IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Walter d/b/a Diversified Automotive Services, Appellant	:	
	:	2262 C.D. 2013
v.	:	2263 C.D. 2013
	:	2264 C.D. 2013
Rinek Rope Co., Inc., City of Easton, Heywood Becker, Karin Becker, Turog Properties Management, Inc., Turog Properties Limited and Michael T. Foster	:	
Turog Properties Limited, Appellant	:	
	:	
v.	:	2276 C.D. 2013
	:	Argued: September 8, 2014
Robert Walter t/a Diversified Automotive Services	:	
	:	
v.	:	
	:	
Turog Properties, Limited and Heywood Becker, Michael T. Foster, and Rinek Rope Co., Inc.	:	
	:	
Robert Walter d/b/a Diversified Automotive Services	:	
	:	
v.	:	
	:	
Rinek Rope Co., Inc., City of Easton, Heywood Becker, Karin Becker, Turog Properties Management, Inc.,	:	

Turog Properties Limited, and :
Michael T. Foster :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: October 9, 2014

Robert Walter d/b/a Diversified Automotive Services (Walter) appeals three orders[1] of the Court of Common Pleas of Northampton County (trial court) that entered judgment in favor of Rinek Rope Co., Inc., City of Easton (City), Turog Properties Management Inc., and Turog Properties Limited (Turog) and against Walter after a non-jury trial. In addition, the trial court granted a compulsory nonsuit in favor of Heywood Becker, Karin Becker and Michael T. Foster. In brief, the trial court denied Walter's claim for monetary damages for the flooding to his leased property and awarded unpaid rent and late charges to Walter's landlord, Turog. Walter appealed the judgment on his various tort and contract claims in favor of defendants, and Turog cross-appealed its award of damages as inadequate. We affirm the trial court.

[1] The three orders consist of three Praecipes for Judgment filed by Appellees. The trial court noted that after the first Praecipe for Judgment filed by Turog was entered by the Prothonotary on November 25, 2013, the other filings were technically moot. In any event, there is no dispute that the Prothonotary properly entered judgment under Pennsylvania Rule of Civil Procedure No. 227.4(1)(b) (authorizing a prothonotary to "enter judgment upon … a decision of a judge following a trial without jury, if … the court does not enter an order disposing of all [post-trial] motions within one hundred twenty days after the filing of the first motion.").

On August 4, 2006, Turog filed a complaint against Walter for eviction, ejectment, breach of contract, quantum meruit and unjust enrichment, based on Walter's failure to make timely rental payments to Turog.[2] On September 1, 2006, Walter filed a counterclaim, asserting breach of contract, negligence and fraudulent conveyance against Turog and additional defendants Heywood and Linda Becker, Foster and Rinek Rope Co., Inc. (Rinek). On September 15, 2006, Walter filed a separate complaint asserting negligence claims against Rinek, the Beckers, Foster and the City. The complaint also raised claims pursuant to the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa. C.S. §§5101-5110, against the Beckers, Turog and Foster. On June 10, 2009, Turog filed a counterclaim alleging the same facts and seeking the same relief as in its original complaint. The cases were consolidated. After trial, the trial court made a number of findings, which follow.

In the spring of 2004, Walter was looking to lease a property for his automobile sales and service business. Walter chose property at 991 Bushkill Drive, Easton, Pennsylvania (Property), which was then owned by Rinek. Walter talked to Heywood Becker, an agent of Rinek, about using two buildings on the Property, which are identified in the record as Buildings 12 and 13.[3]

---

[2] Turog filed its complaint after Walter appealed a judgment in a landlord/tenant action entered by Magisterial District Judge Gay L. Elwell on June 6, 2006, in favor of Turog and against Walter. Turog was awarded possession of the property and damages in the amount of $8,148.40. Walter deposited $7,950 with the Northampton County Prothonotary to obtain a supersedeas from that judgment and continued to remain on the property and make monthly rental deposits to the Prothonotary through May 1, 2009, at which point the lease terminated.

[3] In the 1990s a service station was located on the Property. Walter worked at that service station for approximately two years. Throughout that time period, Walter observed that water would enter Building 13 during rain storms. However, the water could be removed with a broom or a squeegee.

