeal	David P. Smith, of Law Office of Theresa A. Berkey, of New Lenox, for appellant. Douglas E. Heathcock, of Heathcock Law LLC, of Mokena, for appellees.

Panel JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices Albrecht and Davenport concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Mufaddal Real Estate Fund, LLC (landlord), filed a six-count amended complaint against defendants, Vara School Professionals, Inc. (Vara), and personal guarantors Richard Dramato, Vivian Dramato, Alphonso Amato,[1] and Audrey Amato (collectively, tenants), who operated a hair salon and cosmetology school. The first two counts of the amended complaint alleged that Vara breached the parties' commercial lease by (1) failing to pay rent from March 2020 through December 2020 and (2) causing property damage. The remaining four counts alleged that the four personal guarantors of the lease breached their guarantees thereunder. The tenants asserted various affirmative defenses related to their obligation to pay rent during the Governor's shutdown orders pursuant to the COVID-19 pandemic.

¶ 2 Thereafter, the landlord filed a motion for partial summary judgment as to the issues of Vara's unpaid rent and the personal guarantors' liability under the lease. The trial court granted the landlord's motion, finding that the tenants were obligated to pay rent during the mandated shutdown and rejecting their affirmative defenses. The trial court continued the issue of damages. The landlord subsequently moved to dismiss the count in its amended complaint related to property damage caused by the tenants, which the trial court granted. After the issue of damages was fully briefed and the trial court heard oral arguments, the landlord was awarded $98,500 in unpaid rent and $4925 in late fees. Despite the landlord's argument for compounded late fees, the trial court awarded simple late fees at 5% of the base rent for each month that the tenants failed to pay. The landlord filed a petition for attorney fees, which the trial court granted in the amount of $8528 after deducting unsupported fees for the landlord's prior counsel and fees incurred while litigating the compound late fees issue. For the reasons set forth below, we affirm in part and reverse in part the trial court's judgment.

¶ 3 ### I. BACKGROUND

¶ 4 On January 1, 2016, the tenants entered into a five-year commercial lease with Fall Creek Group, LLC, to rent a space to operate a hair salon and school. The lease limited the tenants' use and occupancy of the property to this sole purpose. The subject property was located at 333-337 Vertin Boulevard, Shorewood. The lease term began on January 1, 2016, and expired on December 31, 2021; however, the tenants indicated to the trial court that the expiration date was a scrivener's error and that the lease actually ended on December 31, 2020. The landlord does not appear to dispute this fact, and the tenants voluntarily vacated the rental property in December 2020. As such, we accept that the lease term was intended to end on December 31, 2020. The parties agreed to a graduated rent schedule, which included the tenants paying monthly rent of $9850.

[1]Alphonso Amato passed away in 2017 and is not a party to this appeal.

¶ 5 The lease contained, in pertinent part, the following additional provisions:

> "23. Destruction of Premises. In the event of a partial destruction of the Premises during the term hereof, from any cause, provided that such repairs can be made within one hundred twenty (120) days of casualty under existing governmental laws and regulations, Landlord shall forthwith repair the building in which the Premises is located and the Premises to a vanilla shell condition and Tenant shall repair all improvements and/or alterations previously made to the Premises by Tenant as well as all HVAC units and all Tenant's personal property, equipment and trade fixtures, but such partial destruction shall not terminate this Lease, except that *Tenant shall be entitled to a proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of Tenant on the Premises*. If such repairs cannot be made within one hundred twenty (120) days of the casualty, Landlord, at its option, may make the same within a reasonable time and this Lease will continue in effect with the rent proportionately abated as aforesaid. In the event that Landlord shall elect not to make such repairs or such repairs cannot be made within two hundred seventy (270) days of the casualty, this Lease may be terminated at the option of either party. In the event that the building in which the Premises is situated is destroyed to an extent in excess of one-third of the replacement costs thereof, Landlord may elect to terminate this Lease whether the Premises is injured or not. A total destruction of the building in which the Premises is situated shall terminate this Lease.
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> 25. Landlord's Remedies in Default. All payments of rent and additional rent not received within five (5) days of the due date shall be subject to a five percent (5%) late payment charge *and such charge shall be collected as additional rent.* ***.
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> * * *
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> 28. Attorney's Fees. In case suit should be brought for recovery of possession of the Premises or for any sum due hereunder, or because of any act which may arise out of the possession of the Premises, or *enforcement of this Lease, the prevailing party shall be entitled to recover all costs and expenses incurred in connection with such action including reasonable attorney's fees*.
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> * * *
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> 39. Force Majeure. Whenever a period of time is provided in this Lease for either party to do or perform any act or thing, said party shall not be liable or responsible for any delays due to strikes, lockouts, casualties, acts of God, war, governmental regulation or control or other causes beyond the reasonable control of said party, and in any such event, said time period shall be extended for the amount of time said party is so delayed; *provided that this Section shall not apply to Tenant's obligation to pay Rent and other charges hereunder.*" (Emphases added.)

