SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1049-15T1

LIZA ANNE HEIDT,

Plaintiff-Respondent,

v.

NANCY CASTELINO,

Defendant-Appellant,

and

LLOYD M. FERNANDES and ASTUTE MANAGEMENT, INC.,

Defendants.

Submitted November 10, 2016 – Decided March 8, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. DC-2690-15.

Nancy Castelino, appellant pro se.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondent (James M. Mulvaney, on the brief).

PER CURIAM

Pro se defendant-landlord Nancy Castelino appeals from the September 29, 2015 order of the Special Civil Part, entering final judgment in favor of plaintiff-tenant Liza Anne Heidt for $2,962.76. Following a bench trial, the judge awarded plaintiff rent abatement and ordered defendant to credit plaintiff's security deposit towards future rent payments. The judge also awarded plaintiff attorney's fees. After reviewing the record and applicable law, we affirm.

I.

We derive the facts from the trial record. Defendant owns a five-bedroom, single-family rental home in Princeton. In May 2015, plaintiff and defendant signed a two-year lease agreement for the home beginning on May 15, 2015. The lease set the rent at $4,000 per month and required plaintiff to pay a $6,000 security deposit with the June 2015 rent. Plaintiff moved into the premises in May with her three children, one of whom has asthma.

Plaintiff testified that on June 12, 2015, during a heat wave, the thermostat in the home "wasn't working," fluctuating between temperatures of eighty-eight to ninety degrees Fahrenheit. Plaintiff emailed defendant at 5:36 p.m. to inform her of the extreme heat and that the air conditioner was not cooling the home. Plaintiff also contacted the energy and

thermostat companies, but they were unable to remedy the situation. Receiving no response from defendant, plaintiff sent an additional email at 1:07 p.m. the next day, informing defendant that she scheduled a service appointment and planned to deduct the fee from her rent. Michael J. Messick Plumbing & Heating, Inc., (Messick) then repaired the air conditioning system at a cost of $512.30 to plaintiff.

Defendant finally responded to plaintiff's email at 3:52 p.m., stating she would not pay for the service call. When plaintiff informed her the plumbing company already made the repairs, defendant threatened legal action.

Plaintiff testified she knew defendant's phone number and had previously contacted her by phone. However, she stated defendant told her not to contact her by text or phone, and "the best correspondence from me to her . . . would be e-mail and I did just that." Plaintiff said she never discussed with defendant how to contact her in the case of an emergency. Conversely, defendant testified she never told plaintiff that she could not call her.

On June 17, 2015, defendant entered the premises with a technician to fix one of the toilets. According to plaintiff, defendant described this as a "temporary fix." However, on July 8, 2015, the toilet became clogged and overflowed. Plaintiff's

attorney emailed defendant on this date[1] and attached a letter requesting repairs to the toilet, which he described as "completely inoperable." When defendant did not respond, plaintiff hired Messick to repair the toilet on July 10, 2015, at a cost of $335.75.

Plaintiff further testified she paid the required $6,000 security deposit. Plaintiff said she never received notice of the interest rate or the address of the bank holding the deposit. On July 10, 2015, defendant sent plaintiff's counsel a letter, stating she provided the location of the security deposit on the first page of the lease, that plaintiff could verify the deposit from a cancelled check, and that she sent a notice of deposit status on June 5, 2015. Defendant attached a reproduction of the June 5 notice, which contained the interest rate and bank address.

Plaintiff filed her initial complaint on or about July 10, 2015. On July 20, 2015, plaintiff filed an amended complaint against defendant, defendant's husband, and Astute Management, Inc., a corporation defendant organized to collect rent. In count one of her amended complaint, plaintiff asserted claims for breach of the implied warranty of habitability and breach of

[1] Plaintiff's complaint incorrectly states her attorney informed defendant of the toilet issue on July 9, 2015. However, the record shows plaintiff's counsel sent the email containing this notice on July 8.

contract, seeking, in part, rent abatement of $848.05 for repairs to the air conditioner and the toilet. In count two, plaintiff sought a declaratory judgment crediting the $6,000 security deposit, plus interest, towards her rent payments. Plaintiff claimed defendant violated N.J.S.A. 46:8-19 by failing to provide her with the security deposit's interest rate and the address of the bank holding the deposit. Plaintiff also asserted trespass and breach of contract (count three); unjust enrichment (count four); and consumer fraud, in violation of N.J.S.A. 56:8-1 to -204 (count five).

Defendant's husband filed an answer to the initial complaint but did not answer the amended complaint; both defendant and the corporation failed to answer either complaint. On July 30, 2015, defendant sent plaintiff a notice to quit.[2] This notice terminated the lease and demanded plaintiff vacate the premises by August 31, 2015.

Despite defendants' failure to answer the complaint, the parties agreed to proceed to trial. On September 9, 2015, the court heard testimony from plaintiff, her realtor, a plumber from Messick, and defendant. The next day, the trial judge made findings of fact and issued an oral decision from the bench.

[2] Defendant had previously sent plaintiff a notice to cease on July 5, 2015.

Addressing plaintiff's claims of habitability and breach of contract, the judge found section nine of the lease required defendant to make repairs to the plumbing, heating, and electrical systems, and therefore, plaintiff was entitled to a rent abatement for the repairs to the air conditioning. The judge further noted the home "would have been uninhabitable without the repair," finding plaintiff acted reasonably by making necessary repairs after defendant did not respond for three-quarters of a day. The judge therefore awarded plaintiff $512.30 for the cost of repairs and an additional $133.33, equivalent to one day's rent, for the "one day that the premises were effectively uninhabitable."

The judge also awarded plaintiff the $335.75 cost of repairs for the toilet. The judge noted, "[W]ith this kind of rental you would expect that the plumbing systems, the toilets are functioning and working." He described "the repair and the amount" as "fair and reasonable and necessary."

Regarding count two of plaintiff's amended complaint, the judge rejected defendant's argument that she appropriately notified plaintiff of the interest rate and location of her security deposit. The judge found inadequate notice on the first page of the lease, which only stated the deposit was in the care of a Chase Bank in Hillsborough and did not list the

interest rate. The judge also determined plaintiff was not obligated to do "investigatory work" by looking for the bank location on the security deposit check. Last, the judge found there was no evidence defendant mailed plaintiff the notice of deposit on June 5, 2015, finding defendant's purported evidence was an "afterthought to cover the fact" that she failed to provide adequate notice.

The judge declined to enter judgment against defendant's husband, concluding he was not a responsible party because he was not on the lease. The judge also dismissed the count against the corporation and dismissed counts three and five of the amended complaint.

Following trial, plaintiff filed an application for attorney's fees. Defendant opposed the application and raised new issues challenging the court's decision. On September 29, 2015, the court issued a written opinion explaining its $1,981.38 award for attorney's fees and rejecting defendant's additional arguments. The court also entered an order granting final judgment in favor of plaintiff for $981.38 on counts one and four of her amended complaint. The order further required defendant to credit plaintiff $6,117.60 from her security deposit towards her future rent payments, and precluded defendant from requiring any additional security deposit for the

remainder of the tenancy. Last, the order awarded plaintiff attorney's fees. This appeal followed.

II.

The scope of our review of a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The findings on which a trial court bases its decision will "not be disturbed unless they are so wholly insupportable as to result in a denial of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (citations omitted). On the other hand, although a trial court's factual findings will not be overturned absent an abuse of discretion, questions of law are subject to de novo review. Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 372 (1999).

Defendant raises sixteen overlapping arguments in her briefs on appeal, several of which she failed to raise before the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). However, we discern three main contentions that merit brief discussion, specifically, defendant's challenges of the trial court's findings on (1) habitability and breach of contract, (2) the security deposit, and (3) attorney's fees. Defendant also raises additional arguments that merit brief discussion. We address these issues in turn.

The seminal case on the issue of rent abatement is Berzito v. Gambino, 63 N.J. 460 (1973). Our Supreme Court held all residential leases contain an "implied covenant or warranty of habitability." Id. at 467. Accordingly, a tenant may initiate an action to recover part or all of the rent paid to his landlord "where he alleges the [landlord] has broken his [or her] covenant to maintain the premises in a habitable condition." Id. at 469. In order to succeed on the claim, "[t]he condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person." Ibid. "At a minimum, the necessities of a habitable residence include sufficient heat and ventilation, adequate light, plumbing and sanitation and proper security and maintenance." Trentacost v. Brussel, 82 N.J. 214, 225 (1980). However, a tenant must also provide his landlord with notice and sufficient time to effectuate repairs. Berzito, supra, 63 N.J. at 469.

