2014 IL App (1st) 130307

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Plaintiff and Counterdefendant–Appellant,
v.
TERRA FOUNDATION FOR AMERICAN ART, Defendant

No. 1–13–0307. | June 9, 2014.

OPINION

Justice HOFFMAN delivered the judgment of the court, with opinion.

****634** The Metropolitan Water Reclamation District of Greater Chicago (the District) appeals from a $36,432,047 judgment entered against it and in favor of the counterplaintiff, NM Project Company, LLC, (hereinafter, the Project Company). The damages were awarded after the District was found to have intentionally interfered with the easement rights of the Project Company and its predecessors-in-interest to use and enjoy an alley owned by the District. For the reasons that follow, we affirm the judgment of the circuit court, as modified.

The litigation in this case has developed over the course of eight years, creating a voluminous record, which we summarize here, in relevant part, to address the issues now before us.

The District is a municipal corporation with its headquarters at 100 East Erie Street in Chicago, near the intersection of Michigan Avenue and Erie Street. On the eastern border of its headquarters, parallel to Michigan Avenue, the District owns an alley (the Alley), which separates its property from three properties, 664, 666, and 670 N. Michigan Avenue (collectively referred to as the Property), now owned by the Project Company.

In June 2005, the Terra Foundation for American Art (Terra) and 664 N. Michigan, LLC, entered into an "Option and Purchase Agreement" covering the purchase and development of the Property which was then owned by Terra. Two of the three properties, 666 and 670 N. Michigan Avenue, benefited from three recorded easements over the Alley dating back to the 1940s. The easements provided that the owners of the 666 and 670 N. Michigan parcels have "full and free right and liberty to use and enjoy" the Alley. 664 N. Michigan, LLC, planned to develop the Property by demolishing the existing buildings and constructing a 40–story luxury condominium and retail store complex. The plan contemplated use of the Alley to provide access to the proposed garage for residents of the condominium complex. Shortly after entering into the "Option and Purchase Agreement," the 664 N. Michigan, LLC, assigned its rights under the agreement to the 670 N. Michigan, LLC, of which it was the managing member.

Upon learning of the plans for the development of the Property at a meeting with its representatives in the summer of 2005, the District objected and contended that use of the Alley for the proposed garage exceeded the terms of the easements. Despite the District's objections, the design phase for the development of the Property immediately began and financing opportunities were pursued. By September 2005, the Ritz Carlton Corporation had been contacted regarding the use ****635 *48** of its brand name in the marketing and the management of the condominium units to be constructed on the Property. Marketing efforts began in January 2006 based on the initial development plans, with construction projected to begin sometime between October 2006 and March 2007. Delivery of completed condominium units to purchasers was planned for early 2009.

On July 12, 2006, the District filed the instant action against Terra and 664 N. Michigan, LLC, seeking judicial declarations concerning the scope of the easements. The District alleged that the intended use of the Alley in connection with the development plan exceeded the scope of the easements. It further claimed that the 664 N. Michigan Avenue parcel had no easement rights, and therefore, the Alley could not be used for that parcel's benefit.

*****[SOME HISTORY REMOVED]*****

Among the facts incorporated in all three claims, the counterplaintiffs alleged that the District had blocked access to the Alley by locking the security gate, refused to allow access to the Alley for legitimate construction purposes, and allowed its employees and other invitees to park in the Alley in a manner which obstructed ingress and egress. Specifically, the counterplaintiffs alleged that: "[i]n late 2005 and early 2006, * * * [they] began offering the residential units for sale, with delivery expected in late 2009"; they had "secured the necessary financing, and anticipate[d] that the cost of the Development [would] exceed $183,000,000"; and that, in order to construct the complex, they had to demolish the existing structures on the Property. The counterplaintiffs alleged that the District's conduct prevented their construction workers from erecting scaffolding necessary for demolition

activities. They also alleged that "in recent months, the District [had] embarked upon an unlawful campaign to interfere with the Alley Easement and keep the * * * [counterplaintiffs] from accessing ***49 **636** and using the Alley." After it closed on the purchase of the Property, the Project Company asked the District to remove the gate, but the District refused. Thereafter, the District began allowing vehicles to park in the Alley for entire workdays and storing garbage dumpsters in the Alley to prevent ingress and egress.

According to the counterclaim, the District's interference was alleged to have: impaired the counterplaintiffs' unencumbered right to use the Alley and to enjoy the 666 and 670 North Michigan Avenue properties, including their efforts to proceed with the construction of the improvements on the Property; threatened the counterplaintiffs' agreements with contractors and subcontractors, who were unable to perform their work at the time and in the manner contemplated by their respective contracts; impaired the counterplaintiffs' ability to comply with their financing agreements, equity partner agreements, and the redevelopment agreement with the City of Chicago; "threaten[ed] to deter potential customers from purchasing units in the Development"; "delayed the * * * [counterplaintiffs] from obtaining a demolition permit from the City, and required [them] to incur additional expenses, including but not limited to attorneys' fees, consulting fees, and interest."

On August 14, 2008, after a lengthy hearing, the trial court entered a preliminary injunction against the District, enjoining it from interfering with the Project Company's use and enjoyment of the easements over the Alley. However, the trial court found that the 664 N. Michigan Avenue parcel held no rights under the easements at issue and, therefore, the Project Company had no right to use the Alley for the benefit of that parcel. The trial court further enjoined the District from parking cars in the Alley, obstructing access with a security gate, interfering with scaffolding placement, denying access to construction workers, and interfering with the removal of the security gate. The trial court specifically found that the "District began to deny access after learning of the developer's plans for the new buildings and ha[d] intensified its efforts in denying access since April 30, 2008."

The District appealed the trial court's preliminary injunction order, and, on April 22, 2009, this court affirmed that order.

*****[SOME HISTORY REMOVED]*****

¶ 14 On May 19, 2009, after a hearing, the trial court entered a permanent injunction consistent with the preliminary injunction it had entered on August 14, 2008.[1] First, the court found that the 664 N. Michigan Avenue parcel had no easement rights and, therefore, the Alley could not be used for activities benefitting only that parcel. As to that portion of count II of the District's complaint, the court entered judgment in its favor. Second, the District was permanently enjoined from interfering with the Project Company's use and enjoyment of the Alley easements, including parking cars in the Alley in a manner which blocked ingress and egress or interfering with construction activities benefitting the 666 and 670 N. Michigan Avenue properties. However, the District was allowed to use the Alley to store its garbage dumpsters. The issues pertaining to the security gate were moot because the District had removed it. The issues pertaining to demolition activities on the 666 and 670 N. Michigan Avenue properties were also moot because demolition had been completed after the preliminary injunction had been granted. The matter was then set for an August 2009 trial to resolve the counterplaintiffs' claim for damages.

*****[SOME HISTORY REMOVED]*****

On August 24, 2009, the hearing on the counterclaim for damages commenced. The attorneys for the parties made opening statements. Counsel for the Project Company opened by arguing that the evidence established intentional interference with the easement rights over the Alley dating back to 2005 and that the Project Company sought damages in the amount of $66,468,910. The District argued that ****638 *51** the counterplaintiffs never alleged or referred to any conduct by the District occurring before 2008 until they tendered LoGuidice's report on January 12, 2009. Counsel also argued that the Project Company's damages were based on the speculative conclusions made by LoGuidice and that there was no evidence that the Project Company's business plans were affected by the District's conduct between March 1, 2007, and April 30, 2008.

On October 13, 2009, an altercation involving the use of the easement arose between a District police officer and a Project Company principal. The altercation led the Project Company to file a petition seeking an adjudication of indirect civil contempt against the District for a violation of the May 19, 2009, permanent injunction. On March 5, 2010, after a 9–day hearing, the trial court entered an order holding the District in indirect civil contempt and imposing sanctions. The District appealed, and, on June 8, 2011, this court reversed that judgment. *Metropolitan Water Reclamation, District of Greater Chicago v. Terra Foundation for American Art,* No. 1–10–0971, 409 Ill.App.3d 1150, 377 Ill.Dec. 746, 2 N.E.3d 662 (2011) (unpublished order under Supreme Court Rule 23). Those proceedings delayed the course of the hearing on the

counterclaim for damages.

*****[DAMAGES EVIDENCE & HISTORY REMOVED]*****

Based on the evidence, the court computed its judgment in favor of the Project Company on count I of the counterclaim, alleging interference with the easement as follows: $5,397,265 for additional construction costs; $2,996,264 for advertising and marketing expenses; $249,004 for additional Terra rent payments; $387,587 for construction management expenses; $603,562 for the cost to build a new sales center; $52,500 for additional real estate transfer taxes; $61,966 for legal fees incurred in other litigation; $1,875,006 for additional ground lease payments; and, $24,808,793 for increased interest on the mezzanine loan. The court also entered a $100 judgment in favor of the Project Company for nominal damages on its trespass claim as pled in count III. Fourteen days later, the District filed its timely notice of appeal.

In urging reversal, the District argues that: (1) the economic loss doctrine bars recovery for the type of damages awarded by the circuit court; (2) the judgment was based in part upon conduct that was not alleged in the counterclaim; and (3) the damage award is against the manifest weight of the evidence. From the outset, we note that the District has made no argument in its briefs before this court contesting in any way the trial court's finding that it did, in fact, intentionally interfere with the Project Company's right to use the Alley beginning in 2005 and continuing until the injunction prohibiting its conduct issued in August 2008. Therefore, our analysis of the issues raised starts with this proposition as an established fact.

In support of its first argument that the economic loss doctrine bars recovery for the $36,432,047 in damages awarded to the Project Company, the District contends that recovery for economic losses occasioned by disappointed commercial expectations are not recoverable in tort. In response, the Project Company asserts that the trial court properly determined that the District forfeited its argument in this regard by failing to raise it as an affirmative defense or in a motion to dismiss, but instead improperly raising it for the first time after the trial was completed. On the merits of the issue, the ****645 *58** Project Company argues that the economic loss doctrine has no application to intentional torts such as the one involved in this case.

We review the forfeiture issue using an abuse of discretion standard. See *Hanley v. City of Chicago,* 343 Ill.App.3d 49, 53–54, 277 Ill.Dec. 140, 795 N.E.2d 808 (2003). The question of whether the economic loss doctrine is applicable to damages sustained as the result of an intentional tort is one of law, and, therefore, our review of that issue is *de novo. Bogner v. Villiger,* 343 Ill.App.3d 264, 267–68, 277 Ill.Dec. 593, 796 N.E.2d 679 (2003); *Smith v. Intergovernmental Solid Waste Disposal Ass'n,* 239 Ill.App.3d 123, 134, 178 Ill.Dec. 860, 605 N.E.2d 654 (1992).

Addressing the circuit court's finding that it forfeited the economic loss argument, the District relies upon the holding in *Rosos Litho Supply Corp. v. Hansen,* 123 Ill.App.3d 290, 293–94, 78 Ill.Dec. 447, 462 N.E.2d 566 (1984), *overruled in part on other grounds by 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.,* 136 Ill.2d 302, 144 Ill.Dec. 227, 555 N.E.2d 346 (1990), which concluded that a defendant is not required to raise the economic loss doctrine earlier than in a posttrial motion. Under the facts of this case, we disagree.

The economic loss doctrine as a defense to the damages claimed by the Project Company presented a legal question which could have been easily resolved much earlier in the proceedings through a motion to dismiss or a motion for summary judgment, long before the close of a lengthy damages trial. See *Production Specialties Group, Inc. v. Minsor Systems, Inc.,* 513 F.3d 695, 699 (7th Cir.2008) (finding the defendant's motion for a new trial was "not the appropriate place to raise for the first time arguments that could have been brought earlier in the proceedings," including its economic-loss argument which could have been "easily resolved at the summary judgment stage or even as a motion to dismiss for failure to state a claim"). Here, the District failed to raise the argument at any stage of the proceedings prior to the Project Company having rested its case for damages on June 22, 2011. It failed to raise the defense after it received the damages report of the Project Company's forensic accountant, LoGuidice, in January 2009; five months prior to the permanent injunction hearing. Even after the District received LoGuidice's report, it did not object to the requested damages; rather, it sought merely to sever the damages claim from the equity claims. The District's failure to raise the argument earlier prejudiced the Project Company by depriving it of an opportunity to renew its motion to amend the counterclaim or otherwise address this issue before it participated in the lengthy trial on damages. See *Kaiser Agricultural Chemicals v. Rice,* 138 Ill.App.3d 706, 713, 93 Ill.Dec. 316, 486 N.E.2d 417 (1985) (finding that the plaintiff forfeited its defense to the defendant's counterclaim based upon the economic loss doctrine by failing to raise the defense in its answer; "[a] party may not raise on appeal defenses not interposed in its answer before the trial court [citation], even where it appears that the evidence presented could have supported that defense").

Although some courts in other jurisdictions have determined that the economic loss doctrine is not an affirmative defense (see *Tarrant County Hospital District v. GE Automation Services, Inc.,* 156 S.W.3d 885 (Tex.Ct.App.2005)), section 2–613(d) of the Code of Civil Procedure (735 ILCS 5/2–613(d) (West 2012)) encompasses both affirmative defenses and other grounds "which, if not expressly stated in the pleading, would be likely to take the ****646 *59** opposite party by surprise" and requires such defenses or grounds to be plainly set forth in the answer or reply. This the District failed to do. We find, therefore, that the trial court did not abuse its discretion in holding that the District forfeited its economic loss argument by failing to raise it at an earlier stage in the proceedings.

Forfeiture aside, for the reasons which follow, we conclude that the economic loss is inapplicable to a claim based upon intentional interference with an easement. In *Moorman,* the supreme court held that a plaintiff cannot recover for solely economic losses under the tort theories of strict liability, negligence, and innocent misrepresentation. *Moorman,* 91 Ill.2d at 91, 61 Ill.Dec. 746, 435 N.E.2d 443; *In re Chicago Flood Litigation,* 176 Ill.2d 179, 198, 223 Ill.Dec. 532, 680 N.E.2d 265 (1997). The court defined economic losses as those sustained by reason of " 'inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property * * *' [citation] as well as 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' [Citation.]" *Moorman,* 91 Ill.2d at 82, 61 Ill.Dec. 746, 435 N.E.2d 443. The doctrine "stems from the theory that tort law affords a remedy for losses occasioned by personal injuries or damage to one's property, but contract law and the Uniform Commercial Code (810 ILCS 5/1–101 through 1–209 (West 1996)) offer the appropriate remedy for economic losses occasioned by diminished commercial expectations not coupled with injury to person or property. [Citation.]" *Mars, Inc. v. Heritage Builders of Effingham, Inc.,* 327 Ill.App.3d 346, 351, 261 Ill.Dec. 458, 763 N.E.2d 428 (2002).

The *Moorman* court articulated three exceptions to the economic loss doctrine; namely, circumstances where: (1) the plaintiff sustains personal injury or property damage, resulting from a sudden or dangerous occurrence (*Moorman,* 91 Ill.2d at 86, 61 Ill.Dec. 746, 435 N.E.2d 443); (2) the plaintiff's damages are proximately caused by a defendant's intentional, false representation, *i.e.*, fraud (*Moorman,* 91 Ill.2d at 88–89, 61 Ill.Dec. 746, 435 N.E.2d 443); and (3) the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions (*Moorman,* 91 Ill.2d at 89, 61 Ill.Dec. 746, 435 N.E.2d 443). *In re Chicago Flood Litigation,* 176 Ill.2d at 199, 223 Ill.Dec. 532, 680 N.E.2d 265.

*****[PART of DISCUSSION REMOVED]*****

Similar to the torts of intentional interference with a contract or with prospective business advantage, a claim of intentional interference with an easement seeks to protect the interests of those in possession of real property against unreasonable interference with their rights to access and use their property. Unlike situations involving commercial transactions or defective goods to which the *Moorman* doctrine has traditionally been applied, the case at bar originates in property law where the duties running between dominant and servient estate holders have been long recognized. As the supreme court has noted, the "concept of duty" has been "at the heart of the distinction drawn by the economic loss rule" (*2314 Lincoln Park West,* 136 Ill.2d at 314, 144 Ill.Dec. 227, 555 N.E.2d 346), and the "principle common" to the recognized exceptions to the doctrine is that "the defendant owes a duty in tort to prevent precisely the type of harm, economic or not, that occurred" (*id.* at 315, 144 Ill.Dec. 227, 555 N.E.2d 346). Here, the District had a duty not to interfere with the Project Company's use of the easement and to prevent the precise type of harm that occurred. See 28A C.J.S. *Easements* § 91, at 396 (2008) (discussing dichotomy of interests between servitude estates); see also *McMahon v. Hines,* 298 Ill.App.3d 231, 235–36, 232 Ill.Dec. 269, 697 N.E.2d 1199 (1998) (discussing rights of dominant and servient estate holders to reasonable use of property subject to easement).

Historically, tort damages have been allowed for interferences with easements. See *Page v. Bloom,* 223 Ill.App.3d 18, 23, 165 Ill.Dec. 379, 584 N.E.2d 813 (1991) (affirming a judgment for lost crop profits where the plaintiff established that his damages were caused by the defendants' obstruction of an easement); *Can Am Industries, Inc. v. Firestone Tire & Rubber Co.,* 631 F.Supp. 1180, 1184 (1986) (C.D.Ill. 1986) (awarding punitive damages where the servient owner blocked the dominant estate's easement); ****648 *61** *LeClerq v. Zaia,* 28 Ill.App.3d 738, 742–43, 328 N.E.2d 910 (1975) (affirming punitive and nominal damages judgment where the dominant estate/defendant was proven to have intentionally interfered with the servient estate/plaintiff's property when it damaged the roadway upon which it had ingress and egress rights).

> "An easement holder is entitled to such damages as are proximately caused by a wrongful interference with the easement, and the easement owner is entitled to such damages as naturally and proximately result from the

> act complained of, and such as would fairly and reasonably compensate him or her for the wrong suffered * * *. Even if plaintiffs are unable to prove any injury or actual damage, they are entitled to nominal damages where defendants impaired enjoyment of plaintiffs' use of a right-of-way over defendants' land, as the law presumes damage in order for plaintiffs to vindicate their rights." 28A C.J.S. *Easements* § 278, at 507–08 (2008).

The considerations behind the economic loss doctrine articulated in *Moorman* are not present here. This is not a situation where, at the time the easement was created, the parties to the easement could have allocated their risks as in contract or where the Uniform Commercial Code applies. See *Mars, Inc.,* 327 Ill.App.3d at 351, 261 Ill.Dec. 458, 763 N.E.2d 428.

The District also contends that *In re Chicago Flood Litigation* supports its argument that actions involving property rights are subject to the economic loss doctrine. In that case, the supreme court did hold that a "plaintiff in a private nuisance action may recover all consequential damages flowing from the injury to the use and enjoyment of his or her person or property. * * * However, recovery of damages for solely economic loss is not permissible." *In re Chicago Flood Litigation,* 176 Ill.2d at 207, 223 Ill.Dec. 532, 680 N.E.2d 265. However, the court did not distinguish between negligent or intentional nuisance claims; rather, it merely stated that the policy behind the economic loss doctrine was to avoid the open-ended economic consequences of a single negligent act, such as the sudden flood occurrence at issue. *Id.* Here, however, we have an on-going, continuous, and intentional interference with easement rights by the District, including the physical blocking of ingress and egress from the Property in order to prevent or discourage its development. Unlike the circumstances present in *In re Chicago Flood Litigation,* the damages suffered by the Project Company in this case were the very damages the District sought to inflict upon it, namely, to prevent or delay the development of the Property.

In this case, the Project Company presented evidence of the costs it incurred as a result of the District's intentional interference with its right to use the easement, including costs incurred by reason of increased interest obligations and increased rent payments. The losses sought by the Project Company do not relate to the "inadequate value, costs of repair and replacement of [a] defective product, or consequent loss of profits" or the "diminution in the value of the product because" of inferior quality as the *Moorman* court defined economic losses, nor were they the result of an isolated negligent act. Rather, the losses sought are consequential damages which the Project Company incurred by reason of the delay caused by the District's ongoing interference with its ability to use the alley to access and develop the Property.

We believe that the holder of rights under an easement is entitled to recover damages, including for economic losses, ****649 *62** proximately caused by the intentional interference with those rights. See 28A C.J.S. *Easements* § 279, at 509 (2008); Restatement (Third) of Prop.: Servitudes § 8.3, at 492–93 (2000); see also, *Wells v. Sanor,* 151 S.W.3d 819, 825 (Ky.Ct.App.2004) (measure of damages for interference with easement includes the diminution in value of the use of the property during the time the obstruction continued and the rental value of property is a relevant factor in determining the amount of damages); *Mondelli v. Saline Sewer Co.,* 628 S.W.2d 697, 699 (Mo.Ct.App.1982) ("easement holder is entitled to such damages as are proximately caused by wrongful interference with the easement," including, if obstruction is temporary, the "reduction in rental value of the property" during obstruction or "any special damages which may be established"). Accordingly, even if the District had not forfeited its argument, we agree with the trial court that the economic loss doctrine does not apply to bar the Project Company's recovery of damages for economic losses it incurred as a proximate result of the District's intentional interference with the easements at issue.

We next address the District's contention that the court erred in awarding damages for conduct which exceeded the counterclaim's factual allegations and legal claims. In support of its contention in this regard, the District makes a number of arguments, namely that: (1) the circuit court's award of damages beyond that which the Project Company sought in its counterclaim is void; (2) the circuit court erred in awarding damages for conduct which occurred outside of the period pled in the Project Company's counterclaim; (3) the circuit court erred in awarding damages based upon an unpled cause of action, namely, intentional interference with a business expectancy; and (4) the Project Company lacked standing to claim interference with easement rights occurring prior to April 30, 2008.

*****[PART of DISCUSSION REMOVED]*****

Forfeiture aside, we also reject the District's arguments on their merits. Relying on *Ligon v. Williams,* 264 Ill.App.3d 701, 202 Ill.Dec. 94, 637 N.E.2d 633 (1994), the District argues that the judgment against it is "void" because the trial court lacked jurisdiction to enter a judgment based upon unpled allegations and an unpled cause of action. However, we find its reliance upon on *Ligon* misplaced. *Ligon* involved a court's *sua sponte* custody order entered when the complaint in the case did

not raise the issue of custody. *Ligon,* 264 Ill.App.3d at 702–04, 202 Ill.Dec. 94, 637 N.E.2d 633. Here, however, the justiciable issue of damages resulting from the District's alleged interference with the easements was clearly presented in the counterclaim. Thus, the circuit court had subject matter jurisdiction to enter the judgment and its order is not void. Rather, the District's contentions that the judgment was improperly entered on unpled allegations or an unpled cause of action raise only questions of whether the judgment is voidable. See *In re Custody of Ayala,* 344 Ill.App.3d 574, 584, 279 Ill.Dec. 456, 800 N.E.2d 524 (2003) ("A voidable judgment is one entered erroneously, either through mistake of fact or law or both, by a court having jurisdiction and is not subject to collateral attack.").

Next, the District contends that the trial court erred by awarding damages for conduct which occurred outside of the period pled in the counterclaim. As an initial observation, we note that the counterclaim is rather vague as to the period covered. To be sure, it references acts of alleged interference occurring after April 30, 2008, such as the District's refusal to allow the Project Company to deliver scaffolding through the Alley on May 15, 2008, and the locked security gate across the Alley which prevented a representative of the Project Company along with employees of the a construction company from delivering construction materials to the Property on June 26, 2008. However, the counterclaim also references alleged acts of interference occurring at times no more specific than "in recent months" and "for extended periods of time." The prayer for relief requested damages "resulting from the District's interference" without specifying any time frame. If the District was confused as to the time period of its alleged interference, it could have requested a bill of particulars (see 735 ILCS 5/2–607 (West 2008)), but did not.

Assuming for the sake of analysis that the counterclaim as pled refers only to alleged acts of interference with easement rights occurring after April 30, 2008, the record is clear that during the injunction phase of the proceedings both the Project Company and the District presented evidence addressing the District's conduct prior to April 30, 2008, all without objection. Consequently, the District cannot claim either surprise or prejudice when the same evidence was presented during ****651 *64** the subsequent hearing on damages. Contrary to the District's assertion that it was prevented from examining witnesses concerning its pre-April 30, 2008, conduct, the record reflects that the District was allowed to fully explore the timing and progress of the Property's development and the effects of its interference with the easement rights over the Alley both pre- and post-April 30, 2008, that it was allowed to thoroughly cross-examine LoGuidice, and that the District presented evidence to refute LoGuidice's assumptions and calculations.

In response, the Project Company requests that we use our authority pursuant to Illinois Supreme Court Rule 362 (eff. Feb. 1, 1994) and grant its motion to amend the counterclaim to conform to the proofs in order to cure any technical defect in the pleadings that may exist. The Project Company seeks to add five additional paragraphs which it asserts are supported by the proofs. Those paragraphs contain the following allegations: (1) beginning on or about June 21, 2005, the Project Company entered into a series of agreements with Terra regarding the development of the three properties; (2) based on those agreements, the Project Company had a reasonable expectation of proceeding with its development plans in a timely manner as it pursued financing options in late 2005 and began selling condominium units in early 2006 with expected delivery by late 2009; (3) the District learned about the proposed development plan in 2005 and (4) "immediately thereafter, the District began to purposefully interfere" with the plan by preventing access to the alley; and, (5) the District's wrongful interference caused a significant and material breach in the Project Company's business expectancy, delaying all aspects of the development.

The District objects for three reasons: (1) the new count neither states a claim upon which relief can be granted nor was proven at trial; (2) the Project Company did not challenge the circuit court's denial of its initial motion to amend; and (3) the District would be severely prejudiced by injecting a new cause of action into the litigation at this stage. Regarding the sufficiency of the claim, District contends that the new count does not specify a third party toward whom the District directed any activity and with whom the Project Company lost a business relationship. Rather, the original counterclaim and the proposed new count make only a general reference to interference with the Project Company's own development activities, such as financing, contracting, permitting, demolition, and construction. Regarding prejudice, the District contends that the amendment would deprive it of the opportunities to demand a jury trial, take important discovery, and raise additional defenses. The District also argues that the original counterclaim alleged conduct that occurred only after April 2008 while the proposed amendment alleges conduct occurring from 2005 through 2008.

*****[PART of DISCUSSION REMOVED]*****

We deny, however, that portion of the Project Company's motion that seeks to amend the counterclaim to include a new claim against the District, namely, intentional interference with prospective economic advantage. In that regard, we agree with the trial court. The inclusion of a new cause of action at this late date would prejudice the

District as it contains elements that the District was not called upon to refute during any stage of the litigation. Specifically, the District was never called upon to defend against the allegations that it either knew of the Project Company's expectation of entering into a valid business relationship with some specified third party and that its purposeful interference prevented that expectancy from ripening into a valid business relationship. See *Fellhauer,* 142 Ill.2d at 511, 154 Ill.Dec. 649, 568 N.E.2d 870. We view an attempt to amend a pleading to conform to the proofs on the issue of damages entirely differently than a motion to amend which seeks to interject an entirely new cause of action.

*****[PART of DISCUSSION REMOVED]*****

We also reject the District's indirect argument that the Project Company lacked standing to recover damages incurred before the April 30, 2008, closing. The District has framed the standing argument only in terms of the Project Company's failure to allege conduct in the counterclaim predating the April 30, 2008, closing. However, the District fails to cite to any authority supporting its standing argument. Therefore, as the Project Company argues, the argument has been forfeited. See Ill. S.Ct. R. 341(h) (eff. Feb. 6, 2013); *Bohne v. La Salle National Bank,* 399 Ill.App.3d 485, 498, 339 Ill.Dec. 501, 926 N.E.2d 976 (points not supported by authority are forfeited on appeal). We note also that objections to a party's standing are forfeited if, as in this case, they are not raised timely in the trial court. ****653 *66** *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 508, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988); *Contract Development Corp. v. Beck,* 255 Ill.App.3d 660, 664, 194 Ill.Dec. 423, 627 N.E.2d 760 (1994).

Forfeiture aside, we point out that the 2005 purchase agreement provided that Terra granted the 664 N. Michigan, LLC, access to the property. Specifically, the 2005 purchase agreement provided that "Terra grants to * * * [664 N. Michigan, LLC] and its designees the right to enter upon the property to survey the Property and to perform test borings of the soil * * * and such other tests, inspections and investigations as Company deems necessary in its sole and absolute discretion."

Accordingly, under the 2005 purchase agreement, the Project Company and its predecessors-in-interest had license to access the Property prior to the closing. *O'Hara v. Chicago Title & Trust Co.,* 115 Ill.App.3d 309, 320, 71 Ill.Dec. 304, 450 N.E.2d 1183 (1983) (stating that a "license, as it relates to real property, is permission to do an act or a series of acts upon the land of another without possessing any estate or interest in such land"). As Terra's licensee, the Project Company and its predecessors-in-interest enjoyed the easement rights which Terra enjoyed as the language of the easements clearly state that the easement rights flow to the property owners, heirs and assigns and allow ingress and egress for them and their tenants, servants and licensees. See *Metropolitan Reclamation,* No. 1–08–2223, slip order at 5–6 (quoting the easements at issue here).

Therefore, even had the District not forfeited the standing argument, the evidence established that the Project Company, although not the record property owner, acquired rights under the Alley easements as assignee of the 2005 purchase agreement. See 28A C.J.S. *Easements,* § 258, at 485 (2008) ("In general, standing to sue to enforce the use of an easement is commensurate with the right to use the easement, regardless of whether the suitor holds title to the benefited property"); Restatement (Third) of Prop.: Servitudes § 8. 1, at 474 (2000) ("A person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude. Ownership of land intended to benefit from enforcement of the servitude is not a prerequisite to enforcement, but a person who holds the benefit of a covenant in gross must establish a legitimate interest in enforcing the covenant."); see also, *Tower Asset Sub Inc. v. Lawrence,* 143 Idaho 710, 152 P.3d 581, 584 (2007) (agreeing with Restatement (Third) of Property that a party has standing to enforce the right to use an easement if he has the right to benefit from the easement and title ownership is not a necessary prerequisite).

Finally, the District contends that the trial court's factual findings, that it caused the Project Company's 18–month construction delay and 31–month marketing delay, are against the manifest weight of the evidence. The District contends that the evidence established that the Project Company's alleged damages were caused by its own business decisions. The District also asserts that the nominal award of $100 for the trespass claim was improper. We disagree.

A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *1472 N. Milwaukee, Ltd. v. Feinerman,* 2013 IL App (1st) 121191, ¶ 13, 374 Ill.Dec. 957, 996 N.E.2d 652. "Stated differently, a factual finding is against the manifest weight of the evidence when an ****654 *67** opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Id.* (citing *Eychaner v. Gross,* 202 Ill.2d 228, 252, 269 Ill.Dec. 80, 779 N.E.2d 1115 (2002)). "[A] reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact." *Id.* (quoting *In re Application of the County Treasurer,* 131 Ill.2d 541, 549,

137 Ill.Dec. 561, 546 N.E.2d 506 (1989)). To warrant reversal of a damages award, we must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law. *Id.* An award of damages is not against the manifest weight if there is an adequate basis in the record to support the trial court's assessment. *Id.*

In this case, there is clearly an adequate basis in the record to support the court's finding that the Project Company's demolition and construction activities were delayed by the District's conduct as of March 1, 2007—the date when the Landmark Commission approved the demolition of the 664 N. Michigan building. Further, witnesses for the Project Company testified that, until the District ceased blocking access to the alley, it had no reason to finalize financing and close on the property as it would have incurred interest costs while the project was at a standstill. Witnesses also testified regarding the impact the District's conduct had on the marketing and sales of the planned condominium units. While the District refuted that it caused these construction and marketing delays through the testimony of its expert, Dudney, the trial court, as the trier-of-fact, had the duty to make credibility determinations and resolve conflicts in the evidence. *People ex rel. O'Malley v. Illinois Commerce Comm'n,* 239 Ill.App.3d 368, 380–81, 180 Ill.Dec. 206, 606 N.E.2d 1283 (1993). Here, the trial court found the opinions of LoGuidice credible and well-supported and determined that the evidence established that the District's conduct caused the 18–month construction delay and 31–month marketing delays. We have reviewed the testimony of both LoGuidice and Dudney and conclude that LoGuidice's testimony, which was accepted by the trial court, was sufficient to support the court's conclusion that the District's intentional conduct caused the damages which it awarded, and its resolution of these issues is not against the manifest weight of the evidence. Since the trial court's findings are not contrary to the manifest weight of the evidence, we will not disturb them on review. However, we modify the award to $35,762,047, as the parties agree that the trial court's mezzanine loan interest value inadvertently included $670,000, attributed to the two-month permit delay which the trial court determined was not caused by the District's conduct.

[13] ¶ 84 We also disagree with the District's position that LoGuidice's calculated damages were speculative, remote, or uncertain. Rather, LoGuidice's figures were based on known historical factors. For instance, regarding the "marketing delay," his figure was based on the market conditions in 2006–2007, the sales velocity before the negative publicity ensued and the costs of maintaining the sales office, the website, sales personnel, and advertising for the extended 31 months needed to sell the units. Increased construction costs were derived from the widely accepted Marshall and Swift indices for the 18 months that construction was at a standstill. Like the construction costs and marketing costs, the costs of extra rent to Terra, relocating the sales center, real estate transfer taxes, and litigation fees related to buyers backing out ****655 *68** of their contracts were derived from historical numbers, not on future costs, lost profits, or expenses. Finally, the increased mezzanine loan interest costs had been realized because the lender required the second tranche of financing to be assumed in March 2010, after the delay in condominium sales caused the construction loan to become imbalanced. Thus, we reject the District's position that LoGuidice's estimates were speculative and uncertain.

*****[PART of CONCL. REMOVED]*****

¶For the reasons stated, we grant the Project Company's motion to amend the counterclaim to the extent indicated, and we affirm the judgment of the circuit court of Cook County as modified to reflect the reduction in the mezzanine loan interest value by $670,000.

¶ 87 Affirmed as modified.