On November 16, 2016, the landlord purchased the subject property from Fall Creek Group, LLC, and executed an "Assignment and Assumption of Lease," at which point the landlord became the tenants' landlord.

¶ 6 The tenants paid rent until March 2020. Their last rental payment was submitted on February 4, 2020. On March 20, 2020, the Governor issued an executive order pursuant to the

ongoing COVID-19 pandemic, which required that all nonessential businesses cease operations, required that citizens stay at home, and limited public gatherings. Exec. Order No. 2020-10, 44 Ill. Reg. 5857 (Mar. 20, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf [https://perma.cc/EQ57-B4L3]. In response, the tenants ceased operating their business. On June 26, 2020, a second executive order was released which provided COVID-19 safety guidelines and regulations that businesses were required to adopt in order to reopen. Exec. Order No. 2020-43, 44 Ill. Reg. 11,704 (June 26, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-43.pdf [https://perma.cc/9S2R-G780]. After implementing these guidelines and regulations, including "distance markers, warnings, and distanced stations and areas," as well as "reorganizing its class schedules and curriculum to ensure proper capacity and distancing within the Premises" and "preparing instructions and COVID waivers for persons entering the Premises," the tenants reopened their business on July 19, 2020. The tenants assert that they were closed for an additional week in September 2020 due to a case of COVID-19. The tenants did not pay any rent from March 2020 through December 2020, at which time they vacated the premises.

¶ 7 On May 14, 2020, the landlord mailed the tenants a five-day default notice and demand for payment. The tenants did not submit payment or vacate the premises. On June 17, 2020, the landlord filed a complaint against the tenants alleging breach of lease and breach of guaranty due to the tenants' failure to pay rent and late fees. The landlord alleged that it terminated the lease pursuant to its default provisions and, therefore, the balance of $223,318 was accelerated and due *instanter*. When the tenants failed to file a response or answer within the allotted timeframe, the landlord filed a motion for default judgment. Thereafter, the tenants' counsel filed an appearance and was granted additional time to file an answer.

¶ 8 The tenants filed an answer and affirmative defenses, alleging that (1) the landlord's service of the five-day default notice was inadequate, as it was sent to the wrong address and (2) commercial frustration and impossibility due to COVID-19 and the shutdown orders excused the tenants' nonperformance under the lease. Thereafter, the landlord hired new counsel, who filed an amended complaint on May 17, 2021, alleging (1) breach of lease based on the failure to pay rent and fees in the amount of $130,111 and (2) breach of lease based on property damage of $38,750 for the tenants' failure to return the property in "the same condition in which it was originally leased."

¶ 9 The tenants answered the amended complaint and asserted several affirmative defenses, including commercial frustration, impossibility, and abatement of rent. In relation to commercial frustration and impossibility, the tenants alleged that their use of the rental property was strictly limited to a hair salon and school and that, pursuant to the shutdown orders, they were unable to perform under the lease. They also alleged that the landlord was unable to perform, as it was unable to provide possession of the rental property as intended under the lease. In relation to abatement of rent, the tenants attempted to invoke the "Destruction of Premises" provision of the lease, claiming that the shutdown orders "caused a partial destruction" of the rental property by imposing a physical limit on the use of the space. As such, the tenants contended that they were entitled to an abatement of rent during the time they were unable to operate their hair salon and school.

¶ 10 On June 24, 2021, the landlord filed its motion for partial summary judgment, arguing that the case did not present any genuine dispute of facts on the issue of unpaid rent and fees. Rather, the sole issue was whether, as a matter of law, the tenants' non-payment of rent was

excused. The landlord stated "that the Pandemic may have been unforeseeable" but relied upon the force majeure clause of the lease to support its contention that the tenants remained obligated to pay timely rent, as it specifically provided for the tenants' continued obligation to pay rent despite a government regulation that interfered with the ability to perform. The landlord argued that the contract should be enforced as written because the parties were both sophisticated commercial actors and that the language of the lease was clear and unambiguous. The landlord discounted the tenants' attempted use of the "Destruction of Premises" clause, stating that the rental property remained physically intact, undamaged, and available to the tenants during the entire lease term. The landlord argued against the affirmative defenses of commercial frustration and impossibility, as each requires that the frustrating event be unforeseeable. The landlord contended that the parties explicitly provided for the tenants' performance in the event of a governmental regulation and that a reduction in income is not unforeseeable and, therefore, the affirmative defenses failed.

¶ 11 The tenants opposed the landlord's motion for partial summary judgment, arguing, *inter alia*, that disputed issues of fact remained and that it was improper as a matter of law. Specifically, the tenants argued that the exact dates of the tenants' business closures and re-openings, the late fees assessed, and whether their use and occupancy of the rental property was prohibited constituted issues of fact that precluded partial summary judgment. The tenants also reiterated their arguments regarding impossibility, commercial frustration, and rent abatement to support their position that partial summary judgment was improper.

