THIRD DIVISION
December 30, 2020

No. 1-19-2368

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALDINE BUILDING II, an Illinois limited liability corporation, Plaintiff-Appellant, v. JETZ SERVICE COMPANY, INC., a Kansas corporation registered to do business in the State of Illinois, Defendant-Appellee	)	Appeal from the Circuit Court of Cook County 2016-CH-02978 Honorable Caroline Kate Moreland, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Howse and Justice Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Appellant's arguments were waived because they were presented for the first time on appeal; case was remanded with instructions to address appellee's petition for appellate attorney fees.

¶ 2 Aldine Building II, LLC (Aldine) appeals from a $25,354.50 attorney fee award entered after it voluntarily dismissed its declaratory judgment action concerning a contract with Jetz Service Company, Inc. (Jetz Service). Aldine contends the contract's attorney fee clause is unenforceable as a matter of public policy.

¶ 3 In late 2015, Aldine became the owner and manager of a 68-unit apartment building located

at 506 West Aldine Avenue in Chicago. Jetz Service is a Kansas corporation that, among other things, installs and maintains laundry equipment in multi-unit residential buildings in the midwestern and southern United States. Aldine and Jetz Service were successors in interest to a lease for a laundry area in the apartment building and washers and dryers used by the residents. They were also successors in interest to a contract rider and a lease extension agreement. Within days of acquiring ownership of the building, Aldine sent notice that it was terminating the contractual relationship. A disagreement arose as to whether Aldine's notice had been effective and whether the terms of the contract rider took precedence over the two other documents. In early 2016, Aldine filed a declaratory judgment action to determine the interplay of the three documents, and also seeking a judicial declaration that Aldine had a superior right to possess the premises where the laundry equipment was located and was entitled to money damages from a holdover tenant. After about three years of motion practice, the trial judge conducted a pre-trial settlement conference and Aldine decided to withdraw its action pursuant to section 2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009 (West 2016).

¶ 4 After the judge granted Aldine's motion to withdraw the suit, Jetz Service filed a petition for attorney fees based on the following language in the original lease agreement:

> "4. Lessor represents and warrants that lessor is the owner, beneficial owner, contract purchaser, lessee, or duly-authorized managing agent of the aforesaid premises, and that Lessor has good right and lawful authority to enter into and execute this Lease under all of the terms and provisions herein set forth, and that this Lease will be binding upon Lessor and all future owners, and their heirs, executors, and assigns of the Lessor. It is the intention of the parties hereto that this Lease run with the land and property(s) hereinabove

described. Lessor further warrants that as of the commencement date of this Lease, there will be no other Lease or Agreement in effect regarding the demised premises or regarding installation and operation of laundry equipment upon the demised premises and *this Agreement shall be governed by the laws of the State of Illinois, with the courts of Cook County having sole and exclusive jurisdiction and Lessor shall be liable for all costs, including attorney fees, incurred by Lessee in connection with or arising out of this Lease*." (Emphasis supplied.)

¶ 5 The trial judge considered written and oral arguments about the contract clause and attorney time records. Aldine's written memorandum in opposition to the fee petition was minimal and covered barely three typewritten pages. Aldine stated in relevant part:

"2. This clause does not say the prevailing party of any lawsuit is entitled to fees. It only states[,] however, Lessor is liable…without any determination made by a court.

3. This clause states only Lessor is liable for fees and costs.

4. Lessee can NEVER be liable for fees.

5. In addition, the plain reading of this clause states:

'…Lessor shall be liable for all costs, including attorneys' fees incurred by Lessee.'

6. Therefore, if Lessor writes a letter to [Jetz Service] and an attorney for [Jetz Service] writes a letter in response, Lessor would have to pay for it, including the time involved and postage, even if Lessor had a legitimate legal issue with Lessee.

7. If Aldine continued this present action and won, under [Jetz Service]'s theory[,] Aldine would have to pay all of [the] attorneys' fees and costs.