The buildings are located at the base of a hill. Water runs off a city street, Burke Street, through a pair of stone gabions to a man-made swale that runs down the hill towards the northeast corner of the Property (Upper Swale). The swale then runs along the eastern boundary of the Property for approximately 30 feet (Lower Swale) and drains into an 18-inch wide reinforced concrete pipe. The pipe runs underneath the street and empties into a creek. Water collected from approximately 6.7 acres of land makes its way to this pipe.

Building 12, which Walter intended to use for storage, does not have a roof. Building 13 has a roof, and Becker informed Walter that the roof leaked. Becker also told Walter that the trash rack and the Lower Swale needed to be kept free of debris to prevent flooding. David Leggett, a prior tenant of the property, warned Walter to keep items off the floor during heavy rains, due to flooding.

Walter began using Buildings 12 and 13 in May 2004. On June 10, 2004, Becker signed a lease agreement, on behalf of Rinek, for Building 13 and delivered it to Walter. On June 15, 2004, Walter signed the lease, but never returned it to Rinek. However, Walter did provide a copy of the lease to the Commonwealth of Pennsylvania in order to procure his Vehicle Dealership License. Therein, Walter certified that the lease was effective between him and Rinek.

The lease gave Walter the right to occupy Building 13 for five years, effective June 1, 2004. The rent was $2,450 per month for the first year; $2,550 for the second year; $2,650 for the third year; $2,750 for the fourth year; and $2,850 for the fifth year. The lease states that

> [t]he rent, if not received by the 10th day of any month causes the Lessee to automatically be in default, and when received after the 10th day of the month incurs a late charge of $25 per day, retroactive to the first day of that month. A default which

> is not cured within 10 days after notice of the same by the Lessor automatically accelerates the term rent, and Lessor may proceed to seek recovery of the space and damages including attorney's fees.

Reproduced Record at 262a (R.R. __).

To maintain Building 13, Walter had the trash rack and the Lower Swale cleaned every Friday. On September 18, 2004, five to six inches of rain fell in the City within a twelve-hour period as a result of Hurricane Ivan.[4] Building 13 was flooded, causing damage to Walter's personalty and to the building itself. The inability of the pipe to manage the runoff contributed to the flooding of the property. The runoff would have exceeded the capacity of the pipe even if the Lower Swale had been completely free of debris.

Walter presented the testimony of Scott P. Policelli, P.L.S., a licensed professional land surveyor. Policelli stated that M.S. Reilly, Inc. owned the land adjacent to the east of the Property. Both the pipe and the trash rack are located on the Reilly property. Policelli described the rainfall as consistent with a 10-25 year storm frequency. He was unable to provide an opinion about what storm frequency the City's storm-water management system should have been designed to handle.

Because of the damage caused by the flood, Rinek informed Walter he did not have to pay rent for the months of October and November 2004. Rinek also accepted Walter's late payments of rent without further penalty through March 2005. Walter stopped paying rent in April 2005. On October 21, 2005, Rinek

---

[4] While Walter was attempting to drive to the property on September 18th, his automobile was caught in a mudslide, causing damage to the exhaust and transmission pan. Supplemental Reproduced Record at 54b (S.R.R. __).

deeded the Property to Turog for the sum of $1.00 and assigned Turog its rights under the lease.

The trial court found that Walter did not establish that the City owned the Lower or Upper Swale or the pipe. Under the lease, Walter was responsible for the maintenance, cleaning and repairs to the Property. Therefore, neither Rinek nor Turog breached the terms of the lease.[5] Further, Walter did not establish the capacity standard for a properly constructed storm-water maintenance system. In short, Walter did not make out a negligence claim against the City or his landlord.

The trial court found that because Walter did not pay rent from April 2005 through May 2006, he owed rent plus $25 per day in late charges to Turog. However, from June 2006 onward, Walter satisfied his rent obligation by making payment to the Prothonotary. Therefore, the $25 per day charge was not assessed for that time period.

In sum, the trial court found in favor of all defendants on Walter's claims and in favor of Turog on its cross-claim for breach of contract. It ordered Walter to pay Turog $145,650.00 and pre-judgment interest in the amount of $16,485.02, plus costs.

Walter appealed to this Court and raises the following issues:[6] (1) whether the trial court erred in holding that the City was not liable for damages caused by the flood; (2) whether the trial court erred in holding that Rinek was not liable for damages caused by the flood; (3) whether the trial court erred in holding

---

[5] Nonsuit was granted in favor of the Beckers and Foster because they never acted in a personal capacity, but only as agents of Rinek or Turog.

