2012 IL App (2d) 110473
No. 2-11-0473
Opinion filed June 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SPANISH COURT TWO CONDOMINIUM ASSOCIATION, Plaintiff and Counterdefendant-Appellee and Cross-Appellant, v. LISA CARLSON, Defendant and Counterplaintiff-Appellant and Cross-Appellee.	)	Appeal from the Circuit Court of Lake County. No. 10-LM-301 Honorable Michael J. Fusz, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices Bowman and Burke concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Spanish Court Two Condominium Association, brought an action against defendant, Lisa Carlson, under the Forcible Entry and Detainer Act (the Forcible Entry Act) (735 ILCS 5/9-111 (West 2010)), seeking possession of her condominium unit and an award of unpaid general and special assessments, late fees, and costs and attorney fees. Defendant appeals from the trial court's pretrial ruling dismissing her affirmative defenses and counterclaim, which were premised on plaintiff's alleged failure to maintain the exterior of the building, resulting in damage to the interior of defendant's unit, and on plaintiff's alleged failure to repair a toilet that was

damaged when plaintiff demolished part of defendant's unit while attempting to determine the source of a leak into a neighboring unit. Defendant also appeals from the court's subsequent judgments granting plaintiff the right to take possession of the unit and imposing a monetary award. The latter consisted of (1) delinquent general, or monthly, assessments as well as a special assessment for replacement of patio doors, (2) late fees for the delinquent assessments, and (3) costs and attorney fees. Plaintiff cross-appeals from the court's refusal to enter judgment for a special assessment to upgrade the fire alarms and elevator on the condominium property. Plaintiff also requests an award of costs and attorney fees on appeal. We hold that the trial court was correct in severing the counterclaim but that it erred in striking the affirmative defenses in their entirety. We reverse and remand for partial reinstatement of the affirmative defenses.

¶ 2 BACKGROUND

¶ 3 At all times relevant here, defendant was the owner of a condominium unit in a building governed by plaintiff pursuant to its condominium declaration. Plaintiff's forcible entry and detainer (FED) complaint, filed February 5, 2010, brought two counts. Count I was entitled "Possession" and cited provisions of the Forcible Entry Act. Plaintiff alleged that it had approved, pursuant to the declaration, "monthly and special assessments and other common expenses," and that defendant was delinquent in paying the common expenses. Plaintiff alleged that defendant had not paid the monthly assessments from August 2009 through January 2010. Plaintiff did not specify the "special assessments" that it claimed defendant owed. As remedies, plaintiff sought both possession of defendant's unit and a monetary award of $2,143.83, which included delinquent monthly and special assessments, late charges, and costs and attorney fees.

¶ 4 Count II of the complaint alleged breach of contract. The count incorporated all of the allegations of count I concerning defendant's failure to pay the common expenses. The count incorporated count I's citations to the Forcible Entry Act and cited no additional authority. Finally, count II did not seek possession but only the same monetary award sought in count I.

¶ 5 On March 18, 2010, defendant filed her combined answer, affirmative defenses, and counterclaim. On November 9, 2010, the trial court granted plaintiff's motion to strike defendant's affirmative defenses and sever her counterclaim. Following a bench trial, the court entered judgment awarding defendant both possession of the unit and a monetary sum comprised of unpaid assessments, late fees, and costs and attorney fees.

¶ 6 The issues in this appeal involve the following two documents: (1) the "Declaration of Condominium Ownership and of Easements, Restrictions and Covenants For Spanish Court II Condominium Development" (Declaration); and (2) the "By Laws of Spanish Court II" (Bylaws). The sole copies in the record, which are the exhibits admitted at trial, are partly illegible (apparently from poor photocopying)[1] but the portions on which the parties rely, and that seem most material to the issues at hand, are legible.

¶ 7 In her combined answer, affirmative defenses, and counterclaim, defendant "admit[ted] that she ha[d] not paid her assessments from August[] 2009," but "denie[d] that she owe[d] those assessments in light of the damages she *** incurred as a result of certain property damage sustained by her condominium unit as a result of [defendant's] failure to properly maintain the roof directly above her unit and for destroying property within her unit without justification." Defendant alleged as follows regarding the roof. About 12 years ago, plaintiff replaced the roof directly above

[1]We are surprised that the trial court did not insist on better copies.

defendant's top-floor unit. Plaintiff thereafter failed to undertake "certain [yearly] maintenance procedures" recommended by the company that replaced the roof. As a result of this failure, the roof deteriorated, allowing "a significant amount of water leakage" into defendant's unit. The leak deformed the drywall, disengaging it from the wall studs, and caused the paint to peel. Defendant is "liable to expend significant sums of money to repair the unit." Despite repeated requests by defendant, plaintiff has refused to repair the roof and stop the leak.

¶ 8 Defendant also alleged that the "brickwork directly above [her unit]" has deteriorated and is in need of "repair, recaulking, and tuckpointing." Defendant alleged that "an experienced professional" inspected the brickwork and determined that its condition "has also allowed water to enter into her unit[,] which has contributed to the damage of the walls and internal structure of her unit." Although plaintiff is aware of the deteriorating brickwork, it has refused to repair it.

¶ 9 Finally, defendant alleged that plaintiff failed to finish certain interior repairs. Defendant alleged that, several months ago, plaintiff directed plumbers to enter her unit "and destroy the wall and plumbing in the bathroom *** on the belief that a leak in a neighboring unit was caused by a leaking pipe in the bathroom of [her unit]." The plumbers determined that the leak originated elsewhere. Plaintiff subsequently replaced the drywall and restored the plumbing, but defendant found that her toilet would not work. Although plaintiff is aware of the inoperative toilet, it has refused to repair or replace it.

¶ 10 Defendant advanced two separate affirmative defenses based on the foregoing allegations. Both defenses claimed that the alleged neglect by plaintiff constituted a breach of its covenant under the Declaration to maintain, repair, and replace the common elements of the condominium property utilizing the mandatory assessments collected by plaintiff from unit owners. As her first defense,

defendant asserted that plaintiff was "estopped as a matter of law" from seeking past-due assessments and associated late fees, costs, and attorney fees. As her second (and alternative) defense, defendant requested that there be deducted from any monetary award against her an amount between $6,000 and $10,000, the estimated cost of repairing the damage to her unit.

¶ 11 Based on the same allegations, plaintiff counterclaimed for an award of damages between $6,000 and $10,000.

¶ 12 On April 14, 2010, plaintiff filed motions to strike defendant's affirmative defenses and sever her counterclaim. Citing multiple authorities, principally *Sawyier v. Young*, 198 Ill. App. 3d 1047 (1990), plaintiff argued that defendant's affirmative defenses and counterclaim were disallowed by section 9-106 of the Forcible Entry Act (735 ILCS 5/9-106 (West 2010)) because they were "not germane to the distinctive purpose of the proceedings," as that section provides. In an order dated November 9, 2010, the trial court granted the motions, but without explanation. The court struck the affirmative defenses and reassigned the counterclaim to another division of the circuit court.

¶ 13 Defendant argues on appeal that it was error to sever her counterclaim and strike her affirmative defenses. As we explain below, the trial court properly severed the counterclaim in its entirely but erred in striking the affirmatives defenses in their entirety.

¶ 14 ANALYSIS

¶ 15 The issue in this case, which appears to be one of first impression in Illinois, is whether, in an action brought under the Forcible Entry Act by the board of managers of a condominium property against a unit owner for possession of the unit due to unpaid assessments, the unit owner may claim as a defense that her responsibility for the assessments was diminished or nullified by the failure of

the board to maintain the common elements of the property as required in the condominium instrument. Although there are no prior decisions on point, we hold, by analogy to the case law on actions brought under the Forcible Entry Act by landlords for possession of leased property due to unpaid rent, that the unit owner may claim neglect as a defense to the board's suit under the Act. We further hold, also by analogy to existing case law on suits under the Forcible Entry Act involving leased dwellings, that, with certain narrow exceptions, the unit owner may not counterclaim under the Forcible Entry Act for damages caused to her unit or to her personal property by the board's neglect of the common elements.

¶ 16 This issue involves consideration of what matters are "germane" under section 9-106 of the Forcible Entry Act. The meaning of a statute is a question of law, which we review *de novo*. See *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 43 (2003). Our review also requires us to construe contractual provisions, a matter that is likewise subject to *de novo* review. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). In both instances, the aim is to discern the intent of the drafter, the best indicator of which is the language used. See *Gallagher*, 226 Ill. 2d at 233; *Lee*, 208 Ill. 2d at 43.

¶ 17 Before we address the text of section 9-106, we first examine some preliminary sections of the FED Act. As to which persons may bring an action, the Forcible Entry Act provides in relevant part:

> "(a) The person entitled to possession of lands or tenements may be restored thereto under any of the following circumstances:
>
> * * *

> (4) When any lessee of the lands or tenements, or any person holding under such lessee, holds possession without right after the termination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.
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> * * *
>
> (7) When any property is subject to the provisions of the Condominium Property Act [(765 ILCS 605/1 (West 2010))], the owner of the unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agent have served the demand set forth in Section 9-104.1 of this Article [(735 ILCS 5/9-104.1 (West 2010))] in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time limit prescribed in the demand ***." 735 ILCS 5/9-102(a)(4), (a)(7) (West 2010).

There is no dispute here that plaintiff has met the prerequisites in section 9-102(a)(7) for a suit under the Forcible Entry Act.