¶ 12 At the hearing on the landlord's motion for partial summary judgment, the parties clarified their positions. Regarding the applicability of the force majeure provision, which the landlord argued was dispositive, the tenants stated as follows:

> "MR. HEATHCOCK [(TENANTS' ATTORNEY)]: *** The force majeure provision has nothing to do with what we're arguing. The force majeure provision in paragraph 39 says whenever a period of time is provided in this lease for either party to do it before any act or thing. We're not talking about a period of time. That would be what happens if there is a delay. I love force majeure provisions in construction contracts and other things where there is a schedule. This is a lease. Although it exists in the contract, it doesn't apply here because we are not talking about extending the time to do anything."

The landlord responded, in pertinent part, as follows:

> "MR. SMITH [(LANDLORD'S ATTORNEY)]: *** And this is a perfect example of a case where I think that [the force majeure provision] should be applied. [Tenants] were able to keep possession of the property so that they were able to reopen when applicable law allowed them to. The only other thing that I would say is I don't think this distinction as far as a period of time is—has merit. I mean, the obligation to pay rent—the lease does provide a period of time when the obligation to pay rent occurs, and that's on the first of every month. And plainly 39—paragraph 39 addresses that because it goes on to say but this won't apply to the obligation to pay rent because that will continue."

¶ 13 The trial court took the matter under advisement. On January 3, 2022, the trial court granted the landlord's motion for partial summary judgment on the issue of the tenants' liability to pay rent during the COVID-19 pandemic and shutdown orders, finding that the tenants' obligation continued uninterrupted and unexcused. The trial court did not address the merits of the

landlord's force majeure argument, but instead directly rejected the affirmative defenses of commercial frustration and impossibility, and found that, pursuant to *Phelps v. School District No. 109*, 302 Ill. 193 (1922), a pandemic was foreseeable and should have been addressed in the lease if the tenants wanted their nonperformance to be excused as a result. Further, though it did not rely on the terms of the force majeure clause in support of its judgment, the trial court noted that the clause certainly contemplated the "general possibility of extraordinary events," such as a governmental regulation, and that such events would not excuse the tenants' obligation to pay rent. Finally, the trial court rejected the tenants' affirmative defense of abatement of rent, stating that "a plain-language reading of [the 'Destruction of Premises' clause] demonstrates that the provision contemplates a *physical* destruction of the premises," which did not occur. The remaining issues, including the calculation of damages, were continued.

¶ 14 Subsequently, the trial court granted the landlord's motion to voluntarily dismiss the breach-of-lease count related to the condition of the premises and property damage. The landlord also filed a motion for judgment against the tenants in the amount of $270,492. The rent ledger attached to the motion showed that the landlord assessed compounded late fees against the tenants, rather than one-time fees of 5% on each individual rental payment that was overdue. The tenants objected, arguing that the compounded late fees were improper as a matter of law and not authorized under the terms of the lease. The landlord responded that the terms of the lease permitted compounded late fees, as the late fees were to be collected as "additional rent." The landlord further asserted that the compounded late fees did not constitute an unenforceable penalty because they were "a percentage of the total owed on a monthly basis."

¶ 15 The trial court conducted a hearing on the landlord's motion for judgment against the tenants. The parties did not dispute that the tenants owed $98,500 in unpaid rent. However, the tenants argued that the total damages sought, specifically the late fees, had "no relation whatsoever to the damages incurred by the Landlord." The tenants, instead, calculated a one-time late fee of 5% of the rent due during each of the 10 months, which totaled $4925. The tenants argued that the late fee provision was "merely to secure performance of the agreement" and was, therefore, unenforceable. The landlord argued, again, that the language of the lease permitted compound payments and that the case law cited by the tenants was distinguishable and inapplicable. The trial court took the matter under advisement. On September 19, 2022, the trial court entered an order granting the landlord $98,500 in unpaid rent for March 2022 through December 2020. The trial court further found that "Landlord [was] not entitled to compounded late fees under the Lease." The landlord was awarded $4925 in late fees "based upon 'a five percent (5%) late payment charge' under Section 25 of the Lease." The landlord was granted leave to file a petition for attorney fees.

¶ 16 On September 29, 2022, the landlord filed a petition for attorney fees, including all fees incurred by the landlord's prior and current counsel. The landlord attached to the petition an affidavit of its current counsel but did not include an affidavit of its prior counsel. The fee petition included invoices and billing statements from both current and prior counsel. The tenants objected to any contribution to the landlord's attorney fees, arguing that, because both parties prevailed on certain issues, neither party could appropriately be designated as the "prevailing party" under the "Attorney's Fees" clause of the lease. The tenants also objected to the foundation of prior counsel's fees due to the lack of a supporting affidavit.

