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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2707-21**

**SOMERVILLE SENIOR
CITIZENS HOUSING INC.,**

Plaintiff-Respondent,

v.

**BETTY MACKENZIE and
SCOTT MACKENZIE,**

Defendants-Appellants.

Argued May 1, 2023 – Decided May 24, 2023

Before Judges Whipple and Mawla.

On appeal from the Superior Court of New Jersey,
Law Division, Somerset County, Docket No. L-0174-
20.

Gary A. Blaustein argued the cause for appellants.

Douglass F. Sclar argued the cause for respondent
(Sclar & Sclar LLC, attorneys; Douglass F. Sclar, on
the brief).

PER CURIAM

This appeal stems from a March 29, 2022 eviction from federally subsidized section-eight housing. Defendants Betty Mackenzie,¹ who was in her late nineties when this action began, and her son, Scott Mackenzie, age sixty-three (Betty and Scott, respectively) lived in plaintiff Somerville Senior Citizen Housing, Inc.'s 153-unit housing complex, under section eight regulations promulgated by the United States Bureau of Housing and Urban Development (HUD). Betty was a tenant in the building since 2005, subject to a written lease with an annual renewal provision. We remand for an explanation of Scott's liability for back rent, while affirming as to all other aspects.

HUD subsidizes the rent in plaintiff's building, rendering a tenant's share of rent typically capped at thirty percent of their annual income. However, if a tenant exceeds a certain income threshold, they are no longer eligible for a HUD subsidy, and must pay market rent. Attached to every lease is a HUD required certification; to retain their subsidy, tenants must annually certify information relating to income and occupancy. Failure to properly certify obligates a tenant to pay a HUD-approved market rate rent for the apartment.

¹ The court was advised prior to argument Betty Mackenzie is now deceased.

Betty's monthly income consisted of a \$1,459 social security payment as well as \$146.08 from a pension fund. She had no savings or other assets. Based on her finances, she qualified for the HUD subsidy.

Per the terms of Betty's lease, no other individuals were permitted to reside in the unit without the written approval of the landlord. Guests are only permitted to stay for two weeks. However, following a divorce, Scott began permanently residing with his mother in 2011. The arrangement was informal, and Scott is not listed on the lease.

Nevertheless, since 2011, when renewing her lease, Betty certified annually she was the sole occupant of the apartment, and her income fell within the range which qualifies for subsidization. As a result, Scott's income—which consists of social security and disability payments—was not counted toward the rent calculation.

For years, Scott's presence was acknowledged and permitted by plaintiff's then building director, Mrs. Parr. She was aware of his presence and allowed him to reside in the building. Parr accepted Scott because his presence benefitted Betty, who suffered two strokes in 2014 and has had other related health issues ever since. Betty testified: "All I remember is someone[,] . . . [Mrs. Parr,] told him my son was staying here with me because

he was my caregiver. And I couldn't afford a caregiver. And whoever the gentleman was she spoke with said to her, well that's no problem; I can . . . agree to that."

Scott provided extensive care for his mother, including helping her dress, use the bathroom, eat, and get in and out of bed. He accompanied her to medical providers and scheduled the appointments. Scott was "on duty" to care for his mother at all times. Scott had Betty's power of attorney and handled her finances. It is clear Betty relied on Scott in lieu of going to an assisted living facility.

Scott was permitted to stay without incident while Parr served as director—a period of approximately seven years. The current controversy started in 2018, when Parr's successor advised Scott he should apply to be added to the lease as a tenant to allow him to remain in the apartment, should Betty pass away.

To that end, Scott attempted to comply and submitted an application, which plaintiff referred to a third-party, LeasingDesk, for a background check. Scott initially failed that check when LeasingDesk found his "rental history unsatisfactory or insufficient." Plaintiff denied Scott's application; documents

indicated the decision to do so was initially based solely on "rental history and eviction" according to a printout of plaintiff's system.