¶ 18 Next, we note the parallels between what a landlord may seek, and what a condominium board of managers may seek, in an action under the Forcible Entry Act. When, following appropriate notice to the tenant, the landlord deems the lease terminated due to unpaid rent, the landlord may couple the claim for possession with a claim for unpaid rent. 735 ILCS 5/9-209 (West 2010). Section 9-106 of the Forcible Entry Act (735 ILCS 5/9-106 (West 2010)) reiterates that "a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due." Similarly, a board of managers is not limited to seeking possession alone. Section 9-111(a) of the Forcible Entry Act (735 ILCS 5/9-111(a) (West 2010)) provides:

> "(a) *** [W]hen the action is based upon the failure of an owner of a unit therein to pay when due his or her proportionate share of the common expenses of the property, or of any other expenses lawfully agreed upon or the amount of any unpaid fine, and if the court finds that the expenses or fines are due to the plaintiff, the plaintiff shall be entitled to the possession of the whole of the premises claimed, and judgment in favor of the plaintiff shall be entered for the possession thereof and for the amount found due by the court including interest and late charges, if any, together with reasonable attorney's fees, if any, and for the plaintiff's costs."

¶ 19 We turn now to section 9-106 of the Forcible Entry Act, which is the subject of conflicting interpretations as it applies to this case. The section provides in relevant part:

> "The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. Except as otherwise provided in Section 9-120 [(735 ILCS 5/9-120 (West 2010))[2]] no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due." 725 ILCS 5/9-106 (West 2010).

The supreme court has defined "germane" as "closely allied; closely related, closely connected; *** appropriate." (Internal quotation marks omitted.) *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 256 (1970). " 'Forcible entry and detainer is a summary statutory proceeding to adjudicate rights to possession and is unhampered and unimpeded by questions of title and other collateral matters not directly connected with the question of possession.' " *Id.* at 255 (quoting *Bleck v. Cosgrove*, 32 Ill.

[2]This provision is not relevant here.

App. 2d 267, 272 (1961)). Possession and directly related matters might be the only substantive issues for decision in a FED action, but, as our review of the statutory sections revealed, possession is not the sole remedy available to the plaintiff in the action: a landlord may seek overdue rent (735 ILCS 5/9-106, 9-209 (West 2010)), and a condominium board of managers may seek overdue assessments (735 ILCS 5/9-111(a) (West 2010)). Cases involving rented dwellings have held that, where the landlord seeks possession under the Forcible Entry Act for nonpayment of rent, the tenant has the right to defend the action by disputing some or all of the claim for rent. In *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 367 (1972), the supreme court held that an implied warranty of habitability exists in a lease for a dwelling in a multiunit building[3] and that section 9-106 of the Forcible Entry Act permits a tenant to claim an alleged breach of the warranty as a defense to an action for possession due to unpaid rent. *Jack Spring*'s rationale for finding an implied warranty of habitability in multiunit dwellings is that, with society's transformation from an agrarian to an industrial society, it can no longer be assumed that tenants have the expertise to make their own repairs to the leased premises as did the "jack-of-all-trades" farmers of old, and hence rent is now paid with the assumption that the dwelling will be maintained by the landlord in a habitable state. *Id.* at 364-66.

¶ 20 In *Peoria Housing Authority v. Sanders*, 54 Ill. 2d 478, 483 (1973), the court, making no mention of *Jack Spring*'s express restriction of its holding to rentals in multiunit buildings (see *Jack*

[3]About 10 years later, the court extended the warranty to leases of single-family residences, on the ground that "[a] tenant will legitimately have the same expectations that a single-family dwelling will be fit to live in as he would have in the case of a structure with multiple dwelling units." *Pole Realty Co. v. Sorrells*, 84 Ill. 2d 178, 182 (1981).

Spring, 50 Ill. 2d at 367), held without qualification that "when an action for possession is based upon nonpayment of rent, the question whether the defendant owes rent to the plaintiff is germane, whether or not the plaintiff seeks judgment for the rent that he says is due." In *Sanders*, the plaintiff, a housing authority, sought possession for nonpayment of rent (specifically, one month's rent plus a late fee) but did not seek an award of overdue rent. The defendant filed a counterclaim (1) asserting that the parties had orally modified the rental agreement to soften the late-fee provision (*Sanders*, 54 Ill. 2d at 479-80), and (2) challenging as unconstitutional the plaintiff's policy that it would make a downward adjustment in rent only if the tenant's income decreased by 25% (*Peoria Housing Authority v. Sanders*, 2 Ill. App. 3d 610, 617 (1971) (Stouder, J., dissenting)).[4] The counterclaim "prayed that defendant's rent be recomputed and that she be allowed as damages any overcharge that might have been made." *Sanders*, 54 Ill. 2d at 480. The court reversed the trial court's dismissal of the counterclaim, reasoning that the defendant was permitted to dispute whether and in what amount rent was due, and even to counterclaim for recoupment of rent. *Id.* at 483.

