2014 IL App (2d) 131066-U
No. 2-13-1066
Order filed September 16, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES MIKOLAITIS, Plaintiff/Counter-Defendant-Appellant, v. MORANO INVESTMENTS, INC., and JERRY MORANO, Defendants/Counter-Plaintiffs/Cross-Defendants-Appellees (Tom Sims, Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellee).	)	Appeal from the Circuit Court of Kane County. No. 11-SC-5431 Honorable James R. Murphy, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendants' motion for a directed verdict on their counterclaim/affirmative defense of breach of warranty of marketable title, because the issue of whether Mikolaitis materially breached the contract was a question of fact on which there was conflicting evidence, so it should have been resolved by the jury. Under the same reasoning, the trial court correctly denied Mikolaitis's motion for a directed verdict on his complaint. The trial court also did not err by granting defendants' motion to strike Mikolaitis's prayer for relief requesting the entire amount outstanding on the promissory note, as the note did

not contain an acceleration clause. Therefore, we affirmed in part, reversed in part, and remanded the cause.

¶ 2 James Mikolaitis (plaintiff and counter-defendant) sold a bowling alley business to Morano Investments, Inc., and Jerry Morano (defendants, counter-plaintiffs, and cross-defendants). Mikolaitis accepted as payment $85,000 and a promissory note of $340,000 plus interest. Tom Sims (defendant, counter-plaintiff, and cross-plaintiff) signed the promissory note as guarantor. Morano Investments, Inc., and Morano (collectively Morano[1]) stopped payments on the promissory note in May 2011, and Mikolaitis filed suit against them and Sims for breach of the note. Morano and Sims (collectively defendants) filed affirmative defenses and counterclaims arguing, among other things, that Mikolaitis did not have marketable title to the assets he sold.

¶ 3 At the close of the evidence, the trial court granted directed verdicts for defendants on Mikolaitis's complaint requesting the balance of the note due and for Mikolaitis on any claim by Morano of overpayment. The trial court's ruling resulted in no damage awards to any party. We affirm in part, reverse in part, and remand.

¶ 4 I. BACKGROUND

¶ 5 A. Pre-trial Proceedings

¶ 6 Mikolaitis filed suit against defendants on October 11, 2011, and he filed an amended complaint on November 29, 2011. Count I of the amended complaint alleged breach of contract on the promissory note. Mikolaitis alleged that defendants owed $17,373 in arrears and $3,920 in late charges on the note, plus attorney fees and costs. Mikolaitis sought payment on the

[1] When discussing trial testimony, we also use "Morano" to refer to Jerry Morano individually.

arrearage and/or the entire outstanding balance of $330,087 on the note. Count II alleged breach of the lease. Mikolaitis alleged that the landlord filed a forcible entry and detainer action in January 2011 against the parties due to defendants' failure to pay rent. Mikolaitis sought $3,036 for legal fees and costs he incurred in that case.

¶ 7 Morano and Sims each asserted affirmative defenses of misrepresentation, fraud, failure of consideration, and frustration of purpose. Morano filed counterclaims against Mikolaitis alleging mutual mistake of fact, fraud, and breach of contract. Sims asserted the same counterclaims, and he also filed a cross-claim against Morano for indemnification.

¶ 8 Sims and Morano additionally filed motions to dismiss Mikolaitis's complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). They asked that, among other things, the trial court strike Mikolaitis's prayer for relief requesting the entire unpaid balance on the promissory note, because the note did not contain an acceleration clause. They further sought the dismissal of count II on the basis that the lease did not contain a provision entitling Mikolaitis to attorney fees and costs. The trial court granted these requests on March 6, 2012, striking Mikolaitis's request for the unpaid balance and dismissing count II.

¶ 9 B. Trial

¶ 10 A jury trial took place in September 2013, and we summarize the evidence. Leonard W. Besinger owned Meadowdale Shopping Center, which was completed in 1956. In 1961, Meadowdale Shopping Center and another entity owned by Besinger, Meadowdale Lanes, built a bowling alley in the shopping center, and they operated it until 1969. At that time, they sold the bowling alley business to Spencer Meadowdale Bowl, Inc., operated by William Spencer. The 1969 lease could be extended for up to 35 years, with rent set at $1,666 per month. In mid-1983, Spencer assigned his rights in the bowling alley to Paul and John Pondelicek, who operated the

alley until 1991.

¶ 11 Paul Pondelicek testified as follows. He, his brother, and brother-in-law purchased Spencer's Meadowdale Bowl from Spencer for $250,000 in June 1983. About $10,000 to $20,000 of that amount was for goodwill. The alley was closed and run-down, with fire-damage to four lanes and two machines. Pondelicek purchased the center through a stock sale because Spencer's Meadowdale Bowl owned the 35-year lease that went with the building, with very favorable rent. The purchase included the alley's contents. There was a list of assets as part of the sales contract, and it included the machines, lanes, ball returns, racks, shoes, counters, pizza ovens, and other things. Pondelicek made improvements to the alley but never worked with the landlord in doing so because the landlord could not end the lease and "wanted nothing to do with" them. During Pondelicek's eight-year ownership, the landlord never indicated that it claimed ownership of the alley's physical assets.

¶ 12 Pondelicek testified that he sold the alley to Mikolaitis in 1991 for $425,000; he and Mikolaitis also had an agreement for an additional $10,000. The assets were what Pondelicek had purchased, being the pinsetters, lanes, machines, shoes, bar equipment, etc. Pondelicek believed that he had marketable title to the assets because Spencer said he had good title, and the attorneys listed the assets in the agreement.

¶ 13 Mikolaitis testified that he began managing the bowling alley in 1989, when it was owned by the Pondeliceks. It was operated as Spencer's Meadowdale Bowl, Inc., doing business as Liberty Lanes. Mikolaitis purchased the alley from them in 1991 by buying the stock of Spencer's Meadowdale Bowl. Mikolaitis filed his tax returns under the name Liberty Lanes, Inc. Mikolaitis believed that Liberty Lanes was incorporated but had later been told that it was never actually incorporated.

¶ 14 When Mikolaitis purchased the alley, the original June 1969 lease was in effect, and he assumed that lease. That lease expired on May 31, 2004. Mikolaitis subsequently entered into a new lease with the landlord dated September 1, 2004.

¶ 15 Mikolaitis testified that in addition to the $425,000 price listed in the June 1991 contract, he paid $200,000 for improvements. Mikolaitis spoke to Frank Scarpelli, the landlord's agent, before purchasing the center, but Scarpelli never suggested that the landlord owned any of the physical assets inside Liberty Lanes. Mikolaitis believed that he owned the alley's assets based on Pondelicek's representations and the language of the 1969 lease.

¶ 16 Mikolaitis testified regarding various improvements he made to the bowling alley, all or almost all of which occurred before 2004. Mikolaitis purchased automatic scoring computers for $80,000, "masking units" for about $8,000, bar equipment (coolers, televisions, pool tables, and foosball tables) for $25,000, and kitchen equipment (autofry system, freezer unit, commercial coffee maker, and popcorn maker) for $15,000 to $20,000. Mikolaitis improved the electric ball returns at a cost of about $10,000 and redid the wooden lanes. He purchased a new oiling machine, a new music system, commercial fans, new bar furniture, and an outside advertising sign. The landlord never indicated that it owned the new equipment Mikolaitis bought and installed. Mikolaitis also bought a new air conditioning system for $54,000; the air conditioner unit was listed as part of the building in the lease, unlike the other improvements. Mikolaitis kept the original oiling machine on the premises and believed he kept the old projection scoring system in the storage room. Mikolaitis considered the bowling equipment and fixtures in the bar and restaurant to be movable trade fixtures, which were exempted under the 2004 lease. The landlord never verbally said it owned any fixtures, and none were listed in the 2004 lease.

¶ 17 Mikolaitis began considering selling the alley in 2007 due to his age and health. He accepted Morano's initial offer, but that deal did not come to fruition because Morano could not get financing. A few months later, Morano made another offer, but Mikolaitis required that he have a cosigner. Mikolaitis accepted Sims as a cosigner because Sims ran a very good bowling center, and Mikolaitis thought that he could provide Morano with financial help if necessary.

¶ 18 Paragraph 1 of the contract with Morano, entitled assets purchased, listed about 90% of the items Mikolaitis owned at Liberty Lanes at the time he sold it. It did not include the outside sign, bumper lanes, balls, rental shoes, and lockers on the premises. Those items were all covered in the sentence stating "all other chattels and assets now in the center." Mikolaitis did not claim ownership of bathroom toilets, as those were considered permanent fixtures. The contract was dated June 20, 2008, and closing on the sale of Liberty Lanes took place on August 18, 2008. After the closing, Mikolaitis's wife worked for Morano for one year to help in the transition and teach them how to run a bowling center.

¶ 19 The payment terms were $5,791 per month for 10 years. Morano made all the scheduled payments in the first two years. In October 2010, Morano requested that they reduce the payment amount by $1,000 per month due to the recession, and Mikolaitis agreed. Morano made his last payment in April 2011; around May 2011, Scarpelli told Mikolaitis that he did not have the right to sell some of the alley's assets to Morano.