8. That is absurd and unconscionable."

¶ 6 Aldine did not, however, indicate that it was " 'absurd and unconscionable' " for the trial court to enforce the fee clause under the actual circumstances in which Aldine sued and eventually dismissed its suit. In paragraphs 9 through 11, Aldine quoted the voluntary dismissal statute and contended that despite its valid exercise of its right to dismiss, Jetz Service was arguing "this contract should override [that statute]." In paragraphs 12 through 17, Aldine made its only citation to precedent, *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 518 N.E.2d 424 (1987), which is an often-cited case regarding the contents of a fee petition, and Aldine disputed the factual sufficiency of the fee petition under consideration. Aldine concluded:

> "18. There has been no substantive ruling throughout this case.
>
> 19. More importantly[,] the law states that the Plaintiff can take a voluntary dismissal at any time."

¶ 7 The trial judge allowed Aldine to supplement its response with an order filed in a related case in which a fee petition from Jetz Service had been denied. We are unable to describe that order, as it was not included in the record on appeal.

¶ 8 Jetz Service's reply memorandum addressed whether the voluntary dismissal of the case affected Aldine's contractual obligation to pay costs and attorney fees, whether the timekeeping entries met the standard set out in *Kaiser*, 164 Ill. App. 3d 978, 518 N.E.2d 424, and whether the order entered in the related case was of any significance.

¶ 9 After considering the parties' presentations, the trial judge granted Jetz Service's fee petition on October 21, 2019. We cannot summarize the parties' oral arguments, as Aldine did not include a report of the proceedings in the record on appeal. However, Jetz Service states in its appellate response brief that Aldine did not offer any additional authority at the hearing and Aldine

has not refuted this fact. Aldine did not file an appellate reply brief, despite being granted additional time to do so.

¶ 10 On November 22, 2019, Aldine filed a motion in the appellate court pursuant to Rule 303(d) to extend by one day the deadline to file an appeal and tendered its proposed notice of appeal. Ill. S. Ct. R. 303(d) (eff. Jan. 1, 2015). The motion was granted and the notice of appeal was file-stamped on December 9, 2019. Accordingly, we have appellate jurisdiction pursuant to Rule 301. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 11 Aldine's 33-page brief offers a much more elaborate argument than Aldine made before the trial judge. First, Aldine argues for the first time on appeal that ambiguity in the fee clause has permitted an absurd award. Aldine contends that the remedy to this ambiguity is to disregard the "four corners" rule that limits contract interpretation to the face of the document, and instead follow a trend in Illinois to use the "absurdity doctrine" to consider outside evidence. Aldine does not indicate what evidence could be presented in a contract dispute in which the litigants are not the parties that negotiated or signed the document and are only successors in interest to the agreement. Instead, Aldine proposes that under the "absurdity doctrine" we could read in a prevailing party standard, otherwise Jetz Service could have brought or provoked litigation with Aldine, knowing that regardless of the outcome, Aldine would pay the bill for all the expenses. Also, if Aldine automatically owed Jetz Service's litigation expenses, Aldine would be disincentivized from voluntarily withdrawing its case, even if its claim had a limited chance of success, and this would unnecessarily consume judicial resources and contravene the public policy of reducing litigation. Aldine cites and discusses cases that analyzed ambiguous contracts. Aldine does not, however, cite any precedent in which a court added "prevailing party" language to a

contract. In the alternative, Aldine contends the contract's costs and attorney fees language is so one-sided that it is substantively unconscionable, deters Aldine from bringing any action whatsoever, and should be disregarded. Aldine cites cases regarding unconscionable contracts. Aldine also argues that "[r]equiring specific performance of the Fee Clause in the Lease is not reasonable where it is practically unenforceable and runs contrary to public policy." We will not consider Aldine's newly alleged equitable claim for specific performance, since Aldine did not bring this type of claim in the trial court. Aldine has abandoned its contention in the trial court that the fee petition did not meet the standard established in *Kaiser*, 164 Ill. App. 3d 978, 518 N.E.2d 424. Aldine asks that we vacate the money judgment and remand the case with instructions to reread the fee clause in accordance with Aldine's reasoning.