¶ 17 On November 9, 2022, the trial court conducted a hearing on the landlord's fee petition. In response to the tenants' argument on the prevailing party issue, the trial court stated as follows:

> "THE COURT: Well, Mr. Heathcock, I do think that Mr. Smith's client prevailed to a far greater extent than yours did. Certainly there were some issues that were litigated where I ruled in your favor, but in the big picture, I think Mr. Smith's client would be the prevailing party as a general proposition. But your point is well taken in that I don't think his client should recover all of the fees for all of the issues because, again, there were some things that I think were just—they were just off base on.

The parties and the trial court discussed the fees incurred on the late fee issue specifically, and the trial court stated that it was going to reduce the landlord's fees by the amount incurred on that topic. The landlord was awarded $8528 in attorney fees, which was reduced from the full amount requested to account for the fees incurred in connection with the late fee issue and the landlord's prior counsel. The order specified that prior counsel's fees were "not awarded as said [were] not properly supported." The order also included a denial of the parties' requests for "further briefing and/or submission of additional evidence."

¶ 18 The landlord timely appealed; the tenants timely cross-appealed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, the tenants argue that the trial court erred in granting the landlord's motion for partial summary judgment and in rejecting the affirmative defenses of commercial frustration, legal impossibility, and abatement of rent. The tenants also argue that the trial court's finding that the landlord was the prevailing party and its consequent award of attorney fees was erroneous since both parties "won" on certain issues. In turn, the landlord argues on appeal that, based upon the language of the lease, the trial court's calculation and award of simple, rather than compounded, late fees were improper. The landlord further argues that the trial court erred in its reduction of the attorney fee award as it relates to (1) the landlord's prior counsel and (2) the fees incurred while litigating the late fee issue. For the following reasons, we affirm in part and reverse in part the trial court's judgment.

¶ 21 A. Liability for Rent

¶ 22 We begin with the tenants' challenge to the trial court's grant of the landlord's motion for partial summary judgment and rejection of the tenants' affirmative defenses on the issue of liability for rent. For the reasons that follow, we affirm the grant of partial summary judgment.

¶ 23 We review a trial court's entry of an order granting summary judgment *de novo*. *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72 (1992). *De novo* review requires an independent analysis by the reviewing court without "defer[ence] to the trial court's judgment or reasoning." *People v. Randall*, 2016 IL App (1st) 143371, ¶ 44. A motion for summary judgment shall be granted if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2022). The trial court may grant partial summary judgment if "there is no genuine issue of material fact as to one or more of the major issues in the case, but *** substantial controversy exists with respect to other major issues." *Id.* § 2-1005(d). We may affirm on any ground supported by the record, "regardless of the particular basis relied upon by the trial court." *In re Marriage*

of Benson, 2015 IL App (4th) 140682, ¶ 22.

¶ 24 1. *Force Majeure Section*

¶ 25 Initially we consider the landlord's contention on appeal, as argued below, that the force majeure section of the lease, alone, warranted summary judgment in its favor because it contractually obligates the tenants to pay their rent notwithstanding the government orders at issue. While the trial court did not squarely address the merits of the landlord's force majeure contention in awarding summary judgment, we consider this question first because, if the landlord's interpretation of the force majeure provision is correct, the common law defenses of commercial frustration and impossibility would be unavailable to the tenants. These doctrines are inapplicable where the risk or circumstance giving rise to them is otherwise covered by a term in the contract. See Restatement (Second) of Contracts § 261, cmt. c (1981) ("A party may, by appropriate language, agree to perform in spite of impracticability that would otherwise justify his non-performance ***."); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850, 855 (N.D. Ill. 1990) ("If, however, the parties include a force majeure clause in the contract, the clause supersedes the [impossibility or impracticability doctrine].").

¶ 26 The force majeure clause provides in pertinent part:

> "Force Majeure. Whenever a period of time is provided in this Lease for either party to do or perform any act or thing, said party shall not be liable or responsible for any delays due to *** governmental regulation[,] *** and in any such event, said time period shall be extended for the amount of time said party is so delayed; *provided that this Section shall not apply to Tenant's obligation to pay Rent and other charges hereunder*." (Emphasis added.)

The landlord argues that this force majeure provision straightforwardly provides that a delay in performance by either party, which is the result of a force majeure event, including government regulations, shall not result in liability to the delayed party, *except* that tenant's obligation to pay rent and other charges *will not* be excused under these circumstances. This language, it argues, specifically provides for the very scenario in which the parties have found themselves—a government regulation (shutdown orders) interfered with the tenants' performance under the terms of the contract (paying rent). And it further specifically provides that the tenants' obligation to pay rent is not excused under these circumstances. Accordingly, the landlord argues that, though the trial court correctly granted partial summary judgment in its favor, it needlessly reached the merits of the commercial frustration and impossibility affirmative defenses.

¶ 27 The tenants first argue that we should not consider the force majeure clause because they did not assert the force majeure clause as a defense to their nonperformance under the lease. This argument, however, misconstrues the purpose of a force majeure clause. A force majeure clause is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary (11th ed. 2019). Accordingly, by definition, force majeure clauses allocate the risks between parties to a contract in the face of certain intervening events that interfere with the parties' performance of lease obligations. They are not limited in use or application to a breaching party's defense. To the extent the force majeure

clause applies to the circumstances at issue, it governs our interpretation of the contract and the obligations of both parties.

¶ 28 The tenants next argue that the force majeure clause was intended to have a "very limited application, only serving to extend deadlines that are specifically provided under the Lease." The tenants observe that the force majeure clause "only limits the effect of the time extension" and "does not express any broad intent of the drafters to allocate the unforeseen risks of *** government orders." The tenants argue that the force majeure provision is inapplicable to their obligation to pay rent, as it was only intended to apply to "a performance deadline provided in the lease" and that the rent deadline was "separate" and not a performance deadline. The landlord counters that a straightforward reading of the force majeure clause, which by its terms applies "[w]henever a period of time is provided in this Lease for either party to do or perform any act or thing," clearly includes the tenants' monthly rent payment obligation.

¶ 29 While the parties have argued diametrically opposed interpretations of the force majeure section, the last clause of the section is dispositive in the tenants' favor on the overarching issue of its general inapplicability here. Specifically, the last clause of the force majeure section decidedly directs that "this Section shall not apply to Tenant's obligation to pay Rent and other charges hereunder." On its face, therefore, the force majeure section does not apply at all to the tenants' failure to pay rent. Thus, the trial court did not err in moving directly to the affirmative defenses in deciding the partial summary judgment motion.

¶ 30 2. *Affirmative Defenses*

¶ 31 Though acknowledging their nonpayment of rent, the tenants asserted three affirmative defenses to excuse their failure to pay rent and defeat the partial motion for summary judgment: commercial frustration, impossibility, and abatement of rent. The tenants argue that the trial court incorrectly rejected these defenses in granting partial summary judgment.

¶ 32 A party to a contract may assert the affirmative defense of commercial frustration to excuse nonperformance of a contract, but its success is subject to a "rigorous two-part test." *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*, 122 Ill. App. 3d 940, 952 (1984). The doctrine of commercial frustration will be accepted only when a party shows "(1) the frustrating event was not reasonably foreseeable; and (2) the value of counterperformance by the lessee had been totally or near totally destroyed by the frustrating cause." *Smith v. Roberts*, 54 Ill. App. 3d 910, 913 (1977). Similarly, a party to a contract may assert the affirmative defense of impossibility to excuse performance of a contract but must show that the "circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party demonstrate that it has tried all practical alternatives available to permit performance." *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (2002). As with commercial frustration, impossibility requires that "the events or circumstances which he claims rendered his performance impossible were not reasonably foreseeable at the time of contracting." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6-7 (2010). Courts do not apply these doctrines liberally, as " 'the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.' " *Id.* at 6 (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987)); see *Rosenberger v. United Community Bancshares, Inc.*, 2017 IL App (1st) 161102, ¶ 24 (impossibility doctrine is "narrowly applied"); *American National Bank v.*

Richoz, 189 Ill. App. 3d 775, 780 (1989) (commercial frustration doctrine "should not be applied liberally").

¶ 33 Common to both the commercial frustration and impossibility affirmative defenses is the requirement that the event underlying either defense not be foreseeable. Initially, the tenants argue that the trial court reached its foreseeability conclusion concerning the COVID-19 pandemic "based upon incorrect summary conclusions." Specifically, the tenants claim the trial court "did not address the intent of the parties in the formation of the Lease, the unique facts related to the pandemic or the Shutdown Orders, or the fact that both [parties] agreed that these unique events were unforeseeable." In support of its contention that the landlord "agreed" that the COVID-19 pandemic was unforeseeable, the tenants point to one sentence in the landlord's reply in support of its motion for summary judgment, stating, "While it is true that the Pandemic may have been unforeseeable, the possibility that Vara's revenues may decrease due to market conditions was not." Reading this isolated sentence in the context of the entirety of the landlord's pleadings and briefs, however, demonstrates conclusively that there was no concession as to foreseeability. Rather, the sentence is part of a detailed analysis distinguishing between the foreseeability of the COVID-19 pandemic, specifically, and the more general possibility of governmental regulations affecting the tenants' ability to perform under the lease.

¶ 34 Foreseeability occurs when an event has "[t]he quality of being reasonably anticipatable." Black's Law Dictionary (11th ed. 2019). In considering foreseeability, we consider not whether the underlying cause of the frustrating event was foreseeable, but rather whether the event itself was foreseeable. For example, in *YPI* a party filed a complaint to rescind a contract on the ground that the 2008 global credit crisis precluded it from obtaining commercially practical financing, rendering its performance impossible. *YPI*, 403 Ill. App. 3d at 4. The *YPI* court rejected this application of the impossibility doctrine. *Id.* at 7-8. The court reasoned,

> "Even if the global credit crisis made it difficult, to nearly impossible, to procure the sought-after commercial financing, this is not the relevant issue. The primary issue is whether it was foreseeable that a commercial lender might not provide [the landlords] with the financing they sought. [Citation.] Even without the global credit crisis of 2008, it was foreseeable that a commercial lender might not provide [the landlords] with the financing they sought." *Id.* at 7.

While the global credit crisis may have been unforeseeable, there were any number of reasons a lender might not provide sought after financing. *Id.*

¶ 35 Here then, the question is not whether the COVID-19 pandemic was foreseeable, but whether a government regulation that effectively shut down the tenants' business was foreseeable. Needless to say, there is always the possibility of government regulations, *e.g.*, changes to zoning or licensing ordinances, that might impair the value of a lease. As in *YPI*, it is this foreseeability, rather than the specific reasons behind any governmental regulation, that should prompt a sophisticated commercial party to guard against such possibilities in the contract if they wish them to excuse performance.

¶ 36 Indeed, the instant lease terms further buttresses our foreseeability analysis. Though the force majeure section does not apply to the circumstances here, as discussed (*supra* ¶ 29), it nevertheless speaks to the parties' contemplation that government regulations might otherwise interfere with performance by the parties under the lease by explicitly providing that a party "shall not be liable or responsible for any delays due to *** governmental regulation." As the trial court noted, the inclusion of "governmental regulation" in this context speaks to the

foreseeability of a governmental regulation in general. See *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011) ("A contract must be construed as a whole, viewing each provision in light of the other provisions. [Citation.] The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract."). For this reason, it cannot be reasonably concluded that a government regulation was unforeseeable, even if its specific cause here, *i.e.*, the COVID-19 pandemic, was not.

¶ 37 The tenants' reliance on *55 Jackson Acquisition, LLC v. Roti Restaurants, LLC*, 2022 IL App (1st) 210138, to escape this conclusion is unavailing. The *55 Jackson* landlord sued the tenant for unpaid rent and attorney fees in August 2020. *Id.* ¶ 13. In response, the tenant asserted, *inter alia*, the affirmative defenses of (1) impossibility, (2) commercial frustration, and (3) rent abatement. *Id.* ¶¶ 18-20. The *55 Jackson* landlord did not argue that COVID-19 and its accompanying government orders were foreseeable to defeat the tenant's impossibility and commercial frustration affirmative defenses. Rather, it argued that the government orders did not totally destroy the value of the lease and that the tenant did not resort to practical alternatives to mitigate the problems caused by the orders. *Id.* ¶¶ 58-61. In determining that the impossibility and commercial frustration affirmative defenses were available to the tenant, the court stated, without analysis, the language, "we find no genuine dispute that the allegedly frustrating event—again, COVID-19 and the orders—were not reasonably foreseeable when the Lease was formed." *Id.* ¶ 58. The court then reversed and remanded for hearings to determine whether the government orders truly rendered performance under the lease impossible. *Id.* ¶ 63.

¶ 38 The *55 Jackson* court's statement regarding foreseeability must ultimately be evaluated in the context of the *55 Jackson* landlord never having argued that the COVID-19 orders were foreseeable. Unlike in *55 Jackson*, the landlord here vigorously contested the foreseeability issue, and the trial court correctly concluded that the possibility of government regulations was foreseeable. Further, we question *55 Jackson*'s foreseeability position given that our supreme court held, over 100 years ago, that a pandemic is foreseeable and should be accounted for in a contract. See *Phelps*, 302 Ill. at 198 ("It works no hardship on anyone to require school authorities to insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic.").

¶ 39 The tenants' final affirmative defense is abatement of rent pursuant to the "Destruction of Premises" clause in the lease. The tenants argue that the shutdown orders constituted a partial destruction of the rental property, as they were prohibited from utilizing the property for their business from March 2020 through June 2020. The tenants also suggest that the parties' intention when drafting the clause presents an issue of material fact that should have precluded partial summary judgment. The landlord, on the other hand, argues that the "Destruction of Premises" clause unambiguously applies solely to physical damage or destruction of the property and that the shutdown orders did not cause any physical damage. Accordingly, the question presented is whether the COVID-19 pandemic and its concomitant shutdown orders triggered rent abatement under the "Destruction of Premises" clause.

¶ 40 In *55 Jackson*, the court analyzed a lease provision under the heading " 'Destruction of Premises' " by " 'Fire or Casualty,' " which provided for the tenant's rent abatement in the event the leased property was " 'damaged by fire or other casualty covered by insurance.' " *55 Jackson*, 2022 IL App (1st) 210138, ¶ 10. The lease outlined the landlord's obligation to make repairs in the event of damage by fire or other casualty and the tenant's right to rent abatement

while those repairs were being made so long as the damage was not caused by the tenant's act or neglect. *Id.*

¶ 41 The tenant argued that the "Destruction of Premises" provision and rent abatement was invoked by the public health orders because "a casualty includes direct physical loss or damage, *** and *** the COVID-19 virus is such a dangerous substance." *Id.* ¶ 20. Because of the public health orders, " '[tenant] is unable to use the Premises for its intended purpose.' " *Id.* The court disagreed, concluding that the purpose of the clause was to "address *physical* destruction or damage to the Building or Premises. [The clause] falls under the heading of 'Destruction of Premises' and addresses what Landlord must do regarding repairing the Building after a casualty." (Emphasis in original.) *Id.* ¶ 52. The court held that "[i]nterpreting [the clause] to read 'casualty' broadly as including the COVID-19 pandemic, as [tenant] proposes, would require us to ignore the section's focus on *physical* casualties that require Landlord to repair the Premises or Building." (Emphasis in original.) *Id.*

¶ 42 We acknowledge that the phrasing in the lease before us is different than the phrasing at issue in *55 Jackson*. Here, we are not presented with the question of how to define "casualty"; rather, we are presented with the question of how to define "destruction." Nonetheless, both questions turn on whether the rent abatement language in the lease solely contemplates physical damage to property, or whether the loss of the physical use of the property is sufficient to trigger rent abatement. As such, we find the *55 Jackson* analysis instructive.

¶ 43 Like the lease terms in *55 Jackson*, the provision at issue here falls under the heading "Destruction of Premises," which favors the landlord's argument that the "destruction" contemplated was to be physical in nature. See *id.* Further, the language before us outlines each party's duty to repair the property after partial destruction of the property, which mirrors the landlord's duties to repair physical damages to property delineated in *55 Jackson*. Accordingly, we agree that the emphasis on repairs to the property in the event of its partial destruction demonstrates the parties' intention for the rent abatement clause to apply to *physical* destruction or damage to the leased property. To interpret this provision to include the mere loss of use of the property, despite there being no physical destruction or damage, "would require us to ignore the section's focus on *physical*" destruction necessitating repairs. (Emphasis in original.) See *id.* We further note that the lease's distinction between "partial destruction" and "total destruction" confirms that the parties contemplated differing levels of physical damage to the property and contracted accordingly.

¶ 44 To the extent the tenants argues that the issue of what the parties intended when they drafted this provision presented a question of fact for the trial court that should have precluded the entry of partial summary judgment, we disagree. As indicated, the language of the lease unambiguously sets forth the parties' intention regarding rate abatement in the event of physical damage to the premises. "If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract itself." *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 62.

¶ 45 Accordingly, we affirm the trial court's grant of partial summary judgment in the landlord's favor.

¶ 46 B. Late Fees

¶ 47 The landlord argues that the lease provides for compounded late fees and that, as a result, the trial court improperly assessed a simple late fee against the tenants for their failure to pay

rent. In support, the landlord notes that the "Landlord Remedies in Default" section provides that: "All payments of rent and additional rent not received within five (5) days of the due date shall be subject to a five percent (5%) late payment charge *and such charge shall be collected as additional rent.*" (Emphasis added.) Specifically, the landlord interprets the language, "such charge shall be collected as additional rent" as authorizing compounding late fees. In response, the tenants argue that (1) this language does not provide for compounded late fees and (2) compounded late fees would otherwise constitute an unenforceable penalty. "The construction and legal effect of a lease are questions of law, which we review *de novo*." *Crystal Lake Ltd. Partnership v. Baird & Warner Residential Sales, Inc.*, 2018 IL App (2d) 170714, ¶ 73. The determination of whether a contract contains a valid damages provision, or an unenforceable penalty clause, is also a question of law. *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 749 (1992); *Hidden Grove Condominium Ass'n v. Crooks*, 318 Ill. App. 3d 945, 946 (2001). Accordingly, we apply a *de novo* standard of review. For the reasons set forth below, we affirm the trial court's simple late fee award.

¶ 48 In this case, we need not decide whether the "Landlord's Remedies in Default" section of the lease provides for the compounding of late fees in the event of an untimely payment because enforcing this interpretation of the lease provision would constitute an unenforceable penalty regardless. A lease may provide for a late charge to be added to the rent if rent is not timely paid, but the late charge must be reasonable to be enforceable. *Collins v. Hurst*, 316 Ill. App. 3d 171, 174 (2000). A late charge will not be deemed reasonable or enforceable if it is structured as a penalty merely intended to secure timely payment. *Hidden Grove*, 318 Ill. App. 3d at 947. *Hidden Grove* outlined the following rule to determine whether a late charge constitutes an unenforceable penalty:

> "An agreement setting damages in advance of a breach is an unenforceable penalty unless: (1) the amount so fixed is a reasonable forecast of just compensation of the harm that is caused by the breach; and (2) the harm caused is difficult or impossible to estimate. [Citation.] The unreasonable nature of the sum provided is sufficient grounds for finding that the sum was intended to be a penalty." *Id.*

¶ 49 In *Hidden Grove*, a condominium association sued a member of the association to recover past due association fees and compounded monthly late fees of $25 per month for 10 months. *Id.* at 946. The trial court awarded the association its requested relief, and the member appealed, arguing that the late fees constituted an unenforceable penalty. *Id.* After setting forth the rule for the enforceability of liquidated damages clauses, the court found that the compounded late fees were, in fact, an unenforceable penalty because they did not directly relate to the damages actually suffered by the association. *Id.* at 947. The court further noted that the late fee charge far exceeds the standard 5% to 10% rate and did not reflect the necessary expenses to maintain a past due account or the loss of interest income. *Id.* As such, the court concluded that the "compounding nature of the late charge [was] merely an attempt to secure timely payment of the assessment fee" and was, therefore, an unenforceable penalty. *Id.*

¶ 50 As in *Hidden Grove*, the record here does not support that the landlord actually suffered any damages in excess of the trial court's unpaid rent award of $98,500 and late fee award of $4950. Indeed, the landlord does not allege any damages that would justify compound late fees to make it whole. Rather, it seeks these damages because it interprets the lease as providing for them. Thus, even if the language of the lease provided for compound interest as urged by the

landlord, this provision would be unenforceable because it would allow damages far beyond the harm actually suffered. *Id.* at 947 (despite the parties' agreement to the association's bylaws, the imposition of compounded late fees under the circumstances constituted an unenforceable penalty). The landlord's reliance on *Andersonville South Condominium Ass'n v. Federal National Mortgage Co.*, 2017 IL App (1st) 161875, for a contrary conclusion is unavailing. *Andersonville* lacks any discussion of the first prong of the *Hidden Grove* test—to be enforceable, fixed damages must represent a "reasonable forecast" of the damages actually incurred—which is where we must begin our analysis. See *id.* ¶ 43. Accordingly, we affirm the trial court's simple late fee award.

¶ 51 C. Attorney Fees

¶ 52 Both parties appealed the trial court's award of attorney fees. The landlord argues that, based on its prevailing party status, its fee award should not have been reduced for litigating late fees or for prior counsel's fees. The tenants argue that the landlord should not have been designated as the prevailing party and, therefore, should not have been awarded any attorney fees. A trial court's application of the "terms of the contract to the facts" is reviewed for an abuse of discretion. *Northbrook*, 2018 IL App (1st) 162972, ¶ 61. "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008). For the reasons set forth below, we reverse the trial court's award of attorney fees.

¶ 53 A "prevailing party" is defined as "one that is successful on a significant issue and achieves some benefit in bringing suit." *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership*, 325 Ill. App. 3d 276, 280 (2001). "A party that receives judgment in his favor is usually considered the prevailing party." *Id.* at 281. Nonetheless, there may be some instances where it is inappropriate to designate a prevailing party. *1002 E. 87th St., LLC v. Midway Broadcasting Corp.*, 2018 IL App (1st) 171691, ¶ 31 ("But, if both parties win and lose on multiple different claims, it may be inappropriate to find a single prevailing party."). In such an event, neither party should receive an award of attorney fees. *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001).

¶ 54 Here, while the landlord prevailed on the issue of the tenants' liability for rent, the late fee issue proved to be just as, if not more, significant overall. After the issue of the tenants' liability for rent was resolved in the landlord's favor ($98,500), the trial court still had to determine whether the landlord was entitled to an additional $171,992 in compounded late fees. Ultimately, the trial court's award of $4950 in late fees captured only 2.86% of the total late fees sought by the landlord. Further, the parties litigated the issue of late fees for nearly nine months, as opposed to the six months expended on the tenants' liability for rent. The damages awarded for unpaid base rent were of limited significance "relative to *** the value of the remaining claims, their complexity, or the time devoted to the other issues at trial." *Id.* at 518. As such, the trial court abused its discretion when it found that the landlord was the prevailing party and, therefore, entitled to attorney fees. See *id.* at 515-18 (the trial court abused its discretion when it awarded a landlord its attorney fees under a lease's prevailing party provision where the most significant issue at trial related to a tenant's environmental contamination of the commercial rental property and the landlord was unsuccessful on that issue). Because both parties prevailed on major issues, neither party should have been designated as the prevailing party or awarded attorney fees. See *1002 E. 87th St., LLC*, 2018

IL App (1st) 171691, ¶ 31. For these reasons, we reverse the trial court's attorney fee award and need not reach the merits of the landlord's arguments regarding the reduction of the fee award.

III. CONCLUSION

¶ 55 The judgment of the circuit court of Will County is affirmed in part and reversed in part.

¶ 56 Affirmed in part and reversed in part.