¶ 20 Mikolaitis brought suit in October 2011. Mikolaitis calculated that Morano still owed $103,767 in missed payments and late charges. Mikolaitis agreed that he could not sell something he did not own.

¶ 21 Patrick Bosco testified that he was a sales associate with a bowling center broker. He represented Liberty Lanes in its sale to Morano. He determined the price based on gross revenue

and/or cash flow. A bowling center's condition was important, but he did not consider assets in determining the sales price unless there were capital expenditures to be made; the profitability of the bowling center did not depend on who owned the assets. The alley was listed in 2006 for $575,000 based upon a formula of 1.2 to 2 times gross revenues or 5.5 to 6 times cash flow. Buyers were expected to do due diligence on the center before the purchase. Bosco knew that pin setters, lanes, seating area, and scoring system could all be removed. Bosco agreed that in this case, there was an asset sale rather than a stock sale, but he did not consider the assets' value other than their general condition. In a bowling alley, the pin setters, lanes, seating area, and scoring system could all be removed.

¶ 22 Jerry Morano testified that in June 2008, Mikolaitis accepted his offer to buy Liberty Lanes for $425,000. While investigating the company, Morano looked at the 2004 lease and had an attorney look at it. He also met with Scarpelli. The goodwill was valued at 45% of the sales price, or $191,250. Morano also signed a lease assignment at the closing, agreeing to take the obligations of the 2004 lease as his own. He paid $85,000 at closing and $127,247 over time, for a total of $212,247.

¶ 23 In May 2011, Morano had a conversation with Scarpelli in which Scarpelli stated that the landlord owned the assets "inside the four walls" of Liberty Lanes. Therefore, Morano stopped making payments on the note that month. Morano agreed that he continued to operate Liberty Lanes. In the previous few months, he had replaced the carpeting and paneling and had also done some painting. He did not believe that he retained ownership over any of these improvements.

¶ 24 Sims testified that he considered Morano a business associate and friend, and he also knew Mikolaitis. He did not review the lease for Liberty Lanes before closing. Sims cosigned

the note to allow the transaction to take place. He did not fully understand the risk of signing the note. Sims did not obtain any benefit from the deal.

¶ 25 Scarpelli testified that he believed that the landlord owned the assets within the four walls of the bowling alley because Meadowdale Shopping Center and Meadowdale Lanes never sold the equipment to Spencer. Rather, based on his review of documents, the landlord had leased the building and equipment to Spencer.

¶ 26 Scarpelli had been in the bowling alley in 1968 or 1969, when he was a child. He recalled seeing balls, pins, and lanes. In 1969, the alley was reduced from 36 lanes to 24 lanes. Scarpelli had also been in the alley the previous summer. There were upgrades in the ball return and the scoring system, which was now automated, and there had been some changes to the lights. The landlord had not made any of these changes.

¶ 27 Scarpelli did not contend that the landlord owned all of the items listed on the general assignment from Mikolaitis to Morano, as the landlord did not own the vending machines, mechanical amusement equipment, and advertisement licenses. Kitchen/grill and bar equipment would belong to the landlord if it was affixed or attached to the building. The 2004 lease had provisions stating that when the tenant left the building, the tenant had to leave behind anything attached to the premises. Therefore, the landlord would own the bowling machines, the bowling lanes, the ball returns, the pinsetters, and anything else physically connected to the premises. However, the tenant could also take out the new equipment if the tenant returned the original equipment to its place. In other words, the tenant had to leave anything affixed to the property or put the building in the condition it was in when it was leased, less normal wear and tear.

¶ 28 In March 2013, Mikolaitis's attorney approached Scarpelli and asked if the landlord would sell Mikolaitis the bowling alley equipment for $10,000 to $15,000 so that it would

"essentially enforce" Mikolaitis's case against Morano. Scarpelli declined because the building was designed to be a bowling alley, and without the equipment it would be difficult to lease.

¶ 29 Thomas Winkler was accepted as an expert in commercial real estate and business transactions. Winkler opined that the landlord owned the bowling alley's assets under the 2004 lease, and that Mikolaitis did not have marketable title to them. Winkler agreed that in general, if a tenant installs items on a premises and removes them when he leaves, leaving no substantial damage to the premises, it would be the classic definition of trade fixtures. Here, however, the lease basically said that any trade fixtures would remain on the property.

¶ 30 C. Motions for Directed Verdicts and Trial Court's Rulings

¶ 31 At the close of the evidence, Mikolaitis and defendants[2] filed cross-motions for directed verdicts. Mikolaitis argued that when all of the evidence was viewed it the light most favorable to defendants, it showed that: defendants were guilty of breach of contracts as charged; their burden of proof for their affirmative defenses was not met; and he was not guilty of breach of contract, fraud, or mutual mistake of fact.

¶ 32 The trial court essentially denied Mikolaitis's and defendants' motions for a directed verdict as to the complaint standing alone, granted defendants' motion as to their affirmative defense/counterclaim of breach of warranty of title, and granted Mikolaitis's motion as to defendants' remaining affirmative defenses and counterclaims.[3] The trial court stated as follows. Mikolaitis had proven that Morano paid part of the note but then subsequently failed to pay the

[2] Sims filed the motion for a directed verdict, and Morano orally joined in.

[3] The trial court's written order states, "For the reasons set forth on the record, directed verdict is entered against all parties. Each side to receive no money judgment[.] Each party is to pay their [*sic*] own attorney's fees and costs."

balance due. Mikolaitis asserted in his motion that the affirmative defenses of breach of contract, fraud, and mutual mistake had not been proven. There was no clear and convincing evidence that Mikolaitis had knowingly and intentionally made a material misrepresentation of fact as to what he was able to or had title to sell, so defendants' fraud defense failed. The mutual mistake of fact defense also failed because that occurs if the parties have one idea of what they are contracting for, but the written instrument states something totally different. Here, in contrast, both Mikolaitis and Morano believed that Mikolaitis owned the bowling center's contents and was transferring them. If the parties had treated this as an equity case and sought a reformation of the contract, the court could have relied on an appraisal or an accounting to reduce the sales price to something less than $425,000. However, the trial court did not have any valuations from either side as to what the contents were worth and what was movable. On the breach of contract affirmative defense, there was enough evidence of breach of warranty of good title to survive Mikolaitis's motion for a directed verdict.

¶ 33 The trial court next addressed defendants' motion for a directed verdict, stating the following. It was denying the motion on the grounds of mutual mistake of fact. On the subject of breach of contract, defendant had put on sufficient evidence that at least the bowling lanes, machines, and other attached fixtures currently belonged to the landlord or would revert back to the landlord at the end of the lease. Therefore, there was evidence of a breach of warranty of good title. The question was the materiality of the breach, meaning how important to the transaction were the items that Mikolaitis improved that would actually remain with the landlord. There were other things that were conveyed besides good will, such as possibly the leasehold interest, covenant not to compete, liquor license, furniture and equipment, software, bowling pins, and things like that. The trial court stated:

> "So on the basis of all the evidence and considering the credibility of the witnesses and their testimony about what happened at closing, what kind of diligence they had during the closing, things like that, without weighing the evidence I'm finding that there was a material breach at the time of the sale and that enough of this property, based on the evidence by plaintiff himself that he spent a lot of money on some of this material and that that should have been obvious to him that it could stay with the building after many years of occupancy under a prior lease but also the 2004 lease, and common sense should have given the plaintiff some duty of inquiry. So, also, the defendant had a duty of inquiry and due diligence."

¶ 34 The trial court continued as follows. The materiality was sufficient such that enough of the title may not have been marketable, preventing the contract's enforcement and preventing the jury from making a dollar value determination because there was no evidence of damages from either side to allow reforming portions of the contract or "deduct[ing]" portions of the contract. Still, there was enough evidence to prevent enforcement of the rest of the promissory note, at least the $100,000 claimed to be due, and to prevent any refund requested by defendants for any portion that was claimed to be overpaid. Therefore, the trial court was partially granting both motions for directed verdicts, for defendants on Mikolaitis's complaint requesting the balance of the note due and for Mikolaitis on any claim by Morano of overpayment. Neither side would receive monetary damages, and the parties were to pay their own attorney fees.

¶ 35 Sims's attorney questioned whether the attorney fee ruling also covered Sims' indemnification request. The trial court said that the issue had not been a part of the proofs yet, and Sims could bring a motion within 30 days. It entered a finding under Illinois Supreme Court

Rule 304(a) (eff. Feb. 26, 2010) that there was no reason to delay enforcement or appeal of the order granting the directed verdicts. Mikolaitis timely appealed.

¶ 36 II. ANALYSIS

¶ 37 Mikolaitis first argues that the trial court erred in directing a verdict against him. Mikolaitis argues that he established a *prima facie* case of breach of contract in that he introduced evidence on each of the required elements. He maintains that defendants did not establish a *prima facie* case on their affirmative defenses or counterclaims, and even if they did, the proofs on those were controverted.

¶ 38 A trial court may grant a directed verdict only where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). In ruling on such a motion, the trial court does not weigh evidence or determine witness credibility, but rather considers the evidence and any inferences from the evidence in the light most favorable to the party resisting the motion. *Hemminger v. LeMay*, 2014 IL App (3d) 120392, ¶ 17. A trial court should direct a verdict for the defense only where the plaintiff has failed to establish a *prima facie* case, meaning that the plaintiff has failed to present some evidence on every essential element of the cause of action. *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 63. A directed verdict is not appropriate if reasonable minds may differ as to the inferences or conclusion to be drawn from the facts presented. *Perfetti v. Marion County*, 2013 IL App (5th) 110489, ¶ 15. We review *de novo* the trial court's ruling on a motion for a directed verdict. *Hemminger*, ¶ 18.

¶ 39 Mikolaitis notes that the elements of a breach of contract action are: (1) offer and acceptance; (2) consideration; (3) definite and certain terms; (4) the plaintiff's performance of all

the required conditions; (5) breach; and (6) damages. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940 (2004). Mikolaitis highlights some of the undisputed facts, such as that he and Morano signed a sales agreement; that Morano and Sims signed a promissory note; that Morano stopped paying on the promissory note in May 2011; and that Mikolaitis received only $212,247.20 of the purchase price of $425,000 for the bowling alley.

¶ 40 Regarding the fourth element, the plaintiff's performance of all the required conditions, Mikolaitis argues that proof of this was satisfied through the testimony of various witnesses. First, Pondelicek testified that he purchased the alley for $250,000, of which only $10,000 to $20,000 of that amount was for goodwill, with the remaining cost for the assets, which were all specifically listed in an attachment to the sales contract. Pondelicek testified that he therefore believed that he had marketable title to the assets he sold Mikolaitis. Second, Mikolaitis testified that he transferred the bowling business to Morano as well as the assets listed in the sales agreement. Mikolaitis testified that he had title to the assets based on the Pondeliceks' representations to him and the language contained in the 1969 lease that he assumed when he purchased the business. Third, Bosco testified that the listing price of $575,000 was fair based on the business's revenue and cash flow.

¶ 41 Mikolaitis recognizes that in their case-in-chief, defendants offered evidence that Mikolaitis did not have title to items within the bowling alley. Specifically, Scarpelli testified that based on his review of the landlord's documents relating to the property, including the 2004 lease, the landlord owned all attached assets. Winkler testified to the same conclusion based on the 2004 lease. Mikolaitis argues that this testimony was not based on personal knowledge and was directly contradicted by his, Pondelicek's, and Bosco's testimony, so at the very least, there

was a factual dispute over who owned what. See *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 54 (a trial court may not enter a directed verdict if there is any evidence, along with reasonable inferences from the evidence, showing a substantial factual dispute, or if witness credibility or the determination regarding conflicting evidence is decisive to the outcome). Mikolaitis also argues that he testified that items such as masking units, ball returns, and the overhead scoring system fall into the category of unattached movable trade fixtures, and Bosco testified that the pin setters, lanes, seating area, and scoring system could all be removed.

¶ 42 Mikolaitis further asserts that defendants failed to set forth a *prima facie* case of any of their affirmative defenses or counterclaims, let alone evidence so overwhelming as to warrant directing a verdict against him. Mikolaitis contends that on the one hand the trial court found that defendants had "put on sufficient evidence of the warranty in the bill of sale and the contract, the leases, the testimony of the likelihood that at least the bowling lanes and machines and other attached fixtures are or will revert to the landlord ***," but on the other hand the trial court found that it did not have valuations to determine damages. Mikolaitis argues that, therefore, defendants failed to meet their burden on their counterclaim of showing breach and damages, both of which are elements of the cause of action of breach of warranty of title. Mikolaitis argues that as to the breach, defendants failed to offer specific evidence on what was allegedly owned by the landlord and what was owned by the business. Mikolaitis argues that while Scarpelli testified that the landlord owned the bowling lanes, bowling machines, ball returns, pinsetters, and anything else involved in the business that was physically attached to the premises, Mikolaitis had spent over $100,000 on items Scarpelli failed to mention, such as the oil machine, pins, balls, masking machines, music system, computerized scoring, a fan, an air compressor, furniture, and glassware.

¶ 43 Mikolaitis argues that the propriety of the trial court's directed verdict is further called into question based on its statements that it was ruling on the materiality of the alleged breach of warranty of the items in dispute. Mikolaitis maintains that if the central issue was the materiality of the breach, it was a question of fact that should have gone to the jury. See *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1016-17 (2000) (quoting *Sahadi v. Continental Illinois National Bank & Trust Co.*, 706 F.2d 193, 196 (7th Cir. 1983)) ("The 'determination of "materiality" is a complicated question of fact, involving inquiry into such matters as whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom and usage considers such a breach to be material, and whether the allowance of reciprocal non-performance by the non-breaching party will result in his accrual of an unreasonable or unfair advantage.' ")

¶ 44 Defendants counter that the trial court correctly granted their motion for a directed verdict, and they argue as follows. Mikolaitis did not purchase the assets of the bowling center in 1991, but rather purchased the stock of Spencer's Bowl from Pondelicek, as Pondelicek had before him. The 1991 agreement states that the Pondeliceks would deliver "possession" of the bowling center, inventory, equipment, and business property, but it does not state that they are delivering title to the items. Notwithstanding this lack of title, Mikolaitis purported to sell Morano the business assets in their June 2008 agreement. Specifically, the agreement states that Morano would be purchasing:

> "all of the physical assets which constitute Liberty Lanes *** including the 'Center' leasehold interest entered on the 1st day of September 2004 ***, bowling equipment, kitchen & bar equipment, pro shop equipment, owned vending machines & video games, Illinois Liquor License, furniture, fixtures, office equipment, spare parts, tools, bowling

> pins, league & tournament contracts, computer software and all other chattels and assets now in the 'Center' ***."

The agreement states that at "closing the parties shall execute all appropriate legal documents necessary to reflect the details of this transaction so as to vest in Purchaser marketable title to all assets sold hereunder."

¶ 45 Defendants argue that the 2004 lease also shows that the landlord owned the assets Mikolaitis sold to Morano. Defendants cite a provision stating:

> "Tenant shall not make any alterations, additions or improvements to the Demised Premises without the prior written consent of Landlord, except for the installation of unattached movable trade fixtures, which may be installed without drilling, cutting, or otherwise defacing the Demised Premises. All alterations, additions, improvement and fixtures (other than unattached, movable trade fixtures) which may be made or installed by either party upon the Demised Premises shall remain upon and be surrendered with the Demised Premises and become the property of Landlord at the termination of this Lease, unless Landlord requests their removal ***."

Defendants further reference a provision in the tenant's estoppel certificate, included as an exhibit to the 2004 lease, which states: "Tenant has no right to remove any fixtures in the Leased Premises, except movable trade fixtures owned by Tenant and except Tenant improvements which Landlord required Tenant to remove pursuant to the terms of the Lease, all other than as described below (if applicable)." The following page lists "None" under the category of removable fixtures "other than movable trade fixtures and except tenant improvements which Landlord requires Tenant, if applicable, to remove pursuant to the terms of the Lease."

¶ 46 Defendants also argue that the fact that Mikolaitis's attorney called Scarpelli and asked if the landlord would be willing to sell the bowling alley assets it owned shows that Mikolaitis believed that the landlord owned the assets.

¶ 47 Defendants further argue that Mikolaitis failed to prove the value of the assets that he did properly sell. According to defendants, the trial court construed the 2004 lease as a matter of law and concluded that under its provisions, Mikolaitis could not convey marketable title to Morano because the landlord currently owned or would own all assets other than certain movable fixtures. Defendants argue that when the 2004 lease commenced, the premises contained a fully functioning bowling alley with lanes, bowling machines, ball returns, pinsetters, masking units, computerized scoring systems, and bar, among other assets. Defendants contend that based on the landlord "having installed" and never transferring those assets, combined with the 2004 lease provisions, Mikolaitis could not have conveyed the assets to Morano. Defendants contend that Morano needed all of the assets "to operate its business" such that failing to provide marketable title to the assets was a material breach of contract given the undisputed evidence. Defendants argue that Morano suffered by paying for assets owned by the landlord, but as there was no evidence of assets properly sold, there was no ability to determine whether the $212,247 Morano already paid was an overpayment or underpayment.

¶ 48 As stated, a trial court should direct a verdict for the defense only where the plaintiff has failed to present a *prima facie* case in that he has failed to present some evidence on every essential element. *Perkey*, 2013 IL App (2d) 120470, ¶ 63. Here, Mikolaitis met this threshold by presenting *some* evidence on each element of breach of contract, in that he presented evidence that he owned the bowling alley business, agreed to Morano's offer to purchase the business,

obtained a down payment and promissory note guaranteed by Sims, transferred his business interests to Morano, and that Morano unilaterally ceased payments on the note.

¶ 49 The main question was whether a directed verdict was warranted for defendants on any of their affirmative defenses and/or counterclaims. The trial court put these claims into the categories of fraud, mutual mistake of fact, and breach of contract through breach of warranty of good title. Defendants did not disagree with these categories below, nor do they argue any alternative basis for affirming the trial court's ruling. Therefore, we continue to use the same framework.

¶ 50 The trial court found that fraud and mutual mistake of fact were not applicable, leaving only breach of warranty of marketable title. See *Rackouski v. Dobson*, 261 Ill. App. 3d 315, 318 (1994) (marketable title is title that is reasonably free from the probability of litigation). The trial court found that there was a breach based on the 2004 lease providing that the tenant could remove only unattached trade fixtures. The trial court then recognized that the issue was the materiality of the breach, which is typically a question for the jury. See *Kel-Keef Enterprises*, 316 Ill. App. 3d at 1016-17. By granting defendants a directed verdict on this affirmative defense/counterclaim, the trial court necessarily found that the evidence on this issue so overwhelmingly favored defendants that no contrary verdict would ever stand. See *Pedrick*, 37 Ill. 2d at 510. We conclude that the trial court erred in making this assessment.

¶ 51 Only a material breach of a contract provision justifies nonperformance by the other party; a partial breach by one party does not justify the other's party's subsequent failure to perform. *InsureOne Independent Insurance Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 33. Whether a breach is material is a complicated question of fact that involves considerations as to whether the breach defeated the parties' bargained-for objective or caused

disproportionate prejudice to the non-breaching party, whether custom and usage considers such a breach to be material, and whether allowing reciprocal non-performance by the non-breaching party will result in an unreasonable or unfair advantage to him. *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 346 (2005); see also *CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc.*, 406 Ill. App. 3d 783 (2010) (test for whether breach is material is whether the breach is so significant that, if known in advance, the agreement would not have been made). "A party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract." *Goldstein v. Lustig*, 154 Ill. App. 3d 595, 599 (1987).

¶ 52 Looking at the 2004 lease, we agree with the trial court and defendants that the lease's terms require the tenant to leave all attached trade fixtures on the premises. While Mikolaitis points to his and Pondelicek's testimony in arguing a different conclusion, their testimony was based on representations made to them by sellers of the alley. Such representations predate the 2004 lease.

¶ 53 At the same time, there was testimony about many items that Mikolaitis purchased that were not attached to the premises, such as bar equipment and furniture, kitchen equipment, and an oiling machine, and Mikolaitis provided general testimony as to their value.[4] The contract with Morano also lists physical assets which would not be attached, such as a liquor license,

[4] While defendants argue that Mikolaitis's offer to Scarpelli to purchase the alley's assets after the case began shows a concession that he agreed that the landlord owned all of them, this action is just as easily construed as a means to end any question of the assets' ownership solely for litigation purposes, and it must be interpreted in this manner for purposes of ruling on a motion for a directed verdict against Mikolaitis.

league and tournament contracts, and computer software. Even for items attached to the premises, Scarpelli testified that the tenant could take out new equipment it installed if it returned the original equipment to its place; Mikolaitis correspondingly testified that he believed that the original projection scoring system was still in storage and that he had spent $85,000 on the computerized scoring system. The question of what even constitutes an attached trade fixture in the first instance is also not beyond dispute, as the "law construes the tenant's rights to remove his annexations liberally, at least where removal may be effected without material injury to the freehold." *Empire Building Corp. v. Orput & Associates, Inc.*, 32 Ill. App. 3d 839, 841 (1975). Additionally, Bosco testified that the profitability of a bowling center did not depend on who owned the assets, and that he did not consider the assets' value, other than their general condition, in determining the asking price for Liberty Lanes. Morano claims it needed ownership of all of the assets "to operate its business," yet it is undisputed that Morano continued to operate the alley, and in the months before trial, it continued to invest in the business by replacing the carpeting and paneling.

¶ 54 Given evidence that the unattached fixtures did not belong to the landlord, that the tenant could remove some large value items, such as the computer scoring system, by replacing them with the originals, and that ownership of the assets did not ultimately affect the business's value, along with the considerations that there could be a dispute as to what qualified as an attached trade fixture in the first instance, the trial court erred by determining as a matter of law that Mikolaitis's breach of the contract was material and excused Morano from further performance.

¶ 55 The trial court largely based its decision on what it described as the parties' failure to present evidence on the value of the alley's contents and a breakdown of what was movable. However, defendants raised the issue of lack of marketable title, and it was therefore their burden

to present sufficient evidence that enough of the alley's contents were not movable such that it constituted a material breach. As discussed, the issue of what was movable also had to be considered in conjunction with Bosco's testimony that the assets' ownership was irrelevant to the business's worth. Similar considerations apply to the assets' value. That is, as it was defendants' assertion that the nonmovable assets were worth so much that the failure to transfer ownership of them constituted a material breach of the contract, it was their burden to prove their value. Even otherwise, there was some evidence as to the value of the assets, such as Morano's testimony that $191,250 of the $425,00 purchase price was for goodwill, which would leave $233,750 as the assets' value, and Mikolaitis's testimony that he spent $80,000 for automatic scoring computers, about $8,000 for "masking units," about $25,000 for bar equipment (coolers, televisions, pool tables, and foosball tables), and about $15,000 to $20,000 for kitchen equipment (autofry system, freezer unit, commercial coffee maker, and popcorn maker).

¶ 56 Finally, we note that, as stated, in ruling on a motion for a directed verdict in a jury trial, the trial court should not weigh evidence or determine witness credibility, but rather may only consider the evidence and any inferences from the evidence in the light most favorable to the party resisting the motion. *Hemminger*, 2014 IL App (3d) 120392, ¶ 17. Here, although the trial court stated that it was not weighing the evidence, it also stated that it was "considering the credibility of the witnesses," which is improper on a motion for a directed verdict. For all of these reasons, we reverse the trial court's grant of defendants' motion for a directed verdict on their affirmative defense/counterclaim of breach of warranty of marketable title.

¶ 57 Mikolaitis next argues that the trial court erred in not granting his motion for a directed verdict. Mikolaitis argues that while he set out a *prima facie* of breach of contract, defendant

failed to establish breach and damages on their affirmative defense/counterclaim of breach of warranty of title, and damages on any of their other affirmative defenses and counterclaims.

¶ 58 A trial court should not enter a directed verdict if there is any evidence, along with reasonable inferences from the evidence, demonstrating that there is a substantial factual dispute, or where witness credibility or resolving conflicting evidence is decisive to the outcome. *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 23. We have determined that defendants provided evidence, through the 2004 lease and Scarpelli's testimony, that Mikolaitis may not have had marketable title to all of the assets he purportedly sold to Morano. The question of whether this breach is material should go to the jury, so the issue of any damages for Mikolaitis is premature. We therefore affirm the trial court's denial of Mikolaitis's motion for a directed verdict on his complaint.

¶ 59 Last, Mikolaitis argues that the trial court improperly struck his prayer for relief seeking the entire outstanding balance under the note. A defendant may object, through an answer or in a separate pleading, to a prayer for relief which the allegations do not sustain. 735 ILCS 5/2-604 (West 2010). Defendants sought and obtained this relief through their section 2-615 motion, arguing that Mikolaitis's request was not proper because the note did not contain an acceleration clause. A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint, and we review *de novo* rulings made under section 2-615. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18.

¶ 60 Mikolaitis cites *Busse v. Paul Revere Life Insurance Co.*, 341 Ill. App. 3d 589, 595 (2003), for the proposition that damages for breach of contract may include losses reasonably certain to occur in the future. However, *Busse* refers to a previous version of a jury instruction, which no longer contains the language Mikolaitis relies on, and even then the *Busse* court noted

that, regarding the issue of a breach of a disability policy, most jurisdictions have concluded that damages are losses owing up to the date of trial.

¶ 61 Mikolaitis also argues that the proper measure of damages is the amount that would put the nonbreaching party in the same position as he would have been if the contract had been performed, but not in a better position. See *Santorini Cab Corp. v. Banco Popular North America*, 2013 IL App (1st) 122070, ¶ 26. Mikolaitis argues that had the contract been fully performed, he would have received the entire sales price of the business, plus interest and late fees.

¶ 62 Applying the proposition Mikolaitis himself cites, allowing him to recover the entire amount under a note that does not fully mature, under its own terms, until May 2018 would not put Mikolaitis in the same position as if the contract had been fully performed up until now, but rather a better position. Further, "absent an acceleration clause, a note is due and owing on the date on which it matures." *Wilbur v. Potpora*, 123 Ill. App. 3d 166, 170 (1984); *cf. Gironda v. Paulsen*, 238 Ill. App. 3d 1081, 1085 (1992) (lack of an acceleration clause in the note did not preclude the plaintiffs from seeking the full amount of the note where the plaintiffs' amended complaint was filed after the note's maturity date). In this case, the note provides for damages of $20 per day for late payments, but it does not contain an acceleration clause. Therefore, the trial court did not err in granting defendants' motion to strike Mikolaitis's request for the full outstanding balance under the note.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, we affirm the order of the Kane County circuit court denying Mikolaitis's motion for a directed verdict on his complaint and the order granting defendants' motion to strike Mikolaitis's prayer for relief seeking the entire unpaid amount on the promissory

note. However, we reverse the trial court's grant of a directed verdict for defendants and remand the cause for further proceedings.

¶ 65 Affirmed in part and reversed in part; cause remanded.