[6] In his brief, Walter lists ten issues for review but only addresses six in the argument section of the brief.

that Turog had standing because it did not own the Property when the flood occurred; (4) whether the trial court erred in finding that Walter was bound by the terms of the lease after the Property was damaged; (5) whether the trial court erred in granting a non-suit in favor of the Beckers and Foster; and (6) whether the trial court erred in finding Walter's claim for damages was speculative.

Turog has cross-appealed the trial court's monetary award. Turog argues that the trial court erred in its calculation of the late charges owed under the lease and erred in holding that Walter's rental deposits to the Prothonotary constituted timely rental payments under the lease.

Scope and Standard of Review

We begin with a consideration of this Court's standard and scope of review. When reviewing a trial court's decision in a non-jury trial, we consider whether the findings of the trial court are supported by competent evidence and whether an error of law was committed. *Swift v. Department of Transportation*, 937 A.2d 1162, 1167 n.5 (Pa. Cmwlth. 2007). The trial court is the factfinder, and we may not reweigh the evidence or substitute our judgment for that of the trial court. *Id*. When reviewing a challenge to the sufficiency of the evidence, our review is plenary, as the issue is a question of law. *Id*. In such a case, we must determine whether the evidence of record, "when viewed in the light most favorable to the verdict winner, is sufficient to support" the trial court's determination. *Id*.

City Liability

In his first issue, Walter claims that the trial court erred in holding that the evidence did not show negligence by the City. Walter claims that where a municipality installs storm-water facilities, it assumes the duty to maintain those

facilities. The City installed the pipe in 1963 and made improvements to the Upper Swale in the 1990s, which diverted run-off to the pipe that exceeded its capacity. Thus, the City's installation of the pipe and its diversion of the water run-off to the pipe directly caused the flooding of the property.

The City responds that it is immune from liability pursuant to the act commonly referred to as the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa. C.S. §§8541-8542, absent a showing it owned the storm-water system and had notice of the purported dangerous condition contained thereon. Walter showed neither. Further, even assuming *arguendo* that the City owned the storm-water system, Walter had to show that the City created or maintained it in a manner that breached a duty of care, but he did not present any evidence establishing that the system was negligently designed or maintained. Walter's expert admitted that he did not know the appropriate storm-water capacity for the drainage system in question. Therefore, Walter did not show that the system in question was installed or maintained in a negligent fashion.

> A cause of action may be maintained against a local agency where:
>
> > (1) the damages would be otherwise recoverable under common law or statute if the injury was caused by a person not protected by immunity, 42 Pa.C.S. § 8542(a)(1); (2) the injury was caused by the negligent act of the local agency or an employee thereof acting within the scope of his official duties; and (3) the negligent act falls within one of the enumerated exceptions to governmental immunity set forth in 42 Pa.C.S. § 8542(b).

Metropolitan Edison Company v. Reading Area Water Authority, 937 A.2d 1173, 1175 (Pa. Cmwlth. 2007). Walter argues the utility exception to governmental

immunity is applicable here. Section 8542(b)(5) of the Tort Claims Act sets forth the following requirements for that exception:

> *Utility service facilities.*--A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa. C.S. §8542(b)(5). In short, Walter had to prove that the City owned the utility service facility that caused the flooding, negligently created a dangerous condition on the Property and had notice of the dangerous condition on the Property.

The trial court held that Walter did not prove that the City owned the storm-water maintenance system. The evidence produced at trial showed that the City made three brief interventions to the system in 1993, 1996 and 2000.[7] The

[7] The City's engineer testified he searched the City's records and there was no evidence showing the City installed the pipe or the trash rack. Walter's evidence consisted of a 1963 design plan for a pipe extension project on the Property that listed the name of the then-City engineer. Walter claimed this showed the City installed the pipe. The City's engineer testified that the stamp of a City engineer on a plan could mean that the engineer was consulted on a private plan. It did not establish that the City actually installed the pipe.

The three times the City intervened on the Property are as follows: In 1993, the City installed gabions on property owned by Lafayette College at or near the City's waterline easement upgrade from the swales. In 1996, after a major storm and flooding to the area, the then-tenant on the Property requested assistance from the City. The City performed work on the swales. In 2002, the owner of the Property complained to the City about flooding in the area. However, he complained about the condition of Bushkill Drive at the front of the Property and not the swales.

trial court did not believe this showed ownership or even control of the system. The trial court also rejected the notion that these interventions constituted notice to the City of a dangerous condition.

However, even if ownership and notice had been established, Walter also had to prove that the City created a dangerous condition. Pointedly, no evidence was presented regarding what type of system the City should have built or maintained.

In his brief, Walter points only to Policelli's testimony that storms occur at given "frequencies." R.R. 167a. The most common frequencies are a two-year storm, a 10-year storm, a 25-year storm, a 50-year storm or a 100-year storm. Hurricane Ivan was somewhere between a 10 to 25-year storm. Policelli stated that the drainage capacity of the 18-inch pipe was sufficient to control a volume of rainfall produced by a two-year storm. However, a rainfall greater than that produced by a two-year storm will exceed the pipe's capacity and overflow the swale banks.

The trial court asked Policelli whether there was a standard for designing a drainage system. Policelli replied that such a standard would depend upon a watershed study of the creek and its release rates. The trial court then asked whether Policelli determined "what year storm this area should handle?" Notes of Testimony, October 25, 2012, at 83. Policelli replied that he could not answer that question. He also conceded that "[t]here are circumstances where you only have to design for a two or 10-year storm." *Id.* at 85.

Based on Walter's failure to establish that the storm-water system was negligently designed for the area, we reject Walter's contention that the trial court erred in concluding that the City was not liable for damages. As explained by the

trial court, the pertinent question is not whether the system was capable of handling the very severe weather event that occurred on September 18, 2004. The pertinent question was whether the City had a duty to design, construct or maintain a system that could handle such an event. Walter's expert could not answer that question.

Rinek Liability

In his second issue, Walter argues that the trial court erred in concluding that Rinek was not liable for the flooding of the Property. A landlord owes a duty to a tenant where he had notice of a dangerous condition and has failed to exercise reasonable care in discovering or correcting it. *See Smith v. M.P.W. Realty Co*., 225 A.2d 227 (Pa. 1967). A landlord is liable where he conceals a dangerous condition. *Doyle v. Atlantic Refining Co.*, 53 A.2d 68, 71 (Pa. 1947). Walter argues that Becker, Rinek's agent, knew that the underground pipe on the Property did not control the run-off.

The trial court found, as fact, that before he rented the Property Walter knew that flooding occurred after a rainfall. Becker told Walter to keep the trash rack and Lower Swale free of debris to limit the risk of flooding. Walter's expert, Policelli, testified that the pipe and the trash rack were not on Rinek's Property but on the neighboring property owned by M.S. Reilly, Inc.

The trial court found that Walter failed to demonstrate that negligent construction or maintenance of the pipe, Lower Swale, or Upper Swale contributed to his damage or that Rinek breached any duty or concealed a dangerous condition of the Property. Further, Walter assumed responsibility for maintenance, cleaning and repairs under the lease.

Walter cites cases holding landlords liable for concealment of a dangerous condition. He did not show liability on this basis. The trial court found, as fact, that the landlord did not conceal any dangerous condition on the Property and Walter does not show how this finding conflicts with the record.

Turog Standing

In his third issue, Walter argues that Turog lacked standing because it was formed as a limited partnership on September 28, 2009, and did not acquire ownership of the Property until January 3, 2011, more than a year after Walter's tenancy ended. Walter asserts that Foster and the Beckers are conducting a shell game in an attempt to cause Walter to lose his lawsuit.[8] Walter raised this issue in a motion for summary judgment filed on December 3, 2010, but it was denied on May 12, 2011. Walter did not present any new evidence on this issue at trial.

In its May 12, 2011, opinion the trial court explained that on August 4, 2006, Turog filed a complaint against Walter. Therein, Turog stated that Rinek leased the Property to Walter in 2004 and transferred ownership of the Property to Turog in 2005. Rinek also assigned its rights under the lease to Turog. However, Turog did not file its limited partnership certificate with the Department of State until September 28, 2009. Under the statute, a "limited partnership is formed at the time of the filing of the certificate" with the Department of State. 15 Pa. C.S. §8511(b). Walter claimed that Turog was not a proper limited partnership until September 28, 2009.

However, as the trial court explained, the fact that Turog did not file its certificate until September 28, 2009, does not mean it lacked capacity to sue for

[8] Walter does not elaborate further on this assertion. Walter does not own the Property. He owes rent to someone, whether it be Rinek or Turog. Both parties are part of this lawsuit.

rent. A limited partnership may continue litigation instituted prior to its legal formation without refiling the litigation after the certificate is obtained. Further, a contract made by a nonqualified corporation may be enforced after its qualification. *International Inventors Inc., East v. Berger*, 363 A.2d 1262 (Pa. Super. 1976).[9]

Additionally, in Pennsylvania it is well established that if the partners of a limited partnership do not comply with the statutory requirements for forming such a partnership, they become general partners as to third parties and creditors. *See Van Horn v. Corcoran*, 18 A. 16 (Pa. 1889). This principle was further addressed in *Ruth v. Crane*, 392 F.Supp. 724 (E.D. Pa. 1975), wherein the United States District Court for the Eastern District of Pennsylvania explained:

> Under Pennsylvania law, where parties intend to enter into a limited partnership, but fail to comply with the requirements of the Limited Partnership Act [15 Pa. C.S. §§8521-8525], such as recording a proper certificate, the limited partnership is not formed, but the parties are treated as general partners as to third persons and creditors[.]

Id. at 733 (internal footnote omitted).

Accordingly, we reject Walter's claim that Turog lacked standing.

Validity of Lease

In his fourth issue, Walter argues that he never delivered the signed written lease to Rinek and, thus, is not bound by it. In making this argument, Walter does not refute the factual findings of the trial court. Rather, he argues his version of the facts.

---

[9] Walter focuses on the transfer of the deed to the Property to Turog in 2011, but that date is irrelevant. Turog's standing is based upon Rinek's assignment of the lease rights, not the deed.

A valid contract requires offer, acceptance and consideration. *Koken v. Steinberg*, 825 A.2d 723, 729 (Pa. Cmwlth. 2003). Merely signing a contract may not be sufficient to form a contract. *Makoroff v. Department of Transportation*, 938 A.2d 470, 472-73 (Pa. Cmwlth. 2007). However, one may be equitably estopped from denying the existence of a contract when the party against whom estoppel is asserted has reasonably relied upon its existence. *Id.* at 473.

The trial court found as follows: Walter received a lease agreement signed by Rinek's agent. Walter signed the lease, but did not return it to Rinek. However, Walter did send a copy of the lease to the Commonwealth to obtain his professional license. In doing so, he "certif[ied] that the [l]ease was effective between him and Rinek." Trial Court Opinion, July 11, 2013, at 5, Finding of Fact 21. Further, Walter occupied the Property and began paying rent pursuant to the lease. As such, "Walter accepted the terms of the [l]ease by signing it, sending it to the Commonwealth to obtain his license, continuing his occupation of the premises, and/or paying rent in accordance with the [l]ease." *Id.* at 12, Conclusion of Law 16. Notably, Walter not only occupied the Property, he remained there for the precise five-year period set forth in the lease. Thus, we reject Walter's fourth assertion of error.

Compulsory Non-Suit

In his fifth issue, Walter argues that the trial court erred in entering a compulsory non-suit in favor of the Beckers and Foster. Walter asserts that the trial court should have pierced the corporate veil to find these individuals liable on Walter's claims.

In granting the nonsuit, the trial court found that Walter presented no evidence that the Beckers or Foster had a duty to maintain the storm-water

maintenance system. But, even if they had had a duty, Walter failed to establish that the storm-water maintenance system was negligently designed, constructed or maintained. In granting the nonsuit on the breach of contract claim, the trial court noted that Walter never entered into a contract with the Beckers or Foster but, rather, with Rinek. In granting a nonsuit on the claim that the conveyance of the Property from Rinek to Turog was fraudulent, the trial court found insufficient evidence that Rinek intended to hinder, delay, or defraud anyone by this transfer. As such, it was impossible for the trial court to determine whether the transfer was fraudulent pursuant to Section 5104 of the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa. C.S. §5104.[10]

---

[10] It provides:

> (a) General rule.--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:
> >
> > > (i) 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
> > >
> > > (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.
>
> (b) Certain factors.--In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
>
> > (1) the transfer or obligation was to an insider;
> >
> > (2) the debtor retained possession or control of the property transferred after the transfer;

(Footnote continued on the next page . . .)

Walter claims that he proved that the transfer from Rinek to Turog was fraudulent. Walter points to the following evidence: Heywood Becker held himself out as "the owner or operator or manager and with apparent authority to act on behalf of the corporate or other entity owner of the property…." Walter's Brief at 42-43. Heywood Becker designated Foster as the "man in charge." *Id.* at 43. Foster maintained the same mailing address as Turog. Karin Becker was the recording individual on the 2005 documents transferring the property from Rinek to Turog; she accepted rent checks payable to her and signed Turog's checks for Heywood Becker's "obligations."[11] *Id.* Although not clear, it appears that Walter believes the Beckers and Foster were the alter-egos of Rinek or Turog or both.

"Piercing the corporate veil is an extraordinary remedy reserved for cases involving exceptional circumstances." *Newcrete Products v. City of Wilkes-*

(continued . . .)

> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;
>
> (7) the debtor removed or concealed assets;
>
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

12 Pa. C.S. §5104.

[11] Walter fails to explain the nature of these "obligations."

Barre, 37 A.3d 7, 12 (Pa. Cmwlth.), *appeal denied*, 48 A.3d 1250 (Pa. 2012). "There is a strong presumption against piercing the corporate veil, and the independence of separate corporate entities is presumed." *Id.* The purpose of piercing the corporate veil is to remove the statutory protection insulating a shareholder from liability "[w]here a corporation operates as a mere façade for the operations of a dominant shareholder." *Id.* A court must consider the following factors when determining whether to pierce the corporate veil:

> [1] [u]ndercapitalization, [2] failure to adhere to the corporate formalities, [3] substantial intermingling of corporate and personal affairs and [4] use of the corporate form to perpetrate a fraud.

Id. at 13 (quoting *Lumax Industries, Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995)). Walter does not even cite these four factors in his brief, let alone explain how the trial court erred in applying them. Walter's claim of error must be denied.[12]

Turog Cross-Appeal

We turn to Turog's cross-appeal. It argues that the trial court misconstrued the lease and, as a result, erred in calculating the total late fees Walter owed. The lease provides that any rent "received after the 10th day of the month incurs a late charge of $25 per day, retroactive to the first day of that month." R.R. 262a. The trial court found that Walter did not pay rent from April 1, 2005, through June 20, 2006, a period of 446 days.[13] Therefore, in addition to

[12] Because we conclude that the trial court did not err in rejecting Walter's claim for damages, we need not address his final issue, *i.e.*, whether the trial court erred in finding Walter's claim for damages was speculative.

[13] Walter deposited $7,950 with the Prothonotary on June 21, 2006.

the rent owed for that period, the trial court ordered Walter to pay late charges totaling $11,150, *i.e*, $25 times 446 days.

Turog argues that, pursuant to the "very clear" language of the lease, a separate $25 per day late charge accrues each and every month, and runs until the monthly payment it specifically relates to is made. Each month, a new late charge starts, while the prior month's late charge continues. The trial court erred in accepting Walter's interpretation that $25 per day was the maximum late charge. Walter counters that an interpretation of the lease that would allow the late charges to "snowball" every month is unreasonable. Walter's Reply Brief at 9.

The trial court held that the lease was ambiguous because it was not clear whether a late charge of $25 per day accrued until all past due rent was paid or whether multiple late charges of $25 per day can accrue simultaneously for each and every month the rent is in default. Because the lease was drafted by Rinek, Turog's predecessor-in-interest, the trial court construed the lease in favor of Walter. The trial court held that the lease limited the late charge to $25 per day and "did not provide for a 'snowballing' of late charges." Trial Court Opinion, July 11, 2013, at 14, Conclusion of Law 26.

Turog has not identified the total amount of late fees it believes it is owed. Over a one year period, Turog's interpretation of the lease would appear to impose a $25 per day late charge for 365 days for unpaid January rent; add a $25 per day late charge for 334 days for unpaid February rent; add a $25 per day late charge for 306 days for unpaid March rent; and so on to December. By December, the late charge would be $300 per day or $9,300 for the month of December. Over the course of a year, this would exceed $60,000 in late charges, which is more than double the annual rent.

