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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
LAW DIVISION, SPECIAL CIVIL PART
DOCKET NO.: LT-034082-18

OPEX REALTY MANAGEMENT,
LLC,

Plaintiff,

v.

ROBERT TAYLOR and
MILDRED TAYLOR,

Defendants.

APPROVED FOR PUBLICATION

August 13, 2019

COMMITTEE ON OPINIONS

Decided: April 24, 2019

Bruce Gudin and Charles Issacs, for plaintiff (Ehrlich, Petriello, Gudin & Plaza, attorneys).

Nicholas Bittner, for defendants (Essex Newark Legal Services, attorneys).

PETRILLO, J.S.C.

This case squarely presents an unresolved issue of landlord-tenant law with important implications in a fast-changing residential rental market in our state's largest city. The court must determine whether the City of Newark's rent control ordinance is violated when a landlord seeks to evict a tenant for non-payment of late and legal fees, deemed "additional rent" in the lease, if the

addition of the “additional rent” would cause the total rent due to exceed the maximum rent allowed by local ordinance. The tenants argue that the landlord should not claim late and legal fees as rent in the Superior Court summary dispossess action, but then deny these same charges constitute rent under Newark’s rent control ordinance. The court agrees.

The defendant-tenants, Robert and Mildred Taylor (“the tenants”) live in an apartment in Newark, New Jersey.¹ It is undisputed that their apartment is subject to Newark’s rent control ordinance. Opex Realty Management, LLC (“the landlord”) filed suit seeking to evict the tenants for non-payment of monthly rent along with \$372 in late and legal fees.² The tenants have cured a portion of the summary dispossess non-payment claim by paying into escrow the overdue monthly rent.³ The remaining issue is whether the Newark rent

¹ The complaint names as a defendant, Robert Taylor. The court, pursuant to Rule 6:3-1, will amend the complaint to include his wife Mildred Taylor as there was testimony that she also resides on the premises.

² While plaintiff is the landlord/property manager of the premises, Department of Community Affairs registration number 0714032794 lists 292 Wainwright St., SGMF LLC as the property owner and plaintiff as the registered agent. There is no issue as to plaintiff’s standing to bring this suit. See N.J.S.A. 2A:18-51.

³ The monthly rent in dispute and the ongoing monthly rent that has come due has been paid to the tenants’ attorney in escrow. The court has been advised that the payments are current.

control ordinance would be violated if the tenants are required to pay late and legal fees designated as “additional rent.”

New Jersey statutes subject a tenant to eviction for failure to pay “rent.” See N.J.S.A. 2A:18-61.1(a); N.J.S.A 2A:18-53(b). “Rent” is not defined in the statutes. Absent some superior contravening public policy, parties are free to define the terms of the lease agreement including “rent.” Hous. Auth. & Urban Redev. Agency v. Taylor, 171 N.J. 580, 586 (2002); Marini v. Ireland, 56 N.J. 130, 143 (1970); Fargo Realty, Inc. v. Harris, 173 N.J. Super. 262, 265-66 (App. Div. 1980). See also Vineland Shopping Ctr., Inc. v. DeMarco, 35 N.J. 459, 470 (1961).

The parties to a lease may further designate expenses such as late fees and legal fees as “additional rent.” Cnty. Realty Mgmt., Inc. v. Harris, 155 N.J. 212, 234 (1998). The landlord-tenant court will enforce such lease provisions as long as they do not violate public policy. Id. at 234. The court in Harris stated: “The written lease, however, must expressly permit a landlord to recover reasonable attorney’s fees and damages in a summary dispossess proceeding before a landlord-tenant court may consider those expenses as additional rent.” Ibid.

The Newark rent control ordinance caps the rent that a landlord may lawfully charge. Newark, N.J., Rev. Gen. Ordinances §19:2-3.1 and 3.2 (2000).⁴ Prior to 2014, there were hard caps of 4% or 5% on rent increases depending upon the number of rental units in a building. Ibid. The 2014 revised ordinance imposes a formula-based cap utilizing the Consumer Price Index. Id. at § 19:2-3.

The rent control ordinance states:

The establishment of rents between a landlord and tenant in all housing spaces shall hereafter be determined by the provisions of this chapter. At the expiration of a lease or at the termination of the lease of a periodic tenant, no landlord may request or receive an increase greater than [permitted under the CPI formula but never more than 4%].

[Id. at § 19:2-3.1.]

The rent for any housing space shall not be increased more than the percentages stated above in any consecutive twelve (12) month period

[Id. at § 19:2-3.2.]

It is clear that a municipality, if it chooses, could expressly include or exclude late or legal fees designated as “additional rent” for purposes of its rent control ordinance. Cnty. Realty Mgmt., 155 N.J. at 242. See also Hous. Auth. & Urban Redev. Agency, 171 N.J. at 587. This principle is actually noted in the “Harris

⁴ Shortened from “The Revised General Ordinances of the City of Newark, 2000” to “Revised General Ordinances.”