¶ 12 Jetz Service responds that Aldine did not cite any authority to the trial judge regarding absurd or unconscionable contracts and should not be permitted to present that authority now because new arguments on appeal are waived. See *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, LLC*, 376 Ill. App. 3d 185, 188, 876 N.E.2d 65, 69 (2007) (any issue not presented to the trial court for consideration is waived on appeal). Jetz Service cites to indications in the record that it took more than five months and two different briefing schedules to resolve the fee petition that Jetz Service filed with leave of court on May 2, 2019, because Aldine was asking for additional time to prepare a written response brief. Furthermore, the hearing date was postponed by almost three weeks (from October 2, 2019 to October 21, 2019) because the trial judge required a court reporter to be present. Aldine had time and opportunity to gather and present its authority before the trial judge ruled. Jetz Service argues that Aldine had another opportunity to present a fully-briefed argument in a motion for

reconsideration, but instead of filing a post-judgment motion in the trial court, Aldine took this appeal. Jetz Service contends Aldine's arguments about absurdity and unconscionability have been waived.

¶ 13 Without waiving its objection that Aldine failed to make its arguments in the trial court, Jetz Service points out that Aldine has not filed a hearing transcript. In the absence of a hearing transcript, we are to presume that the trial judge ruled in conformity with the facts and law, and any doubts which arise from incompleteness of the record are to be resolved against the appellant. *Venturini v. Affatato*, 84 Ill. App. 3d 547, 552, 405 N.E.2d 1093, 1097 (1980) (it is the appellant's burden to present a sufficient record for review and any doubt that arises from incompleteness of the record is construed against the appellant). The order on appeal indicates the trial judge was "fully apprised in the premises" before ruling. Jetz Service contends a transcript of the hearing would also show that the trial judge articulated reasons for that ruling and that we have sufficient grounds to affirm the order.

¶ 14 Without waiving its objection that Aldine's appellate argument is new, Jetz Service addresses the merits. Jetz Service points out that Aldine did not raise an ambiguity argument in the trial court and by Aldine's own account there, "This clause states only Lessor is liable for fees and costs." Jetz Service argues that there is no trend toward the "absurdity doctrine" and Aldine's proposed "enhanced contract interpretation standard." Furthermore, the only examples of how the absurdity doctrine could potentially apply require a hypothetical scenario completely detached from the record of this case–asserting that Aldine would be liable "for any and all costs" in any disagreement it had with Jetz Service. Jetz Service contends that it is specious to argue that it could and would institute litigation in bad faith in order to make Aldine responsible for attorneys' fees.

Jetz Service emphasizes that the facts are simple: Aldine sued in order to terminate the contract, after three years of litigation it abandoned the suit and left the contract intact, it receives all the benefits of the contract but wants to avoid its obligation under the contract to pay the expenses that its lawsuit caused. Jetz Service contends that being responsible for attorney fees as the contract plainly states is not absurd and that the judgment should be affirmed. Jetz Service also contends that imbalance in a contract does not make the agreement unconscionable and that here we have a contract between two capable business entities and a fee petition that was reviewed by a trial judge for reasonableness. Furthermore, the only case Aldine cited in the trial court, *Kaiser*, 164 Ill. App. 3d 978, 518 N.E.2d 424, involved a lease with a unilateral obligation to pay attorney fees, stating, " 'Lessee shall pay all costs and expenses, including attorneys' fees which may be incurred by or imposed on Lessor either in enforcing this lease or in any litigation to which Lessor, without fault on its part, may be made a party.' " *Kaiser*, 164 Ill. App. 3d at 981, 518 N.E.2d at 426. In addition, Aldine dives into speculation and hypotheticals and claims that only a "party under delusion" would enter into the subject contract, but these are not grounds for finding that the contract it succeeded to is an unconscionable agreement.

¶ 15 We agree that Aldine's appellate argument is different and much more extensive than its thin argument in the trial court. As quoted above, in the trial court, Aldine set out two hypotheticals in which it might be liable for Jetz Service's litigation expenses and then commented that liability under those imagined scenarios would "absurd and unconscionable." It is improper for Aldine to bring an appeal founded on those three short statements. It is impossible to characterize Aldine's presentation in the trial court as a legal argument. Aldine did not address the facts of this case. Aldine never attempted to define absurdity or unconscionability. Aldine never cited any precedent

regarding absurdity or unconscionability. Aldine did not analogize between established law and its contract and relationship with Jetz Service in order to draw the trial judge to the conclusion that the fee petition should be denied. Moreover, Aldine's appellate argument contradicts its trial court statement that a " 'plain reading' " of the contract indicated " 'Lessor shall be liable for all costs, including attorneys' fees incurred by Lessee.' " Aldine also affirmatively wrote in its trial court memorandum, " '2. This clause does not say the prevailing party of any lawsuit is entitled to fees,' " but now, Aldine contends that the contract *should* be interpreted to include a prevailing party standard. Aldine argues for the first time here for a departure from the well-established principles that courts limit consideration to the face of contracts and give the parties' words their plain and ordinary meaning, because, according to Aldine's new argument on appeal, the contract is either ambiguous or unconscionable.

¶ 16 Aldine has built its three short and unsupported sentences in the trial court into an argument about ambiguity, absurdity, and unconscionability that spans nine full pages of its appellate brief (page 4 to page 13). This is problematic for Aldine because issues which are not presented in the trial court are waived on appeal. *Board of Managers of Eleventh Street Loftominium Ass'n*, 376 Ill. App. 3d at 188, 876 N.E.2d at 69. In its trial court memorandum, Aldine made only a passing reference to absurdity and unconscionability. Aldine's trial court memorandum focused on the voluntary dismissal statute which Aldine quoted in full and the adequacy of Jetz Service's timekeeping records in light of *Kaiser*, 164 Ill. App. 3d 978, 518 N.E.2d 424. Understandably, Jetz Service's reply memorandum in support of the fee petition responded to these arguments, rather than to the passing commentary. Aldine failed to include a hearing transcript for our consideration and we presume that is because the transcript would confirm that Aldine is presenting new

arguments on appeal. *Venturini*, 84 Ill. App. 3d at 552, 405 N.E.2d at 1097 (any doubt that arises from incompleteness of the record is to be construed against the appellant). Furthermore, after Jetz Service pointed out the discrepancy between Aldine's trial court and appellate court presentations, Aldine did not disagree, despite being granted additional time to tender an appellate reply brief.

¶ 17 It is a misuse of the resources of the trial court and the appellate court and fundamentally unfair to appellee Jetz Service for Aldine to present an argument for the first time here. *McKay, Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453, 879 N.E.2d 512, 527 (2007) (the waiver doctrine preserves finite judicial resources by creating an incentive for litigants to bring the trial court's attention to alleged errors, thereby giving the court an opportunity to correct its own mistake and it prevents unfair prejudice to an opponent who might have responded with evidence and argument to the contrary); *Daniels v. Anderson*, 162 Ill. 2d 47, 59, 642 N.E.2d 128, 133 (1994) (finding waiver because allowing a party to change theories on appeal would weaken the adversarial process and the appellate system and could be prejudicial to the opponent); *George W. Kennedy Construction Co., Inc. v. City of Chicago*, 112 Ill. 2d 70, 77, 491 N.E.2d 1160, 1162 (1986) ("It is axiomatic that [arguments] not raised in the trial court cannot be raised for the first time on appeal and are waived."). Furthermore, piecemeal rounds of trial and appellate court proceedings would burden the courts as well as Jetz Service and unnecessarily prolong the resolution of this suit. Accordingly, we find that Aldine has waived its appellate arguments. We affirm the trial court's $25,354.50 judgment against Aldine and in favor of Jetz Service.

¶ 18 Our last consideration is Jetz Service's contention that it is contractually entitled to the attorney fees and costs it incurred because of Aldine's appeal. We agree Jetz Service is

contractually entitled to those fees. However, the proper course is to remand this claim to the circuit court for the appropriate petition and hearing to determine those reasonable attorney fees and costs, including the cost of preparing the fee petition, to which Jetz Service is entitled. *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 953, 819 N.E. 2d 1186, 1190 (2004) (amount of attorney fees on appeal are properly determined by petition and evidentiary hearing, and the reviewing court should remand for those purposes); *Trutin v. Adam*, 2016 IL App (1st) 142853, ¶ 35, 54 N.E.2d 277 (same). We therefore remand with instructions to address Jetz Service's fee petition.

¶ 19 Affirmed; remanded with instructions.