¶ 21 There have been several appellate decisions applying the holdings of *Jack Spring* and *Sanders*. In *Richardson v. Wilson*, 46 Ill. App. 3d 622, 623 (1977), the defendant "admitted that rent had not been paid for 2 months but advanced affirmative defenses that plaintiff had breached implied and express warranties by failing to repair the premises to comply with the municipal building code and by failing to comply with an express covenant to repair." The appellate court reversed the trial court's dismissal of the affirmative defenses. The court explained:

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[4]Only Justice Stouder's dissent in the appellate court revealed the nature of the counterclaim regarding the plaintiff's rent reduction policy.

> "Under these circumstances, although possession is the only issue in this appeal because the landlord is not seeking a judgment for unpaid rent, the resolution of the demand for possession turns upon whether rent was due and unpaid. If rent is due and the tenant has not paid after proper notice, the landlord is entitled to possession. If rent is not owed because the tenant's setoffs based on alleged violations of the landlord's breach of an implied warranty of habitability or his express covenant to repair exceed the amount of rent the landlord claims to be owing, plaintiff is not entitled to possession solely by reason of nonpayment of rent." *Id.* at 624.

¶ 22 In *Quel v. Hansen*, 126 Ill. App. 3d 1086, 1088-89 (1984), the appellate court held that the defendant was entitled to assert the defense that he was due rent credits for management and caretaking services as provided in the lease agreement.

¶ 23 The foregoing cases show that, where possession is sought under the Forcible Entry Act for nonpayment of rent, the tenant may challenge the amount of rent or late fees claimed, and may do so by asserting, *e.g.*, (1) that the lease did not actually call for rent or late fees in the amount claimed (*Sanders*), (2) that the rent charged was unconstitutional or otherwise illegal (*Sanders*), or (3) that a setoff was due because of a provision in the lease for rent credits (*Quel*) or because the landlord breached an express or implied duty to repair (*Richardson*). Any of these bases may also be alleged as part of a claim for recoupment of rent.

¶ 24 The principles of these cases apply equally to actions under the Forcible Entry Act in which the board of managers of a condominium property seeks possession of a condominium unit because of the owner's nonpayment of assessments. As the court in *Jack Spring* explained, it was once understood that land was the principal focus of the leasehold, and tenants were expected to make

their own repairs to the dwelling (*Jack Spring*, 50 Ill. 2d at 363-66). With the fundamental shift in the economic structure, it became understood that rent was paid in exchange for the landlord's promise to maintain the property in a liveable condition. However, there is no need to rely on such assumptions to determine the purpose for the assessments collected by plaintiff's board of managers, or by condominium boards of managers generally. Section 18.4 of the Condominium Property Act (Condominium Act) (765 ILCS 605/18.4 (West 2010)) prescribes duties for boards of managers that are implied in all condominium governance documents in Illinois. See 765 ILCS 605/18.4(r) (West 2010) ("[a]ny portion of a condominium instrument which contains provisions contrary to these provisions shall be void as against public policy and ineffective," and "[a]ny such instrument that fails to contain the provisions required by this Section shall be deemed to incorporate such provisions by operation of law"). Among these is the duty "[t]o provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements" (765 ILCS 605/18.4(a) (West 2010)), which duty may be carried out by the collection of assessments from unit owners (765 ILCS 605/18.4(c), (d) (West 2010)). Consistent with section 18.4(a), article XIII of the Declaration provides that "[m]aintenance, repair, and replacements of the Common Elements shall be furnished by [plaintiff's board] as part of the common expenses." Article VIII of the Declaration provides that unit owners shall pay their proportionate share of the common expenses. Article VI of the Bylaws authorizes plaintiff to collect monthly assessments for the common expenses.

¶ 25 It is unquestioned, and unquestionable, in this appeal that the assessments collected by plaintiff are for the maintenance of the common elements, and that the roof and the brick facade of the building—the two exterior areas that defendant claims were neglected—are among the common elements. We conclude that defendant's assertion that plaintiff has not performed its duties with

respect to the common elements is as viable a defense to plaintiff's suit under the Forcible Entry Act as a landlord's failure to maintain a rented dwelling would be to a suit under the Forcible Entry Act for possession of that dwelling for nonpayment of rent.[5]

¶ 26 Plaintiff points to section 18.4(d) of the Condominium Act, which empowers a board of managers to "collect assessments from unit owners" as part of the board's "powers and duties" (735 ILCS 605/18.4(d) (West 2010)). Plaintiff suggests that a board's right to collect assessments is absolute and that a claim for nonpayment of assessments is not subject to any affirmative defense. Certainly, the Forcible Entry Act does provide a remedy for nonpayment of assessments, implying that the collection of assessments is not only a power and a duty but a right as well, but nowhere does the Forcible Entry Act or the Condominium Act suggest that the right is absolute. Notably, the board's power and duty to maintain the common elements—and the concomitant right of the unit owner to have the common elements maintained—are just as unequivocally affirmed in section 18.4 of the Condominium Act as the board's power and duty to collect assessments. Thus, the

[5]We acknowledge a potential distinction in this case between the two types of assessments that plaintiff claims are overdue. The monthly assessments, it seems, are those that defendant claims should have gone toward the repair of the roof and the brick facade. The special assessments were specifically allocated to a different purpose. Potentially, then, neglect of the roof and the brick facade would not itself be a ground for withholding the special assessments. As plaintiff, however, does not argue along these lines, we will not discriminate between the two types of assessments in deciding what defenses or counterclaims defendant may bring in this suit under the Forcible Entry Act for possession due to nonpayment of assessments.

