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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2901-20**

**WILLIAM CELMAR,**

Plaintiff-Respondent,

and

**CARRIE MARTINO,**

Plaintiff-Appellant,

v.

**INDIAN ORCHARD  
NAVESINK, LLC and  
KIELY FAMILY OF  
COMPANIES,**

Defendants-Respondents.

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Submitted August 16, 2022 – Decided November 15, 2022

Before Judges Messano and Accurso.

On appeal from the Superior Court of New Jersey,  
Law Division, Monmouth County, Docket No. L-  
0129-20.

Manning, Caliendo & Thomson, PA, attorneys for appellant (Vincent Manning, on the briefs).

Michael Elward, attorney for respondent Indian Orchard Navesink, LLC.

## PER CURIAM

In the summer of 2019, Indian Orchard Navesink, LLC entered into a two-year residential lease with William J. Celmar for a single-family home in Red Bank at a monthly rent of \$6,250. In addition to prohibiting the tenant from assigning the lease or subletting the property, the lease prohibited Celmar from permitting "any other person to use the Property without the prior written permission of the Landlord." Celmar, however, had the written permission of Indian Orchard to permit Carrie Martino and her children to use the property. Erin Ecklof, Indian Orchard's general manager of real estate, completed a Red Bank certificate of occupancy compliance form noting they would be residing in the premises from the inception of the lease.

Their tenancy, however, did not go smoothly. Almost as soon as she moved her family in, Martino complained about habitability issues, including a malfunctioning boiler, flooding in the basement and an air conditioning unit that leaked on her twelve-year-old son's head while he slept. Celmar never moved in, a fact Ecklof testified she knew "within a day or two of [Martino]

taking occupancy." In September 2019, two months after Martino moved in, she and Celmar sent a letter to the landlord, clearly written by Martino, detailing the many problems with the premises and threatening to withhold the rent until repairs were made. Despite Martino's many complaints about the condition of the property, Celmar, however, continued to pay the rent, with Martino occasionally hand-delivering the rent check to Ecklof.

That changed in February 2020, after Celmar and Martino filed a four-count complaint against Indian Orchard alleging breach of contract, fraudulent misrepresentation, negligent maintenance and extreme emotional distress.<sup>1</sup> Although the complaint alleged that Celmar and Martino had entered into the lease with Indian Orchard, Indian Orchard denied the allegation in its answer, making clear its lease was solely with Celmar. In its first separate defense, Indian Orchard asserted Martino lacked standing to bring the claims asserted in the complaint "as she is not a party to the lease agreement that is the subject of this action or any other agreement regarding the occupancy of the subject property."

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<sup>1</sup> The parties stipulated to dismissal of the emotional distress count shortly after issue was joined.

After Celmar failed to pay the March rent, Indian Orchard filed a counterclaim against Celmar and Martino for the unpaid rent, describing Celmar as "a tenant under a written lease agreement" and Martino as "a permitted occupant of the subject property but . . . not a party to the written lease agreement." Celmar and Martino admitted both allegations in their answer to the counterclaim.

The parties thereafter litigated their claims and counterclaims, engaging in months of discovery including depositions. When asked at her deposition why rent had not been paid since February 2020, Martino responded it was because she "was sick and tired of pleading to have what I paid for given to my children and myself." Asked what she meant by that statement, Martino answered, "I rented a home for an exorbitant fee of \$6,250 a month and the lease promised me a beautiful home with working utilities: heat, electricity, cable, speakers, security system, appliances, air-conditioning and heat, and not one thing has worked since the first day when the steam boiler blew up."

In January 2021, Indian Orchard amended its counterclaim for breach of express contract to allege that Martino was "a permitted TENANT of the subject property but is not a party to the written lease agreement." The amended counterclaim alleged Celmar executed the lease for Martino's benefit

"in order to provide her with financial assistance in renting the home and to induce the Landlord to rent the property" to her, and that she and Celmar "are jointly and severally liable for the rent." Indian Orchard also included additional claims against Martino sounding in implied contract and unjust enrichment, alleging Martino "agreed to pay rent for her occupancy of the home and has contended that she has paid rent," and that she had "a common law duty to pay the reasonable rental value for the property she has been exclusively occupying." Celmar and Martino denied those allegations.

The parties eventually settled most of their claims, with Celmar and Martino dismissing their affirmative claims with prejudice and Celmar agreeing to the entry of judgment against him for the unpaid rent in the sum of \$90,625, leaving Martino's joint and several liability as the only issue for trial.

At trial, Ecklof and Martino testified to the facts presented here in a proceeding lasting just over an hour. Ecklof testified Indian Orchard knew very early on that Celmar would not be occupying the property and never attempted to make any changes to the lease arrangement or have Martino sign an amended lease. Ecklof also testified that the only rent checks Indian Orchard ever received on account of the tenancy were from Celmar's account. Martino never made a rent payment in her own name. Although Ecklof

testified on direct examination that she was under the impression at an early point in the tenancy that Martino was contributing to the rent, she admitted on cross-examination she "really [didn't] have any idea that [Martino] was contributing any monies toward the rent."

Martino testified she'd always understood she was an occupant, not the tenant, but that she'd been the one to have to deal with all the problems with the property. She claimed that while she'd had numerous conversations with representatives of the landlord about the condition of the property and repairs, she'd never had any conversation about her being a tenant, and no one ever indicated to her that the landlord considered her a tenant.

Martino testified she'd known Celmar since the two were children, and their families had been close during the years he'd worked for her father. Although Celmar provided Indian Orchard a letter during the lease negotiations from Aviation Equipment Repair Enterprises, Inc., the company owned by Martino's late husband prior to his unexpected death in 2014, stating Celmar was a principal stockholder and would receive income expected to exceed \$185,000 in 2019, Martino testified she was not a shareholder and was not aware of whether Celmar was.

In his closing argument, counsel for Indian Orchard told the judge he understood "the challenge of this case without having authority on the lease," and acknowledged in hindsight that the landlord could "have had better business practices," but he contended Martino was "seeking to capitalize on that" and urged the court "to really put a lot of weight on Ms. Martino's own words and consider what happened here." He argued Martino's "conduct and statements show that she, herself, is a tenant" and "looked to the benefits of the lease."

Counsel for Martino, who had represented both Celmar and Martino throughout the matter, countered that there is no authority in New Jersey for an approved occupant of a residential tenancy becoming legally responsible for the rent in the event the tenant on the lease defaults. Counsel maintained the landlord got all it bargained for by obtaining a judgment for the full outstanding amount of the rent from the tenant, and while it "may not be happy [with] the way [it] handled the lease," it had no right to recover rent from an occupant under a theory of joint and several liability.

The judge issued a written opinion, framing the issue as whether Martino "can be held liable for the rent payments for the period of her occupancy, even though she is not named as the tenant on the lease." The judge found it "clear"

that Indian Orchard and Celmar, "the actual parties to the lease," intended Martino to be a third-party beneficiary of their lease agreement. The judge also found Martino "held herself out as the tenant" and "[t]he parties had a meeting of the minds." The judge found Indian Orchard and Martino agreed on the rent, and as Martino testified at her deposition, "she felt that in exchange for the 'exorbitant' rent, she was entitled to a beautiful home with working utilities, etc." Although acknowledging there was no proof in the record of the nature of the relationship between Celmar and Martino, including "whether any money was exchanged between them," the judge found "Martino's own statements indicate that she felt herself to be a rent-paying tenant," who felt "she was not getting the benefit of the bargain made with the Landlord."

The judge rejected Martino's claims that as a non-party to the lease, she cannot be held liable for the rent, finding because Martino "took occupancy based on some agreement with the Tenant Celmar, she could be deemed to be a sub-tenant." Relying on a commercial tenancy case, holding "an unauthorized sub-tenant was a tenant at sufferance responsible for the rental value of that portion of the premises" it occupied, the court found Martino had remained in occupancy "with the consent of the tenant and the acknowledgment of the



landlord," without paying rent to either, knowing Celmar was withholding the rent, and was thereby "unjustly enriched by her use and occupancy" of Indian Orchard's property. Noting the parties had stipulated the amount of the rent due under the lease, less credits for payments and the security deposit was \$90,625, the judge granted judgment in favor of Indian Orchard and against Martino in that sum.

Martino appeals, arguing the trial court erred in finding her a tenant liable for unpaid rent and costs. We agree.

Indian Orchard has not cited any valid authority, and our research has not revealed any, that would support Martino's liability for unpaid rent under the written residential lease agreement between Indian Orchard and Celmar. The trial judge's finding to the contrary on the facts adduced at trial under either a contract theory or the common law of real property was clear error. See Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998) (noting "[i]nterpretation and construction of a contract is a matter of law for the court subject to de novo review").

We discuss what we view to be the court's erroneous legal conclusions in the order they were presented in the opinion. First, the court erred in finding Martino a third-party beneficiary of the lease between Indian Orchard and

Celmar. As our Supreme Court has explained, "[w]hen a court determines the existence of 'third-party beneficiary' status, the inquiry 'focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement.'" Ross v. Lowitz, 222 N.J. 494, 513 (2015) (quoting Broadway Maint. Corp. v. Rutgers, 90 N.J. 253, 259 (1982)). "Resolution of that issue depends upon examination of the contractual provisions and the attendant circumstances." Broadway Maint., 90 N.J. at 272.

Here, the lease does not purport to confer rights on any third party and attendant circumstances in no way suggest Indian Orchard intended to give Martino the right to enforce the lease, even if one could infer that Celmar did. See id. at 259 ("The contractual intent to recognize a right to performance in the third person is the key. If that intent does not exist, then the third person is only an incidental beneficiary, having no contractual standing."). Indeed, until Indian Orchard amended its counterclaim in an attempt to recover its unpaid rent from Martino nearly a year into the litigation, its consistent position was that Martino lacked standing to enforce the lease. See Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 77 (E. & A. 1940) (noting "the real test [of third-party beneficiary status] is whether the contracting parties intended

that a third party should receive a benefit which might be enforced in the courts"). Nothing in the facts, including Ecklof's submission of the municipal certificate of occupancy compliance form listing Martino among those persons who would be residing in the leasehold, supports Martino was anything other than an incidental beneficiary of the lease agreement between Indian Orchard and Celmar.<sup>2</sup> See Ross, 222 N.J. at 513 ("If there is no intent to recognize the third party's right to contract performance, 'then the third person is only an incidental beneficiary, having no contractual standing.'" (quoting Broadway Maint., 90 N.J. at 259)).

Because Indian Orchard's position until it amended its counterclaim was that Martino was simply "a permitted occupant of the subject property" and "not a party to the lease agreement that is the subject of this action or any other agreement regarding the occupancy of the subject property" (emphasis added), the trial court also erred in finding there was a "meeting of the minds" between Indian Orchard and Martino, impliedly giving rise to an express contract between the two. See Knight v. New Eng. Mut. Life Ins. Co., 220 N.J. Super. 560, 565 (App. Div. 1987) ("A meeting of the minds occurs when there has

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<sup>2</sup> Indian Orchard has not argued on appeal that the trial court's judgment could be sustained under a third-party beneficiary theory.

been a common understanding and mutual assent of all the terms of a contract.").

Although Martino certainly asserted the rights of a tenant in her complaints to the landlord, her unilateral statements could not work a modification of the lease, see Cnty. of Morris v. Fauver, 153 N.J. 80, 100 (1998), and Indian Orchard can point to nothing in the proofs suggesting it ever mutually agreed with Martino that she would be responsible for payment of the rent.<sup>3</sup> Indian Orchard's assertion in its brief that we could affirm the judgment because it "reached a verbal agreement [with Martino], informed by the written lease" — a reason not expressed by the trial court — fails for the same reason. There's no proof of any verbal agreement between Martino and any representative of Indian Orchard in the record.

Finally, the trial court erred in relying on common law property concepts to find Martino "could be deemed to be a sub-tenant" and thus a "tenant at

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<sup>3</sup> Maglies v. Estate of Guy, 193 N.J. 108 (2007), relied on by the trial court, has no applicability here. In Maglies, the Court held the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 to -61.12, prohibited "the causeless eviction of a daughter, after the death of her mother, where the landlord consented to the daughter's residence and where the daughter's income factored into the family contribution and federal voucher subsidy paid to the landlord" under the Section 8 program. Id. at 112, 125-26. It provides no support for Indian Orchard's claim that an authorized occupant of a residential tenancy can be held liable for the rent following the tenant's default.

sufferance responsible for the rental value" of the premises she occupied. "A tenant at sufferance is one who comes into possession of land by lawful title, usually by virtue of a lease for a definite period, and, after the expiration of the period of the lease, holds over without any fresh leave from the owner."

Standard Realty Co. v. Gates, 99 N.J. Eq. 271, 275 (Ch. 1926). As we explained in the case relied on by the trial court to find Martino a tenant at sufferance, Xerox Corp. v. Listmark Computer Systems, 142 N.J. Super. 232, 241 (App. Div. 1976), "[t]he purpose of the tenant at sufferance classification was to distinguish the tenant holding over from a trespasser. While the tenant at sufferance is in possession wrongfully, he is not a trespasser because he entered lawfully."

Leaving aside that Martino was not a subtenant but an authorized occupant of the premises under a two-year residential lease that had not expired, making Xerox wholly inapposite, our courts have recognized for more than forty years that traditional principles of property law are a poor fit for modern residential tenancies. See, e.g., Trentacost v. Brussel, 82 N.J. 214, 225 (1980) (noting "[l]eases acquired the character of conveyances of real property when their primary function was to govern the relationship between

landowners and farmers"). Martino was not a tenant at sufferance and, indeed, never a tenant at all.

Celmar was Indian Orchard's tenant, and it recovered a judgment against him for the full amount of the rent due. It offered no lawful basis to recover the same sum from Martino, who was not a party to the lease and with whom it never contracted. As Martino's counsel argued at trial, there is no authority in New Jersey for an approved occupant of a residential tenancy becoming legally responsible for the rent on the tenant's default.

Reversed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION