SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3768-15T3

HUDSON-TROY TOWERS
APARTMENT, CORPORATION,

Plaintiff-Respondent,

v.

HEALTHY DOZEN CORPORATION,

Defendant-Appellant.

Argued November 9, 2017 – Decided March 9, 2018

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-000154-14.

Steven W. Griegel argued the cause for appellant (Roselli Griegel Lozier & Lazzaro, PC, attorneys; Steven W. Griegel, on the brief).

Jessica A. Tracy argued the cause for respondent (Curcio Mirzaian Sirot, LLC, attorneys; Jeffrey A. Sirot, of counsel; Daniel W. Heinkel, Paul F. Campano, and Jessica A. Tracy, on the brief).

PER CURIAM

Defendant Healthy Dozen Corporation, a unit owner of a cooperative and shareholder in plaintiff Hudson-Troy Towers

Apartment Corporation, appeals from the April 25, 2016 order that entered a $42,993.44 final judgment against it in favor of plaintiff.[1] We affirm substantially for the reasons set forth in Judge Hector R. Velazquez's well-reasoned March 18, 2016 written opinion and statement of reasons issued with the order.

Plaintiff operates a housing cooperative in Union City known as Troy Towers.[2] Defendant owns shares of stock in plaintiff, which stock is allocated to a specific apartment unit in Troy Towers. In 1987, the prior owner of the stock assigned the proprietary lease to defendant when it purchased her shares of stock.[3] Neither plaintiff nor defendant has the original or a copy of the 1987 signed proprietary lease.

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[1] Plaintiff has not pursued its cross-appeal.

[2] "A cooperative apartment house is a multi-unit dwelling in which each resident has an interest in the entity owning the building and an agreement entitling him to occupy a particular apartment within the building. The interest in the owner-entity is usually that of a stockholder and the occupancy agreement is generally referred to as a 'proprietary lease.'" Plaza Rd. Coop., Inc. v. Finn, 201 N.J. Super. 174, 175 (App. Div. 1985). Cooperative housing interests, although "hybrid or unique," have been "characterized as realty" rather than personalty. Presten v. Sailer, 225 N.J. Super. 178, 190 (App. Div. 1988).

[3] The Cooperative Recording Act became effective after this purchase. N.J.S.A. 46:8D-1.

Defendant is owned by Philip Smyth, who lives in Ireland. He resides in the apartment when he is visiting the United States and also permits its use by business associates and friends.

In October 2012, Smyth's apartment sustained water damage caused by Hurricane Sandy. The floor tiles in the two bedrooms and the living room buckled and came loose. Smyth discovered the damage in November 2012, when he arrived for a month-long stay. He testified the apartment could not be used because of the damage. Smyth told the manager of the Towers,

> well, look, I can't use it. And she said she knew . . . . I said to her, look, since I'm not going to use it this month and since there are people there in desperate straits with this damage, how long do you think it will be before you get to my unit. And she said two months. And I said, that's fine.

He said he "accepted they wouldn't do the work for two months."

In February 2013, plaintiff's insurance claim was accepted, allowing repairs to the apartment. Defendant was advised that repair work had been scheduled but that the contractor was backed up a few weeks to April 2013, because of the number of units affected. Thereafter, plaintiff advised defendant the work was completed on April 25, 2013. Defendant contended at trial that the repairs were only temporary in nature.

Smyth stayed at the apartment around April 12, 2013, noting there was a problem with the floor in the guest bedroom but

otherwise the "lounge and his bedroom [were] basically o.k." Karen Polly, an employee of Smyth's, stayed at the apartment in May 2013. She noticed evidence of water leaks near the ceiling or windows and some wall dampness but did not mention any issues with the floors. Another employee of Smyth's, Brenda Flood, stayed at the apartment with family members in late May 2013. She arranged for a significant cleanup of the apartment, advising that she left the apartment in "very good shape." She testified the apartment "was livable in."

Flood testified that the floors buckled again in September 2013. Plaintiff contended that the HVAC unit caused this damage, which was defendant's responsibility under the proprietary lease. Although Flood believed the buckling occurred because the earlier repairs had only been temporary, she paid $700 "to put the floor down again."

In April 2013, defendant stopped making monthly payments because of the condition of the apartment and did not resume payments until May 2014, when a new company took over management of Troy Towers. Plaintiff demanded payment of the arrears; defendant requested an abatement.

In October 2014, plaintiff filed a complaint in the Chancery Division, seeking a declaration that defendant was in violation of the "[p]roprietary [l]ease and [b]y-laws" and seeking costs and

attorney's fees. Following a bench trial, the trial court entered a final judgment on April 25, 2016, against defendant for a total of $42,993.44, which included $7,048.98 in attorney's fees. The parties did not dispute the dollar amount of the claimed maintenance fees, late fees or interest charges.

In its written decision, the court found that defendant was assigned the proprietary lease for the apartment in 1987 after it purchased the prior owner's shares of stock in plaintiff corporation and was "provided with copies of the lease and the [c]orporation [b]y-laws." Owners of membership shares are subject to the by-laws of the cooperative and the terms of a proprietary lease. The court found that under the by-laws, plaintiff's Board of Directors adopted a form of a proprietary lease for the leasing of all the apartment units in Troy Towers. That lease required the monthly payment of a maintenance amount equal to plaintiff's cash requirement for the year allocated to the shareholders based on their number of shares. Failure to pay the monthly maintenance fee required the payment of interest as "additional rent." A default in payment that was not cured in a month after notice could result in the termination of the lease. The court noted that paragraph 4b of the proprietary lease provided:

> [I]n case the damage resulting from fire or other cause is so extensive as to render the apartment partly or wholly untenantable, or

> if the means of access thereto are destroyed, the rent hereunder shall proportionately abate until the apartment is again rendered wholly untenantable or the means of access is restored.

The court rejected defendant's claim that it was entitled to an abatement of the maintenance payments. Judge Velazquez found that "[f]irst, Smyth[] agreed to delay the repairs to defendant's unit until after the restoration of other damaged apartments[,]" where people lived. Next, he found that "the evidence established that the company hired to perform the repairs was not able to commence the repair work on the defendant's apartment until April 2013." Under section 29 of the proprietary lease, there was no rent abatement if the repairs were delayed "due to difficulty . . . in securing supplies or labor or other causes beyond the Lessor's control." The court found the repairs were delayed because of the contractor's "inability to provide the labor or manpower to repair all of the damage caused by the storm" and found the delay in completing the repair work was "beyond the control of the plaintiff."

Although Judge Velazquez agreed the "shareholder and lessee of a cooperative apartment could have an arguably valid reason for not paying rent" under the case of Marini v. Ireland, 56 N.J. 130 (1970). Here, defendant did not establish "that it has the right to withhold the rents."

On appeal, defendant contends the court erred by admitting into evidence certain documents that included a copy of an unsigned assignment agreement, a copy of the 2014 amendment to the by-laws, and an unsigned copy of a proprietary lease from 2010. Defendant further argues that the court erred by not granting an abatement or credit and it sought dismissal based on an alleged insufficiency of the pleadings. We find no merit in these arguments.

We review challenged evidentiary rulings for abuse of discretion. Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016). To find an abuse of discretion, the evidentiary ruling must be "so wide off the mark that a manifest denial of justice resulted." Ibid. (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

Generally "[t]o prove the content of a writing . . . the original writing is required" unless an exception exists by court rule or statute. N.J.R.E. 1002. Under N.J.R.E. 1004, "[t]he original [of a writing] is not required and other evidence of the contents of a writing" is admissible if the original contract was "lost or destroyed," "not obtainable," or "in possession of opponent."

Defendant contends the court erred by permitting in evidence unexecuted copies of documents. However, defendant did not dispute that in 1987, his corporation purchased shares of stock in

plaintiff, that these were assigned from the prior owner or that there were by-laws and a proprietary lease that applied to the apartment unit.

None of the parties had the original or a copy of the proprietary lease. Michael Canfield, the building manager for Troy Towers, testified that the lease document proffered at trial was the sole form of proprietary lease used at Troy Towers. He stated it was not likely this document was different from the proprietary lease used in 1987 because it would take an amendment of the by-laws to change the form. Each shareholder signed a proprietary lease and maintained the original. We do not find the court mistakenly exercised its discretion in permitting into evidence an unsigned form lease, by-laws and assignment. The trial court stated that Smyth acknowledged he had been "given or had reviewed, either before or after the closing of title," the types of documents that were introduced.

Defendant also contends that the court erred by entering a judgment against it, claiming it should have received an abatement for the period of time that the apartment was untenantable. We afford a deferential standard of review to the factual findings of the trial court on appeal from a bench trial. Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 483-84 (1974). These findings will not be disturbed unless they are "so manifestly

unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). However, our review of a trial court's legal determinations is plenary. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Here, there was substantial evidence to support the court's findings. Although Hurricane Sandy damaged the apartment at the end of October 2012, defendant agreed that Troy Towers could have two months to repair the damages. Defendant did not dispute that the insurance claim was approved in February 2013, the contractor was not available until April 2013, and that repairs were made then. Although defendant contends that the repairs were temporary and that more work was needed on the apartment, it was not untenantable in April 2013, because Smyth stayed there in April and other employees stayed at the apartment in May 2013. The proprietary lease contemplated the situation where repairs were delayed because of issues outside of plaintiff's control. We are satisfied the trial court's decision that the delay was beyond plaintiff's control and that no abatement was required, was based on adequate, substantial and credible evidence.

Even if there were a habitability claim under Marini[4] for a shareholder and tenant of a cooperative unit, see Harrison Park Owners, Inc. v. Dixon, 254 N.J. Super. 605, 611 (App. Div. 1992) (providing that habitability arguments "could provide sufficient justification for withholding the monthly maintenance charge"), we agree with Judge Velazquez that this defendant did not show any basis for an abatement given the agreement to wait two months for repairs and then the unavailability of the contractor.

Affirmed.

[4] 56 N.J. at 130.