Announcement” read to litigants before every landlord-tenant calendar call. The New Jersey Court Rules state:

B. Items Constituting Rent. A tenant does not have to pay for attorney’s fees, late fees or other charges to avoid eviction unless there is a written lease that calls these items “additional rent.” Even if the lease does say that, the amount really due as rent may be limited by rent control, or if there is public assistance, the rent may be limited by federal law. . . .

[Landlord/Tenant Pre-Calendar Call Instructions, Pressler & Verniero, Current N.J. Court Rules, Appendix XI-S at www.gannlaw.com (2019) (emphasis added). See also R. 6:3-4(c).]

The Newark rent control ordinance, however, is silent. It does not expressly include or exclude late and legal fees and other items of “additional rent.” Rent is a defined term in the Newark ordinance. Section 19:2-2 states:

Rent shall mean the consideration and shall include any bonus, benefits or gratuity demanded or received for or, in connection with, the use or occupancy of housing space or the transfer of a lease of such housing spaces, including, but not limited to monies demanded or paid for parking, pets, the use of furniture, subletting, security deposits and damage and cleaning deposits.

[Rev. Gen. Ordinances § 19:2-2.]

In Ivy Hill Park Apartments v. Sidisin, 258 N.J. Super. 19 (App. Div. 1992), the court dealt with the Newark rent control ordinance in an analogous

circumstance. The court considered whether damages to the apartment considered “additional rent” were lawful under the rent control ordinance. Id. at 20-21. The lease provided that a tenant was responsible for damages the tenant caused. Ibid. If not paid, the damages were designated “additional rent” and were added to the next monthly rental payment. Ibid. Newark, at the time, had a rent control ordinance with a 4% or 5% per year rent cap. Id. at 21-23.

The court in Sidisin began its analysis by emphasizing the importance of Section 15:9B-19. Id. at 21-22. This portion of Newark’s rent control ordinance remains intact in present day Section 19:2-20. It states: “[t]his chapter being necessary for the welfare of the City and its inhabitants, shall be liberally construed to effectuate the purposes thereof.” Rev. Gen. Ordinances § 19:2-20. See also Sidisin, 258 N.J. Super. at 22.

The court in Sidisin, then turned to the language used by Newark in the rent control ordinance. The court said:

We also note, that the ordinance’s definition of rent, liberally construed, is broad enough to include plaintiff’s damages claim. Among other things, rent is defined as "the consideration . . . demanded . . . for, or in connection with the use or occupancy of housing space." Plaintiff’s characterization, in its lease of its entitlement to damages as "so much additional rent for the succeeding months . . . and collectable as such" seemingly qualifies under the ordinance as money demanded for the "use or occupancy of housing space."

[Ibid.]

It is interesting to note that the current definition of rent contained in the Newark rent control ordinance is virtually the same as cited in Sidisin. See Rev. Gen. Ordinances § 19:2-2.

The court, in Sidisin, ruled in favor of the tenant and found that property damages deemed “additional rent” must be included as rent under the Newark rent control ordinance. Sidisin, 258 N.J. Super. at 21. The court expressed a broad rationale for this decision: “We are reluctant to permit plaintiff to establish jurisdiction under N.J.S.A. 2A:18-61.1a by characterizing certain damages as rent and in the same proceeding to deny that the charge sought to be enforced is rent under the rent control ordinance.” Id. at 22. The plain logic of that statement holds no less true today.

In another decision, the Appellate Division expressed a similar sentiment regarding “additional rent” in the context of a rent control ordinance. In 316 49 St. Assoc., Ltd. v. Galvez, 269 N.J. Super. 481 (App. Div. 1994), the rent control ordinance limited rent to \$420 per month for the condominium being rented. Id. at 483. The actual monthly rent amount was \$388 and was lawful. Ibid. However, the lease included an additional \$229 payment each month, designated as an option to purchase. Ibid. Any missed option payments would be deemed “additional rent” and subject the tenant to eviction. Id. at 489. The court found

these option payments were a subterfuge to circumvent the rent control ordinance and disallowed them. Ibid.

Newark has enacted a comprehensive ordinance designed to address what the governing body has termed a “rent emergency.” Rev. Gen. Ordinances § 19:2-1(a). The ordinance includes a conclusion that there is a “substantial and increasing shortage of rental housing accommodations for families of low and moderate income and excessively high rent.” Id. at § 19:2-1(b). The rent control ordinance attempts to balance the “displacement pressures” of gentrification with the rights of land owners to earn a “fair rate of return.” See id. at § 19:2-1(c), 19:2-2.

As part of this scheme, Newark has placed a cap on rent that can be lawfully charged, tied to the Consumer Price Index. Id. at § 19:2-3.1. There is a further maximum cap of 4%. Ibid. Owners are essentially limited to one rent increase per year. Id. at § 19:2-3.2. Newark chose to exempt smaller rental properties from the definition of “multiple dwelling” and the impacts of the rent control ordinance. Id. at § 19:1-2. That exemption is inapplicable in this case.

The Newark rent control ordinance does not expressly include or exclude late fees and legal fees in its calculation of the rent control cap. The ordinance, however, has one section which makes mention of attorney’s fees:

No attorney’s fees, accountant’s fees or application fees incurred by a landlord in connection with any

application to the [Rent Control Board] shall be included in determining whether a landlord is entitled to any rent increases.

[Id. at § 19:2-8.4.]

This demonstrates a mindfulness by the governing body as to the issue of attorney's fees, and a clue as to its intentions. While the reference here to attorney's fees is in a very different context, at a minimum it indicates that the existence of attorney's fees, as a cost component for land owners, is a real and known issue. In other words, the ordinance clearly recognizes the existence of attorney's fees as a cost incurred by a land owner yet, despite this recognition, explicitly disallows it as a cost to be considered in determining the propriety of an applied-for-rent increase. In at least this isolated section, Newark chose not to allow legal fees incurred by landlords to be passed on to their tenants as rent increases.

The decisions in Sidisin and Galvez do not directly answer the question presented in the current matter, but they do serve as a guide for the court.

The Newark rent control ordinance defines rent as “the consideration . . . demanded or received for or, in connection with, the use or occupancy of housing space” Rev. Gen. Ordinances § 19:2-2. This is a broad definition of rent which should be liberally construed. It thus should be read to include items denoted as “additional rent” being asserted by landlords in non-payment

claims under N.J.S.A. 2A:18-61.1. Indeed, the provision of the ordinance at issue contains a non-exhaustive list of items which may be denominated as rent. It is duplicitous for a landlord to seek an eviction for non-payment of rent resulting from late and legal fees in the Superior Court under N.J.S.A. 2A:18-61.1, i.e. “additional rent” contemplated by a lease between the parties, and then deny such items constitute rent in a different forum. Rent as defined by the parties, be it additional or otherwise, is rent, and unless expressly exempt from a rent control ordinance, must be viewed in light of the controls, limitations, and provisions contained therein.

In properties subject to rent control, late and legal fees as “additional rent” should not form the basis for a judgment for possession unless expressly authorized by the rent control ordinance. This express authorization could be easily achieved by the creation of an exception for such costs in calculation of the maximum rent allowed or in calculating the rent at all. The ordinance does no such thing. Instead the ordinance defines rent in broad language without exception for legal costs and late fees. The court will not, and indeed cannot, rewrite a lawfully enacted rent control ordinance which has been promulgated by a governing body for the policy reasons expressed by that body:

It is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the Legislature, and to that end "words used may be expanded or limited according to the manifest reason

and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms."

[Smith v. Fireworks by Girone, Inc., 180 N.J. 199, 216 (2004) (quoting Alexander v. N.J. Power & Light Co., 21 N.J. 373, 378 (1956)).]

Similarly, a court's objective in construing a local ordinance is to discover legislative intent:

As in the case of statutes, the purpose of construction of ordinances and municipal by-laws is the discovery and effectuation of the local legislative intent; and in general the inquiry is governed by the same rules as apply in the interpretation of statutes. Ordinances are to receive a reasonable construction and application, to serve the apparent legislative purpose. The aim of judicial construction is to ascertain the sense in which the terms were employed by the legislative body.

[Wright v. Vogt, 7 N.J. 1, 5-6 (1951) (citations omitted).]

The court will not allow the landlord to circumvent a rent control ordinance and raise the rent beyond the lawful limits by labeling a late fee or legal fee as "additional rent" and then, with a forked tongue, disavow that very label so as to avoid the prohibitions of local law, limiting the amount of rent that may be charged. Under the terms of this lease, the landlord has denominated late fees, counsel fees, and court costs as "additional rent." Having done so, the landlord cannot then deny that the total amount of "rent" imposed upon the

tenants is not subject to the limitations on rent increases set forth in the ordinance.

The landlord is not, however, without recourse. To the contrary, the landlord has available to it a contractual remedy regarding late and legal fees as a measure of contract damages if same are unpaid as rent or otherwise. The landlord is not foreclosed from seeking a money judgment in the appropriate court. To be clear, it is not this court's opinion that late fees and legal fees, to name just two potential items of "additional rent," may never be collected as "additional rent" in this or some other similar rent control paradigm. Rather, it is this court's ruling that rent, additional or otherwise, may not ever exceed the maximum allowable cost provided by an applicable rent control ordinance. Were these tenants not already bearing the maximum rent allowed by law, the outcome might have been different. That said, the court need not speculate further about any of the myriad alternate outcomes that might have resulted under different facts. The tenants, in this case, are already paying the maximum rent allowed by law; the maximum legal increase has already been imposed at the time of their last increase. The law simply does not allow for "additional rent," or any rent for that matter, to be imposed in excess of this maximum.

For the reasons expressed and set forth in this opinion, any judgment for possession for non-payment of "additional rent" in this summary dispossess

action would violate the Newark rent control ordinance. The present matter will be marked dismissed upon payment to the landlord of the outstanding rent without consideration of late and legal fees.