Defendant provides several arguments challenging the judge's determinations on habitability. In essence, defendant asserts the broken air conditioner did not create an urgent situation and that plaintiff did not prove the premises were uninhabitable. Defendant also argues plaintiff should have called or texted her, she responded to plaintiff's emails within

the appropriate amount of time, and plaintiff did not give her sufficient time to inspect and repair the malfunctions.

We reject these arguments. The trial judge's determination on rent abatement "is a factual finding and will be affirmed if supported by credible evidence in the record." C.F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 596 (App. Div. 1980). In the instant matter, the judge determined the air conditioner malfunction — during temperatures of up to ninety degrees — rendered the premises "uninhabitable" and that plaintiff acted reasonably by hiring a repair company after she did not receive a prompt response from defendant. The asthma of plaintiff's son further exacerbated the situation. Moreover, plaintiff testified defendant preferred she contact her by email. Given these circumstances, we decline to disturb the trial judge's finding that the premises were uninhabitable and that plaintiff provided defendant with adequate notice.

Defendant further argues the court erred by "considering bills that were not presented to [the] landlord," alleging plaintiff failed to present her with the actual bills for the repairs until trial. However, plaintiff set forth these amounts in her amended complaint; therefore, the court properly considered these bills during trial.

Next, defendant asserts the trial court erred in its interpretation of plaintiff's right to repair under sections nine, ten, and eleven of the lease. We disagree. Section nine requires defendant to repair the plumbing, heating, and electrical systems, and only makes plaintiff responsible for repairs resulting from her own negligence. Section ten similarly requires plaintiff to "pay" for all repairs made necessary by her negligence. Section eleven bars plaintiff from making "changes or additions" without defendant's consent, including "renovation[s] to the plumbing . . . [or] air-conditioning." Here, the trial court determined plaintiff did not cause the need for the repairs. Moreover, plaintiff did not "renovat[e]" these appliances, but made necessary repairs to render the property habitable. We will not disturb the trial court's findings on this basis.

Defendant also argues the court erred by failing to consider the loss and notice provisions in the lease. Defendant did not raise these arguments before the trial court. See Neider, supra, 62 N.J. at 234. Nevertheless, we find they lack merit. The loss provision states that if only part of the house is uninhabitable, the tenant shall pay the landlord "on a proportional basis." Here, because the trial judge found the broken air conditioner rendered the entire premises

uninhabitable, he appropriately ordered abatement for a full day's rent. Similarly, the notice provision required plaintiff to send "[a]ll notices given under this Lease" to defendant's address by personal delivery or certified mail. As noted, the parties agreed to communicate by email; parties may modify a contract by their actions or conduct. See, e.g., DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999). We discern no error here.

We turn next to the court's findings regarding plaintiff's security deposit. Defendant argues the trial court assumed "facts not in evidence" when it determined defendant did not provide adequate notice pursuant to N.J.S.A. 46:8-19. The statute provides:

> The person investing the security deposit . . . shall notify in writing each of the persons making such security deposit or advance, giving the name and address of the . . . bank . . . in which the deposit . . . is made, the type of account in which the security deposit is deposited or invested, the current rate of interest for that account, and the amount of such deposit or investment, in accordance with the following:
>
> (1) within 30 days of the receipt of the security deposit from the tenant; . . . .
>
> [N.J.S.A. 46:8-19(c).]

Here, the lease only stated the deposit was held by a Chase Bank in Hillsborough; it did not list the bank's address or the

deposit's interest rate. Moreover, plaintiff testified she never received notice of the deposit by mail. The trial court reviewed the testimony of both parties and found plaintiff credible. Therefore, the trial court ordered the appropriate remedy under N.J.S.A. 46:8-19(c).

Defendant also argues plaintiff did not establish the exact date she paid the security deposit, and therefore, the court had no basis to determine defendant failed to comply with the statute's thirty-day requirement. See N.J.S.A. 46:8-19(c)(1). However, defendant claimed she sent plaintiff the notice of deposit on June 5, 2015, meaning defendant received the deposit on or before this date. Therefore, the court did not err by determining defendant did not meet the thirty-day requirement.

Last, defendant argues she was not required to notify plaintiff because plaintiff's fiancé actually issued the check containing the security deposit. Although defendant noted that plaintiff's fiancé paid the deposit in her notice to quit, she maintained that she provided adequate notice to plaintiff. Under the "doctrine of invited error," we will "bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be

error." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996). We decline to reverse on this basis.

Next, we turn to the issue of attorney's fees. The court awarded plaintiff $1,981.38 in attorney's fees pursuant to N.J.S.A. 2A:18-61.66, which states:

> If a residential lease agreement provides that the landlord is or may be entitled to recover either attorney's fees or expenses, or both, incurred as a result of the failure of the tenant to perform any covenant or agreement in the lease . . . the court shall read an additional parallel implied covenant into the lease. This implied covenant shall require the landlord to pay the tenant either the reasonable attorney's fees or the reasonable expenses, or both, incurred by that tenant . . . as the result of any successful action or summary proceeding commenced by the tenant against the landlord, arising out of the failure of the landlord to perform any covenant or agreement in the lease.
>
> The court shall order the landlord to pay such attorney's fees . . . to the same extent the landlord is entitled to recover attorney's fees . . . as provided in the lease. . . .

In its written opinion, the court found an implied parallel covenant based on section five of the lease, which provides:

> The Tenant is liable for any and all damages which Tenant causes by violating any terms/agreement or moves prior to the end of the lease period. Penalty includes one month's rent for breach of contract, plus loss of rent, the cost of preparing the property for re-renting, brokerage commission in finding a new tenant include

> reasonable attorney's fees and costs of collection. . . .

The court determined, because plaintiff "commence[d] and successfully prosecuted such an action" against defendant, plaintiff was entitled to reasonable attorney's fees.

We discern no error regarding the award of attorney's fees to plaintiff. The statute provides for attorney's fees if a tenant successfully pursues an action arising from a landlord's failure to "perform any covenant or agreement in the lease" and permits recovery "to the same extent" as the landlord. N.J.S.A. 2A:18-61.66. Here, defendant breached the warranty of habitability and failed to perform the required repairs under the lease. The lease permitted defendant to recover attorney's fees where plaintiff violated any terms or agreements in the lease. Therefore, plaintiff's motion for fees satisfied the statutory criteria.

Finally, we address defendant's miscellaneous arguments. Defendant first contends plaintiff perjured herself by testifying she did not own a second residence at the time the air conditioner malfunctioned. Defendant premised this allegation upon a deed and insurance application, showing plaintiff and her ex-husband transferred their former home to new owners on June 22, 2015, several days after the air conditioner incident. Defendant is apparently suggesting

plaintiff could have gone to this other home when the air conditioner malfunctioned, and therefore, she had no valid reason to make immediate repairs.

This argument lacks merit. Although plaintiff apparently still held legal title to this other property, she testified she was "clearly no longer residing" there. Indeed, her entire purpose in renting defendant's property was because she could no longer reside in her former marital home. Moreover, the availability of other lodging provides no defense to a breach of the warranty of habitability.

Defendant next argues the trial court erred by placing an "[u]ndue burden of proof" on her to rebut plaintiff's allegations of other damaged appliances, including the dishwasher, lights, and sliding door. However, because the trial court did not render judgment on these issues, we decline to consider them here.

Next, defendant argues the trial court erred by failing to consider the answer filed by defendant's husband. This argument lacks merit. Defendant's husband did not answer plaintiff's amended complaint; nevertheless, the parties agreed to proceed to trial, where both defendant and her husband had the full opportunity to cross-examine plaintiff's witnesses. Following the testimony, the court dismissed the complaint against

defendant's husband. We find the trial court fully considered the arguments of both defendants.

Last, defendant lists several alleged improprieties by plaintiff's counsel, which she argues amounted to "fraud on the court." These arguments lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E). We discern no evidence of unethical behavior by plaintiff's counsel or the trial court.

Similarly, any remaining arguments we did not specifically address lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.