Where an ambiguity exists in a contract, the ambiguity is resolved against the drafter. As we have stated, "[u]nder the rule of *contra proferentem*, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." *Sun Company, Inc. (R&M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878-79 (Pa. Cmwlth. 1998). There is no question that Walter was not the drafter and that Walter's interpretation of the lease is reasonable. Thus, we conclude that the trial court did not err in rejecting Turog's interpretation of the lease.

Turog also argues that it is entitled to pre-judgment interest and late charges through 2009, because Walter's supersedeas deposits to the Prothonotary were not the equivalent of rent payments under the lease. Turog cites to *Perel v. Liberty Mutual Insurance Co.*, 839 A.2d 426 (Pa. Super. 2003), for the proposition that interest runs until the creditor receives payment. *Perel* is simply not on point. *Perel* involved the payment of post-judgment interest following an award of underinsured motorist benefits to a claimant. *Perel* did not involve pre-judgment payments by the defendant into an escrow account, as does this case.

This case originated with Walter's appeal of a ruling in Turog's favor by a Magisterial District Judge. As such, it was governed by Rule No. 1008 of the Pennsylvania Rules of Civil Procedure Governing Actions and Proceedings Before Magisterial District Judges. Walter was obligated to make rental deposits to the Prothonotary in order to perfect his appeal, as follows:

> A. Receipt by the magisterial district judge of the copy of the notice of appeal from the judgment shall operate as supersedeas, except as provided in subdivisions B and C of this rule.
>
> B. When an appeal is from a judgment for the possession of real property, receipt by the magisterial district judge of the copy of

the notice of appeal shall operate as a supersedeas only if the appellant at the time of filing the notice of appeal, deposits with the prothonotary a sum of money (or a bond, with surety approved by the prothonotary) equal to the lesser of three (3) months' rent or the rent actually in arrears on the date of the filing of the notice of appeal, based upon the magisterial district judge's order of judgment, and, thereafter, deposits cash or bond with the prothonotary in a sum equal to the monthly rent which becomes due during the period of time the proceedings upon appeal are pending in the court of common pleas, such additional deposits to be made within thirty (30) days following the date of the appeal, and each successive thirty (30) day period thereafter.

Upon application by the landlord, the court shall release appropriate sums from the escrow account on a continuing basis while the appeal is pending to compensate the landlord for the tenant's actual possession and use of the premises during the pendency of the appeal.

In the event the appellant fails to deposit the sums of money, or bond, required by this rule when such deposits are due, the prothonotary, upon praecipe filed by the appellee, shall terminate the supersedeas. Notice of the termination of the supersedeas shall be forwarded by first class mail to attorneys of record, or, if a party is unrepresented, to the party's last known address of record.

When the deposit of money or bond is made pursuant to the rule at the time of filing the appeal, the prothonotary shall make upon the notice of appeal and its copies a notation that it will operate as a supersedeas when received by the magisterial district judge.

C. Indigent Tenants

***

(3)(a) If the rent has already been paid to the landlord in the month in which the notice of appeal is filed, the tenant shall pay into an escrow account with the prothonotary the monthly rent in thirty (30) day intervals from the date the notice of appeal was filed; or

(b) If the rent has not been paid at the time of filing the notice of appeal, the tenant shall pay:

> (i) at the time of filing the notice of appeal, a sum of money equal to one third (1/3) of the monthly rent;
>
> (ii) an additional deposit of two thirds (2/3) of the monthly rent within twenty (20) days of filing the notice of appeal; and
>
> (iii) additional deposits of one month's rent in full each thirty (30) days after filing the notice of appeal. The amount of the monthly rent is the sum of money found by the magisterial district judge to constitute the monthly rental for the leasehold premises pursuant to Rule 514A. However, when the tenant is a participant in the Section 8 program, the tenant shall pay the tenant share of the rent as set forth in the "Section 8 Tenant's Supersedeas Affidavit" filed by the tenant.

(4) The prothonotary's office of the Court of Common Pleas in which the appeal is taken shall provide residential tenants who have suffered a judgment for possession with a "Supplemental Instructions for Obtaining a Stay of Eviction" as it appears on the website of the Minor Court Rules Committee.

(5) When the requirements of paragraphs (2) and (3) have been met, the prothonotary shall issue a supersedeas.

(6) Upon application by the landlord, the court shall release appropriate sums from the escrow account on a continuing basis while the appeal is pending to compensate the landlord for the tenant's actual possession and use of the premises during the pendency of the appeal.

(7) If the tenant fails to make monthly rent payments to the prothonotary as described in paragraph (3), the supersedeas may be terminated by the prothonotary upon praecipe by the landlord or other party to the action. Notice of the termination of the supersedeas shall be forwarded by first class mail to

> attorneys of record, or, if a party is unrepresented, to the party's last known address of record.
>
> (8) If the Court of Common Pleas determines, upon written motion or its own motion, that the averments within any of the tenant's affidavits do not establish that the tenant meets the terms and conditions of paragraph (1), supra, the Court may terminate the supersedeas. Notice of the termination of the supersedeas shall be forwarded by first class mail to attorneys of record, or, if a party is unrepresented, to the party's last known address of record.
>
> D. If an appeal is stricken or voluntarily terminated, any supersedeas based on it shall terminate. The prothonotary shall pay the deposits of rental to the party who sought possession of the real property.

Pa.R.C.P.M.D.J. No. 1008A-D.

As explained by the trial court, a tenant who wishes to remain in possession of the leased premises during the pendency of an appeal is required to deposit amounts equal to the monthly rent with the Prothonotary. As such, the escrowed payments are made in lieu of paying rent directly to the landlord. We agree with the trial court that Walter's payments to the Prothonotary pursuant to Pa.R.C.P.M.D.J. No. 1008 must be considered timely rental payments under the lease.

Turog also argues that the supersedeas deposits made by Walter did not equal the full amount of the rent owed. The trial court found as fact that the terms of the lease required Walter to pay $2,650 a month during the third year[14] of the lease; $2,750 during the fourth year of the lease; and $2,850 during the fifth year of the lease. Trial Court Opinion, July 11, 2013, at 5, Finding of Fact No. 22.

[14] At the time of the Magisterial District Judge's award in 2006, Walter had entered into his third year of the lease.

However, the trial court also found that Walter properly deposited $2,650 on a monthly basis through May 1, 2009, to the Prothonotary. *Id.* at 8, Finding of Fact No. 48.

Turog did not preserve this issue. Turog does not point to any place in the voluminous record where it raised the claim that Walter had not remitted the proper rent amount to the Prothonotary or that the rental amount awarded was incorrect. In its motion for post-trial relief, Turog raised the issue of whether payment to the Prothonotary constituted payment to Turog. However, Turog never claimed that the payments made by Walter to the Prothonotary were inadequate. In the conclusion section of its request for post-trial relief, Turog requests additional late charges and interest but does not request an increase in the amount of rent awarded by the trial court. Issues not properly raised in post-trial motions are waived. *Hinkson v. Department of Transportation*, 871 A.2d 301, 303 (Pa. Cmwlth. 2005). Further, issues not raised before the trial court cannot be raised for the first time to an appellate court. *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43, 45 n.5 (Pa. 1998). Thus, we will not address this issue.

Conclusion

For these reasons, we deny Walter's appeal and Turog's cross-appeal. We affirm the trial court.

_____

MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Walter d/b/a Diversified Automotive Services, Appellant	:	
	:	2262 C.D. 2013
v.	:	2263 C.D. 2013
	:	2264 C.D. 2013
Rinek Rope Co., Inc., City of Easton, Heywood Becker, Karin Becker, Turog Properties Management, Inc., Turog Properties Limited and Michael T. Foster	:	
Turog Properties Limited, Appellant	:	
v.	:	2276 C.D. 2013
Robert Walter t/a Diversified Automotive Services	:	
v.	:	
Turog Properties, Limited and Heywood Becker, Michael T. Foster, and Rinek Rope Co., Inc.	:	
Robert Walter d/b/a Diversified Automotive Services	:	
v.	:	
Rinek Rope Co., Inc., City of Easton, Heywood Becker, Karin Becker, Turog Properties Management, Inc.,	:	

Turog Properties Limited, and :
Michael T. Foster :

O R D E R

AND NOW, this 9th day of October, 2014, the orders of the Court of Common Pleas of Northampton County dated November 22, 2013, November 25, 2013, and December 2, 2013, are AFFIRMED.

_____
MARY HANNAH LEAVITT, Judge