Condominium Act appears to set the rights of unit owners on par with the rights of the board of managers. Moreover, the rights arise from mutually exchanged promises—on the one hand to pay assessments, on the other hand to maintain the common elements—and so the Declaration and the Bylaws are best seen as contracts. See *La Salle National Bank v. Vega*, 167 Ill. App. 3d 154, 159 (1988) (a contract is an agreement between competent parties, on a consideration sufficient in law, to do or not to do a particular thing); *1230-1250 Twenty-Third Street Condominium Unit Owners Ass'n v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009) ("A condominium instrument, such as the bylaws, is a contract between the unit owners and the condominium association."); 1 Gary A. Poliakoff, Law of Condominium Operations § 1:23 (2011) (while sometimes referred to as a constitution, a condominium governance document is "more accurately described as a contract between the unit owner and the association, promising that in exchange for the unit owner's payment of assessments, the association will maintain the property and enforce the other covenants within the documents"). Notably, plaintiff entitled count II of its complaint "Breach of Contract." We do not suggest, however, that count II actually alleged common-law breach of contract, as it incorporated most of count I, did not cite any law other than the Forcible Entry Act, and did not set forth any elements of breach of contract.[6] Plaintiff's choice of a title for count II is, nonetheless, suggestive of how it viewed the character of the documents sued on.

¶ 27 Based on the foregoing, we hold that, where a condominium board of managers sues for possession of a unit because of delinquent assessments, and the condominium instrument indicates

[6]If count II was a *bona fide* breach-of-contract count, then plaintiff would have been hard pressed to claim that defendant could not argue that plaintiff itself breached the contract sued on.

(as presumably most do) that the unit owner's promise to pay assessments is in exchange for the board of managers' promise to use those assessments for the repair and maintenance of the condominium property, the unit owner may claim, as a justification for nonpayment of assessments, that the board of managers breached its duty of repair and maintenance. Defendant here claims a breach of that duty, but what complicates the issue is that she seeks recompense for damage to her own property, both as a setoff from any assessments due and as a basis for an affirmative plea for damages. To see the complication, we review the case law that has attempted to articulate the relief a defendant in a FED action may seek. In *Sawyier*, 198 Ill. App. 3d at 1054, the court gave the following categorization of available defenses:

> "The types of claims which Illinois courts have found to be germane to the issue of possession generally fall into one of four categories: (1) claims asserting a paramount right of possession [citation]; (2) claims denying the breach of any agreement vesting possession in plaintiff [citation]; (3) claims questioning the validity or enforceability of the document upon which plaintiff's right to possession is based [citation]; and (4) claims questioning a plaintiff's motivation for the bringing of the forcible action [citation]."

¶ 28 Defendant's affirmative defenses and counterclaim would qualify as germane, if at all, under category (2); defendant neither asserts a paramount right of possession, questions the validity or enforceability of the condominium documents, nor questions plaintiff's impetus for bringing this action. Once again, we analyze the cases on rented dwellings to determine what kind of relief the owner of a condominium unit may seek as a defendant in a FED action.

¶ 29 Statements in some of the cases on rented dwellings suggest that a defendant in a FED action may never bring a counterclaim for damages: (1) "Counterclaims seeking money damages are not

germane to forcible entry claims" (*American National Bank v. Powell*, 293 Ill. App. 3d 1033, 1044 (1998)); and (2) "[N]o cross-demand in the nature of recoupment can be interposed by way of defense [in a FED action]" (*Sauvage v. Oscar W. Hedstrom Corp.*, 322 Ill. App. 427, 430 (1944)). A more accurate statement is: "Where a [defendant's] claim seeks damages *and not* possession, it is not germane to the distinct purposes of the forcible entry and detainer proceeding." (Emphasis added.) *Sawyier*, 198 Ill. App. 3d at 1053. Damages sought by the defendant must be tied to the issue of possession. The first corollary to this principle is that, where possession is not contested, the defendant may not seek damages at all. For example, in *Sawyier*, the defendant sold property to the plaintiffs with the written understanding that the defendant could live rent-free in the coach house for the rest of his life. Several months later, the plaintiffs filed an action under the Forcible Entry Act, claiming that they were entitled to possession of the coach house. The complaint was silent as to the basis for the claim of possession. The defendant filed a combined answer and counterclaim, in which he admitted that the plaintiffs were entitled to possession of the main house on the property but did not address their claimed entitlement to possession of the coach house. In the remainder of his answer and counterclaim, the defendant (1) "den[ied] that he wrongfully possessed the coach house, alleging that he had vacated the house because of certain wrongful acts of plaintiffs," and (2) "alleged that plaintiffs had breached the real estate contract and committed various torts." *Id.* at 1049.

¶ 30 The appellate court held that the combined answer and counterclaim were not germane to the proceeding:

> "Although defendant claims to be seeking a determination of his right to possession of the coach house, he, in effect, conceded the issue of possession when, in his answer, he stated

> that he had vacated the coach house and no longer claimed any interest in it. Thus, the issue of possession was not even involved in the proceeding. Additionally, although he now claims that the damages sought in his counterclaim include the equivalent of unpaid rent, it is clear from his pleading that he is seeking only monetary damages, including damages measured by the value of rent-free use of the coach house for the remainder of his life, for the alleged breach of the real estate contract and misrepresentation of plaintiffs. Where a claim seeks damages and not possession, it is not germane to the distinct purposes of the forcible entry and detainer proceeding. [Citations.]
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> ***
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> *** As a result of defendant's pleadings, possession is not in issue in this case. His claim only seeks monetary damages for plaintiffs' alleged breach of the real estate contract and the various torts. Where a claim essentially involves damages and not possession, it is not germane to forcible actions." *Id.* at 1053-54.

See also *Reid v. Arceneaux*, 63 Ill. App. 2d 113, 116 (1965) (no error in striking of counterclaim that did not question the plaintiff's right to possession but claimed fraud and misrepresentation in the inducement of the agreement).

¶ 31 The second corollary is that, where possession *is* contested, the defendant may claim damages, but restrictedly. In any case where possession is sought on the basis of delinquent rent, it is legally permissible for the defendant not only to deny liability for rent, but also to seek recoupment of overpaid rent. For instance, the supreme court in *Sanders* allowed the defendant to claim not only that she owed no rent, but also that she actually overpaid and should be reimbursed. *Sanders*, 54 Ill. 2d at 480. The defendant asserted that the overpayment would be established once

it was proved that the parties orally modified the contract to mitigate the late-fee provision and that the plaintiff's policy on rent reduction due to diminished income was too restrictive. *Id.*

¶ 32 The counterclaim in *Sanders* was representative of *Sawyier*'s category (2), *i.e.*, of a "claim[] denying the breach of any agreement vesting possession in plaintiff" (*Sawyier*, 198 Ill. App. 3d at 1054). The counterclaim was ultimately premised on the contention that the rental agreement (at least, as orally modified and also as adjusted to conform with the law) did not permit the plaintiff to charge what it did, and hence that the defendant did not breach the agreement.

¶ 33 Another defense available under the case law is to concede the validity of the amounts stated on the face of the rental agreement but claim that, due to an extrinsic consideration, less or no rent is in fact owed. For instance, in *People ex rel. Department of Transportation v. Walliser*, 258 Ill. App. 3d 782 (1994), the Illinois Department of Transportation (IDOT) brought a FED action against the former owner of a home that was to be demolished to make space for state roads. The defendant had sold his property to IDOT and signed a one-year lease to remain in the home as a tenant. Eventually, the defendant ceased paying rent, and IDOT sued for possession. *Id.* at 784-85. The appellate court affirmed the trial court's decision barring the defendant from arguing at trial that IDOT improperly denied him relocation benefits. The appellate court determined that the claim was "for monetary relief" and therefore not germane. *Id.* at 788. However, the appellate court proceeded to reverse the lower court's decision barring the defendant from arguing at trial that he was allowed by administrative regulations to instruct IDOT to deduct his rent from his relocation benefits. Citing *Jack Spring*, the court noted that "[w]here a [FED action] is brought for nonpayment of rent, the question of whether rent is due and owing is the crucial issue." *Id.* at 789 (citing *Jack Spring*, 50 Ill. 2d at 359). The court held that "the question of whether IDOT was required to deduct [the

defendant's] rent payments from the benefits that [he] might be eligible to receive from the IDOT was a germane defense." *Id.*

¶ 34 Thus, in *Walliser*, the defendant cited specific authority that he claimed would demonstrate that, though the rental agreement validly called for rent in the amount specified, he was liable for less or no rent because the amount should have been deducted from the relocation benefits to which he was entitled under federal law.

¶ 35 *Walliser* appears to be a strict application of the rule restricting the defenses and counterclaims available to a defendant in a FED action. Considered in isolation, the defendant's claim that IDOT should have awarded him relocation benefits was simply a claim for monetary relief, but, when coupled with the citation to the administrative regulations allowing IDOT to deduct from relocation benefits any rent that a displaced person owes to IDOT, it became germane to the issue of whether rent was due.

¶ 36 *Sauvage* and *Miller v. Daley*, 131 Ill. App. 3d 959 (1985), enforce, like the first part of the *Walliser* analysis, the default rule that the defendant-tenant in a FED action may not seek damages other than overpaid rent. In *Miller*, the plaintiff brought suit against the road commissioner of Canton Township. The plaintiff alleged that, during the pendency of a previous FED action against the plaintiff to dispossess him of an apartment he was leasing from the township, the defendant locked the plaintiff out of the only available restroom on the premises. The plaintiff requested in the second action an award of damages for the property damage and mental distress he claimed the defendant caused during the FED action. The defendant argued that the present claim was barred because the plaintiff could have brought it in the FED action. The appellate court disagreed, holding that the present claim was "not related to the question of which party is entitled to rightful

possession" and therefore would not have been appropriate in the FED action. *Id.* at 961; see also *Munden v. Hazelrigg*, 711 P.2d 295, 298 (Wash. 1985) (a defense or counterclaim in a FED suit for possession premised on unpaid rent must be based on facts that would excuse the tenant's breach; thus, in action for possession for nonpayment of rent, the defendants could not properly assert a counterclaim for damage to their vehicle from a rockslide on the plaintiff's property).

¶ 37 In *Sauvage*, the plaintiffs brought a FED action for possession of a rented dwelling based on the defendant's failure to pay rent for March 1943. The defendant did not dispute that it failed to pay rent for that month, yet it still denied any breach of contract. Specifically, the defendant argued that the rent it owed for March 1943 was exceeded by the compensation that the plaintiffs owed the defendant for heating a portion of the premises that was not included in the lease and that the defendant did not occupy. The trial court refused to take evidence on the counterclaim. *Sauvage*, 322 Ill. App. at 428-30. Affirming, the appellate court reasoned:

> "The lease makes no provision whatsoever for heating the garage in the rear of the premises, which was expressly excepted [in the lease]. If defendant heated the garage it was purely gratuitous, and if entitled to any compensation for that service, such claim would be entirely outside the provisions of the lease and the subject matter of another suit. *Plaintiffs did not join in their demand for possession any request for a judgment for March rent, and no such judgment was entered*." (Emphasis added.) *Id.* at 430.

The emphasized portion of the discussion rests on a point that is no longer valid. After *Sanders*, a tenant-defendant in a FED action may claim as a defense that no rent is owed, even if the landlord-plaintiff does not seek a money judgment for the rent it claims is delinquent. See *Sanders*, 54 Ill. 2d at 483. *Sauvage*'s remaining analysis is, however, sound.

¶ 38 Some decisions appear to recognize an exception to the default rule that the defendant-tenant in a FED action may claim no damages other than overpaid rent. The landlord in *Powell* filed a FED action, and the tenant asserted an affirmative defense and counterclaim, both pursuant to the Chicago Residential Landlord and Tenant Ordinance (RLTO) (Chicago Municipal Code § 5-12-150 (amended Nov. 6, 1991)). The affirmative defense alleged that the FED action was retaliatory, and the counterclaim sought damages as permitted by the RLTO, namely, "an amount equal to and not more than two months' rent or twice the damages sustained *** and reasonable attorneys' fees." *Id.* The appellate court reversed the trial court's order striking and dismissing the RLTO affirmative defense and counterclaim. The court first noted that "[a] retaliatory eviction claim is germane to a forcible entry action and states a defense." *Powell*, 293 Ill. App. 3d at 1044. On the applicability of the RLTO, the court cited *Oak Park Trust & Savings Bank v. Village of Mount Prospect*, 181 Ill. App. 3d 10, 23-24 (1989), where the court upheld the constitutionality of a Mount Prospect ordinance permitting the defendant-tenant in a FED action to counterclaim for any amounts owed him under the rental agreement. The *Oak Park Trust* court held that the ordinance neither contravened the Forcible Entry Act nor abrogated the autonomy of the courts:

> "Presumably, any matter arising under the rental agreement or the [ordinance] would be germane to the issue of whether the landlord is entitled to possession or rent. Further, if a court found that the matter raised by the tenant in his counterclaim was not germane to the forcible entry and detainer action, nothing in the [o]rdinance prevents a court from striking the counterclaim.

> Furthermore, the mere fact that an ordinance defines notice procedures, the duties of the parties, and the remedies available to the parties does not interfere with the court system. Our courts are often requested to enforce or interpret municipal ordinances." *Id.* at 23.

¶ 39 *Powell* held, on the basis of *Oak Park Trust*, that the Chicago ordinance was applicable. *Powell*, 293 Ill. App. 3d at 1045. The court further stated that it saw "no good reason to allow [the defendant] to argue retaliatory eviction under the RLTO, but not to allow him to pursue remedies specifically provided in the RLTO." *Id.*

¶ 40 The *Powell* court clearly erred, however, in affirming the dismissal of the defendant's counterclaim seeking a "refund of overpaid rent for [the plaintiff's] breach of the implied warranty of habitability." *Id.* at 1037. The court held that the implied-warranty counterclaim was not germane "because it [sought] money damages independent of the RLTO." In *Sanders*, however, the supreme court permitted a claim for recoupment of rent that was not based on an ordinance or other enactment. *Powell* seems to run squarely contrary to this holding.

¶ 41 *Powell* suggests that courts will recognize a claim for damages in addition to recoupment of rent if there is an applicable legal provision authorizing it.

¶ 42 Based on the foregoing authorities, we can separate what is legally proper in defendant's affirmative defenses and counterclaim from what is not. We held above that, just as the contract principle of mutually exchanged promises can justify a tenant's refusal to pay rent, so that principle can justify a condominium unit owner's refusal to pay assessments that the board of managers collects to fund its services. We determined above that the Condominium Act, the Declaration, and the Bylaws together establish here a duty of repair and maintenance of the common elements, the funds for which are provided through the mandatory assessments paid by unit owners. We further

held that, because the Condominium Act, the Declaration, and the Bylaws indicate that the promise to pay assessments was exchanged for the promise to repair and maintain the common elements, it is permissible for defendant to claim neglect of the common elements as an offset to, or even nullification of, plaintiff's claim for assessments.

¶ 43 The damage to defendant's unit, her own property, does not have the same relevance. The fact of damage to the unit might, we acknowledge, be probative to the factual question of whether the common elements were damaged or in disrepair and, to that extent, would be probative to whether there was a breach of the duty to repair and maintain the common elements. For instance, moisture in the drywall could tend to factually establish that the roof is leaking. We stress, however, that damage to the unit will have no relevance to the issue of possession other than by serving as a factual predicate for the conclusion that there was a breach. The reason, simply, is that assessments are paid in exchange for repair and maintenance of the common elements, not of the units themselves. If plaintiff has any duty with respect to the units themselves, it does not lie in the promise(s) in exchange for which defendant and other unit owners pay assessments. Moreover, defendant points to no other ground in the Condominium Act, the Bylaws, or the Declaration for a duty respecting the units themselves. Even if there were such a duty, defendant would also have to establish that its breach would justify her in withholding assessments.

¶ 44 Since defendant's promise to pay assessments was not exchanged for any promise regarding her unit itself, the fact of damage to her unit does not in itself provide a legal justification for withholding assessments. If defendant has any ground for withholding assessments, or now counterclaiming for monetary relief, because of damage to her unit, it would have to lie elsewhere than in the Condominium Act, the Bylaws, or the Declaration. Defendant, however, cites no

extrinsic authority such as the ordinances in *Oak Park Trust* and *Powell* or the administrative regulations in *Walliser*. Therefore, like the tort claims in *Miller* and the claim for unpaid compensation in *Sauvage*, defendant's counterclaim and request for a setoff, grounded as both are in alleged damage to her unit, are not germane to the issue of possession as framed in this case. Since the counterclaim seeks nothing but monetary relief for damage to defendant's unit, it was properly severed in its entirety. However, the affirmatives defenses are based partly on breach of the duty to maintain and repair the common elements, and partly on the resulting damage to defendant's unit (notably, the failure to repair the toilet has no apparent relation to any alleged breach of the duty as to the common elements). Accordingly, we vacate the judgment of the trial court and remand for partial reinstatement of the affirmative defenses. The defenses are to be reinstated such that the only alleged legal ground for withholding assessments is a breach of the duty to repair and maintain the common elements. The allegation that there is damage to defendant's unit due to disrepair of the building's exterior is reinstated, but only as a factual predicate, not as a ground in itself for withholding assessments. The allegation that plaintiff has failed to repair the toilet is not to be reinstated at all in the affirmative defenses, as it bears no probative value in establishing a breach of the duty to repair and maintain the common elements.[7]

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[7]Again, plaintiff does not claim that defendant is on different footing with the monthly assessments than with the special assessments. Plaintiff does not, that is, claim that its neglect of the roof and the brick facade cannot be a justification for nonpayment of the special assessments because the latter were allocated for areas of the common elements other than the roof and the brick facade.

¶ 45 Given this resolution, we do not address plaintiff's or defendant's various claims of error as to the relief awarded at trial. Also, since plaintiff has not substantially prevailed on appeal, we reject its request for costs and attorney fees on appeal.

¶ 46 CONCLUSION

¶ 47 We affirm the judgment of the trial court severing defendant's counterclaim, and we affirm in part and reverse in part the judgment striking defendant's affirmative defenses. We remand for reinstatement of defendant's affirmative defenses and for further proceedings consistent with this opinion.

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