Following this initial rejection, Scott followed up with LeasingDesk, who re-investigated his claim. The company replied:

LeasingDesk Screening has investigated your dispute and has notified the sources of the disputed information. Our investigation is now complete. The investigation . . . revealed that the disputed information is inaccurate, incomplete, or cannot be verified. LeasingDesk Screening has reported the findings [of] our investigation to [plaintiff] You may want to review the findings of the reinvestigation with [plaintiff] and we encourage you to do so.

. . . .

The eviction filings and judgments section of the [initial] report provided to [plaintiff] . . . was derived from public records from the [Middlesex County Courthouse Tower]. Based upon our investigation, we have determined that the record should be removed from your file.

Scott then sought a meeting with plaintiff's management to discuss this reversal. He was informed plaintiff's decision stood, despite the change of LeasingDesk's position. The minutes of plaintiff's meeting with Scott show that he presented the LeasingDesk communication, and plaintiff responded "the government says that [Scott] cannot reside here" because of a previous eviction. The minutes state:

[The LeasingDesk original investigation] shows he was evicted and that indicates . . . he could be a risk in paying rent due us. Scott brought with him no documentation or records from the initial eviction proceedings. He stated that he never signed a lease with [the] former landlord [and] that the landlord asked to be paid in cash[,] which Scott refused to do. Denise explained that in order to be served with eviction proceeding there had to be some type of a lease.

Scott did admit not paying rent because of various personal problems. When . . . asked [whether] this was one month or two or several, Scott admitted it was several months of nonpayment.

. . . .

[Plaintiff] asked for landlord[']s name and permission to contact landlord. Scott volunteered this information

. . . .

At this meeting, Scott disclosed he had been using his mother's address as his address for purposes of receiving his mail, social security payments, and driver's license. He was told to contact his lawyer and was instructed to vacate the premises. The minutes do not indicate whether Betty's arrangements for care or Scott's role as her caregiver were ever mentioned, discussed, or considered by plaintiff.

Subsequently, Betty declined to recertify, lost her HUD subsidy, and therefore was assessed market rent of \$1,315 per month. Despite this, she continued to pay only the previously subsidized rate.

In 2019, from July through August, plaintiff progressively served notices to cease, and to quit, followed by an eviction complaint against Betty and Scott. A trial followed in 2021, and the court heard testimony from Betty, Scott, and various employees of plaintiff.

On March 29, 2022, the court granted a judgment of possession to plaintiff, subject to defendant's posting of back rent, calculated at \$24,743, within thirty days. The court found Scott's status—prior to his application to be added to the lease in 2018—was best described as "don't ask, don't tell," but as a result of his formal application, this status could not continue.

Turning to issues of law, the court held Betty was subject to eviction under N.J.S.A. 2A:18-61.1(d) or (e), as a result of her failure to properly recertify and thus comply with the lease:

The undisputed testimony on the issue of rent due as a result of Betty's failure to report Scott's income on the annual recertifications from 2013 through 2020 resulted in an increase of Betty's rental obligation (based upon the market scale) which

totaled, at the time of trial, \$24,7[4]3.^[2] as of July 19, 2021. . . . [Plaintiff] therefore is entitled to a judgment of possession vis-a-vis Betty subject to the posting of the aforementioned sum.

The court also found Scott liable for this failure to pay back rent.

Addressing Scott's ongoing status, the court observed "Scott attempted to make [an] application as a tenant but could not meet the screening criteria [And] at no time was formally accepted by . . . [p]laintiff as a resident." The court also emphasized "at no time in the recertification process was Scott's income used to compute Betty's HUD subsidy." Therefore, the court found Scott was not a "functional co-tenant[.]" and his application to be added to the lease was properly denied.

Finally, the court addressed whether Scott might be considered Betty's "live-in aide," and as such, be permitted to remain living with her so long as she resided within the apartment. The court found Betty "unable to comply with [the] activity of daily living without assistance" and Scott performed numerous essential services for his mother. With this in mind, the court concluded, under various HUD guidelines concerning a family member

² Though the record contains little specific information pertaining as to how this exact amount was calculated, it appears to be back rent due only from the period of April 2019 to present, not the entirety of back rent potentially owed from the date Scott moved into the apartment.

moving into section-eight housing, that Scott would qualify as an aide if: 1) the family recertified their income; 2) Scott signed a release relinquishing future claims to the property in the event Betty quits residency; 3) Betty's physician confirmed the need for a live-in aide; and 4) Scott successfully completed plaintiff's screening process for temporary residency as a family member. The court issued various stays to provide Scott the opportunity to meet these criteria, in the event the back-rent was paid.

This appeal followed.

We utilize a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Gripenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). "The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). Issues of law, including the interpretation of contracts, statutes, and regulations are reviewed de novo. Serico v. Rothberg, 234 N.J. 168, 178 (2018).

Defendants first assert the trial court erred in finding Betty's certifications, which failed to mention Scott's residency, constituted fraud. Defendants admit the certifications were false in that they failed to disclose Scott's presence, but contend such statements were not "intentionally misstated" because plaintiff's employees were aware of Scott's residency and failed to address the discrepancy. Therefore, defendants submit there was no intent to mislead, and thus no fraud.

Multiple sources of law govern whether a tenant receiving a section-eight subsidy is removable. First, federal regulations³ specify termination of a tenancy in a subsidized project is prohibited except in the case of: "1) [m]aterial noncompliance with the rental agreement, [or] 2) [m]aterial failure to carry out obligations under any state landlord and tenant act" 24 C.F.R. § 247.3(a). "Material noncompliance" occurs in the event of:

- (1) One or more substantial violations of the rental agreement;
- (2) Repeated minor violations of the rental agreement that . . . [h]ave an adverse financial effect on the project;

³ Section-eight regulations, in some cases, can preempt state law. These preemptions deal with specific prohibitions on evicting victims of violence or other protected classes and are not applicable here.

(3) If the tenant: (i) [f]ails to supply on time all required information on the income and composition, or eligibility factors, of the tenant household, as provided in 24 C.F.R. part 5; or (ii) [k]nowingly provides incomplete or inaccurate information as required under these provisions; and

(4) Non-payment of rent or any other financial obligation due under the rental agreement (including any portion thereof) beyond any grace period permitted under State law, except that the payment of rent or any other financial obligation due under the rental agreement after the due date, but within the grace period permitted under State law, constitutes a minor violation.

[24 C.F.R. § 247.3(c).]

Alternatively, under our state's "Anti-Eviction Law," N.J.S.A. 2A:18-61.1, a residential tenant is removeable if one of the following grounds for good cause is established:

a. The person fails to pay rent due and owing under the lease

. . . .

d. The person has continued, after written notice to cease, to substantially violate or breach any of the landlord's rules and regulations governing [the] premises, provided such rules . . . are reasonable and have been accepted in writing by the tenant or made a part of the lease at the beginning of the term.

e. . . . The person has continued, after written notice to cease, to substantially violate or breach any of the covenants or agreements contained in the lease

[Ibid.]

The trial court ruled against Betty because she had violated these state statutes.

"The first issue before the [c]ourt is whether, as a result of her failure to properly recertify from 2013 to the time of the trial, Betty is subject to eviction under [the statute]. The answer is clearly yes."

Defendants submit that certain HUD guidelines, contained in an agency handbook,⁴ require fraudulent acts have a degree of intentionality not present on the facts of this case. Specifically, the HUD handbook requires "documentation showing . . . the tenant was made aware of program requirements and prohibitions . . . and . . . intentionally misstated or withheld some material information." This can be demonstrated by documenting repeated occurrences, or showing "the tenant omitted material facts that were known to the tenant (e.g. employment of self or other household members)" Admissions of illegal action or omission, such as "telling an employer or neighbor that an 'absent' spouse has moved in with the tenant" constitute

⁴ The handbook, titled "HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs (2013)," is addressed to "tenants, owners, managers," and various HUD personnel.

fraud. The handbook concludes "[w]hen fraud is present, the authorized course of action for owners to take is termination of tenancy." It cites 24 C.F.R. § 247.3, which provides that a tenant is removeable if they 1) don't pay rent owed; 2) knowingly breach a material term of the lease; or 3) knowingly misrepresent the status of their household to HUD. See also N.J.S.A. 2A:18-61.1(a),(d), and (e).

Even if we accept the argument defendants lacked the intention to commit fraud, the result does not change. Although we recognize this issue is moot as to Betty, the basis for eviction is nonpayment of rent, and Betty failed to pay the properly assessed market rate since declining to recertify with HUD from 2019 onward. This is the path the trial court chose in assessing her the back rent—approximately \$25,000 at that time, for about three years of deficient payments. This path did not necessarily establish Betty behaved fraudulently, just that she must pay the full amount of rent owed for the time period where she has failed to recertify. She was properly assessed the HUD approved market rate, as per the lease, from 2019 onward.

Scott contends it was clear and reversible error for the trial judge to accept his rejection by plaintiff as valid. We are unpersuaded.

Rejecting Scott on the basis of the later withdrawn LeasingDesk report may seem unfair, however, the ultimate decision was not illegal. This is because Scott confirmed, during a subsequent meeting with plaintiff, that he had failed to pay rent to a previous landlord for a period of several months and had been to court for an eviction-related matter. Plaintiff could, therefore, reasonably conclude renting to Scott presented a risk of nonpayment.

Scott's remaining arguments are moot. Relying on Maglies v. Estate of Guy, 193 N.J. 108 (2007), defendants submit that Scott was a de-facto tenant, despite not being listed on the lease.

The facts of Maglies are highly relevant: four years prior to her death, a section eight tenant's (Guy's) adult daughter moved into her apartment with her. Id. at 113. The daughter had a mental disability for which she received social security benefits. Ibid. Following her relocation, Guy included her daughter on a new lease as a "member of the household" but not as an independent tenant. Ibid. The daughter's income was used to compute the HUD subsidy. Ibid. Years later, when Guy died, her daughter applied for subsidized housing and was approved, however, the apartment complex refused to rent the apartment she was already residing in to her. Id. at 114.

Our Supreme Court held that because Guy's daughter lived continuously for years in the apartment, with the landlord's consent, and bore a "substantial portion of responsibility for the rental obligation," she was entitled to status as a tenant despite not being formally included as such on the lease. Id. at 112. The court held "a functional co-tenant—one who can show that she has been continuously in residence; that she has been a substantial contributor toward satisfaction of the tenancy's financial obligations; and that her contribution has been acknowledged and acquiesced to by her landlord—is entitled to invoke the protections of the Anti-Eviction Act" Id. at 126.

Here, as the trial court observed, "the facts are different." Scott attempted to apply as a tenant but could not meet the screening criteria. Scott never contributed to the rent. And obviously, Scott was not included on the lease, even as a "member of the household." Therefore, the protection of Maglies does not extend to him. Id. at 126.


Finally, Scott argues he qualified as a live-in aide in 2018, and therefore should have been considered as such prior to the filing of this eviction action. Indeed, the court found Scott performed essential day-to-day services for Betty, and she was unable to live by herself without his assistance. To that end, the court held Scott "would be entitled to reside in the apartment" as an

adult child live-in aide, provided he first: 1) recertified the family's income; 2) signed a release of any future claim to the apartment; 3) verified the need for a live-in aide from Betty's physician; and 4) completed the screening process as a family member. The court also found Scott "would meet this screening criteria" to be considered a live-in aide, and directed the plaintiff to accept him as such, rather than a full tenant, in the event the back rent was paid. Unfortunately, these provisions are no longer applicable, and in any case could not have established Scott's right to remain in the apartment after Betty passed.

We conclude Scott was not a de-facto tenant, nor could he ever be properly considered Betty's live-in aide. The trial court, however, entered a judgment of possession for failure to pay rent against Scott, as well as Betty, in the amount of \$24,763. It is unclear on what basis it derived this liability—Scott was neither in privity with plaintiff, nor was he a de-facto tenant. Therefore, we remand for an explanation of the basis of Scott's liability for the rent, with instructions to vacate if necessary. In all other aspects the judgment is affirmed.

Affirmed in part, remanded in part. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION