

FIRST DIVISION
FILED: June 18, 2012

No. 1-11-1590

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COREY BYINGTON,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellant,)	COOK COUNTY.
)	
v.)	No. 10 CH 14469
)	
LEASE AN APARTMENT, INC.,)	HONORABLE
)	MARY L. MIKVA,
Defendant-Appellee.)	JUDGE PRESIDING.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The dismissal of the plaintiff's complaint is affirmed.

¶ 2 The plaintiff, Corey Byington, brought this action against the defendant, Lease An Apartment, Inc., asserting statutory and common-law claims based on the defendant's failure to pay interest on and return a security deposit paid by him pursuant to a residential lease. The circuit court dismissed the complaint under section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2008)), and the plaintiff has appealed. For the reasons that follow, we affirm.

No. 1-11-1590

¶ 3 The complaint, motion to dismiss, supporting documents, and depositions establish the following relevant facts. On July 3, 2007, the plaintiff signed a lease for the rental of an apartment, which was managed by the defendant and was located in a multi-unit complex in Joliet, Illinois. The lease provided that it "shall automatically renew and continue thereafter from month to month" until either party gives 30 days' written notice of termination. It further provided that the monthly rent of \$569 "is due and is to be paid in advance of the first day of each month" and that the "rent will be increased" by \$5 for every day it is past due. In addition, the lease stated that the tenant "must have all carpeting professionally steam cleaned within 30 [days] before vacating premises." The terms of the lease required the plaintiff to pay \$29 per month for water service and also provided that the security deposit would be refunded upon termination of the lease, "providing Lessee abides by all terms and considerations herein."

¶ 4 The plaintiff moved into the apartment on July 14, 2007, and paid a security deposit in the amount of \$569. Upon the expiration of the 12-month term of the lease, the plaintiff continued to occupy the premises under a month-to-month lease. The plaintiff's rent was increased to \$598 in September 2008. The plaintiff provided timely notice of termination and subsequently vacated the apartment on October 31, 2009.

¶ 5 Before moving out, the plaintiff "used a steam cleaner to clean the apartment" and determined that "there were no stains on the carpet." The apartment, including the carpet, "was thoroughly cleaned," and though the plaintiff twice requested a "walk through" with the defendant, no such inspection was done before he moved out. Approximately two weeks after he vacated the apartment, the plaintiff received a check from the defendant in the amount of \$403, representing a partial refund

No. 1-11-1590

of his security deposit. The letter that accompanied the check explained that the defendant had deducted \$50 from the plaintiff's security deposit for cleaning of the apartment, \$60 for carpet cleaning, \$29 for a water-bill arrearage, and \$27 due to a "rent shortage" in January 2009.

¶ 6 Thereafter, the plaintiff initiated this action by filing a four-count complaint.¹ Counts I and II sought recovery under the Security Deposit Interest Act (765 ILCS 715/1 *et seq.* (West 2008)) and the Security Deposit Return Act (765 ILCS 710/1 *et seq.* (West 2008)), respectively, and were premised on the defendant's failure to pay interest on and return the plaintiff's security deposit. Count III asserted a claim for breach of contract and alleged that the defendant's failure to pay interest on and failure to return the plaintiff's security deposit violated the terms of the lease, which incorporated the statutory obligations of a landlord in Illinois. Count IV sought recovery under the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2008)). This claim also was predicated on the defendant's failure to pay interest on and failure to return the plaintiff's security deposit, as well as allegations that the defendant falsely represented that it did not have to pay interest on security deposits and failed to disclose that it had a policy and practice of retaining security deposits.

¶ 7 The plaintiff's complaint particularly alleged that he "was not in default *** at the end of his lease or when he vacated the premises," but the defendant failed to pay interest on his security deposit. In addition, the complaint alleged that the deductions of \$50 for apartment cleaning and of

¹ This litigation was brought as a class action and asserted claims on behalf of the plaintiff and other similarly-situated persons, but the complaint was dismissed prior to disposition of the motion to certify the class.

No. 1-11-1590

\$60 for carpet cleaning from his security deposit were for "ordinary cleaning, rather than damage to the leased property" and that the defendant had failed to provide receipts for those charges.

¶ 8 The defendant filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)), asserting that the plaintiff's claim under the Security Deposit Interest Act failed because he was in default of the lease due to a rent arrearage. The motion also asserted that the claim under the Security Deposit Return Act failed because receipts were not required where the cleaning services had been performed by the defendant's employees. The defendant's motion was supported by the affidavit of Robert A. Smith, the president of the defendant, who attested that the record of the plaintiff's rent payments, prepared in the ordinary course of the defendant's business, reflected that the plaintiff was tardy in paying his rent and failed to pay the additional rent due under the lease for December 2007, for April, June, September, and October 2008, and for January, February, March, May, June, and August 2009. Smith's affidavit also attested that "[a]ll of the cleaning done for the plaintiff's apartment was reasonable and necessary" and that the amounts deducted for those services were "reasonable and necessary for the work that was performed by the defendant's employees." In addition, Smith attested that no receipts were provided to the plaintiff because the defendant's employees had done all of the work on his apartment.

¶ 9 The plaintiff opposed the motion to dismiss, arguing that he was not in default and that the defenses raised by the defendant did not constitute affirmative matter, but controverted the well-pled facts in the complaint. He also refuted the defendant's argument that it was not required to provide any receipts because it had cleaned the carpets itself, and he asserted that the cleaning services performed by the defendant either were not performed or were not necessary and that the

No. 1-11-1590

itemizations for those charges were submitted in bad faith. The plaintiff further contended that the record of his rent payments, relied upon by the defendant, was unreliable and should not be considered in resolving the motion. In support of his response, the plaintiff filed an affidavit, which attested that he had "used a steam cleaner to clean the apartment" and that "there were no stains on the carpet."

¶ 10 In reply, the defendant relied on photocopies of the plaintiff's rent checks, as well as the deposition testimony and a supplemental affidavit by Smith, to support its assertion that the plaintiff was in default of the lease terms because he was habitually late with in paying his rent and frequently did not pay the additional rent of \$5 per day. The defendant also relied on Smith's deposition testimony and the "turn sheet" checklist, documenting the inspection of the plaintiff's apartment, to support its contention that the itemization of deductions for cleaning the plaintiff's apartment and carpet was not in bad faith. In addition, the defendant contended that the breach-of-contract and consumer-fraud claims failed because they were predicated on the same underlying facts as the security-deposit claims.

¶ 11 The circuit court granted the defendant's motion to dismiss the complaint in its entirety, finding that the plaintiff was in default of the lease provisions. The court also found that the defendant was not obligated to provide receipts for the cleaning services which were performed by its employees. In addition, the court determined that the itemization of the cleaning-charge deductions was not in bad faith, particularly where the lease required that the carpet be "professionally steam cleaned." Finally, the court found that the evidence presented supported the conclusion that the cleaning charges were reasonable. This appeal followed.

No. 1-11-1590

¶ 12 On appeal, the plaintiff initially argues that the circuit court erred in dismissing his complaint where the defendant's section 2-619 motion was procedurally improper because it failed to raise any affirmative matter. We cannot agree.

¶ 13 In reviewing a dismissal under section 2-619, the court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732 (1993). Though all well-pled facts in the plaintiff's complaint are accepted as true (*Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 413, 808 N.E.2d 957 (2004)), we do not accept conclusions of law or conclusions of fact that are not supported by allegations of specific fact (*Merritt v. Randall Painting Co.*, 314 Ill. App. 3d 556, 559, 732 N.E.2d 116 (2000)). An appeal from a dismissal under section 2-619 is reviewed *de novo*. *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 14 In general, section 2-619 of the Code provides a " 'means of obtaining * * * a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact.' " *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 115 (quoting Ill. Ann. Stat., ch. 110, par. 2-619 (now codified at 735 ILCS 5/2-619), Historical & Practice Notes, at 662 (Smith-Hurd 1983), and citing *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1071, 603 N.E.2d 1215 (1992)). Subsection (a)(9) of that statute allows dismissal where the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2008).

¶ 15 Where the "affirmative matter" raised is not apparent on the face of the complaint, the motion

No. 1-11-1590

must be supported by affidavit or other evidentiary material. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The phrase "affirmative matter" includes any defense other than a contradiction of the essential allegations of the plaintiff's cause of action. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 115 (citing *Barber-Colman Co.*, 236 Ill. App. 3d at 1073). Though the well-pled facts that form the basis of the claim are deemed to be admitted, a defendant does not admit the truth of any allegations in the plaintiff's complaint that may touch on the affirmative matters raised in the section 2-619 motion to dismiss. *Barber-Colman Co.*, 236 Ill. App. 3d at 1073-74. A defendant who presents affidavits or other evidentiary matter supporting the asserted defense satisfies the initial burden of going forward on the motion, and the burden then shifts to the plaintiff. See *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The plaintiff is obligated to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 16 If the plaintiff does not respond to the defendant's affidavits, then the assertions contained therein are to be accepted as true for purposes of the motion. *Barber-Colman Co.*, 236 Ill. App. 3d at 1075. However, if the plaintiff responds with affidavits or other proof that deny the facts alleged by the defendant or establish facts obviating the grounds of the defense, the court may weigh the evidence and decide the motion based upon the affidavits and evidence, as long as a jury demand has not been timely filed. See *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892, 823 N.E.2d 1062 (2005) (citing 4 R. Michael, Illinois Practice § 38.3, at 224 (1989)); see also 735 ILCS 5/2-619(c) (West 2008). If, after considering the pleadings and affidavits, the trial judge finds that

No. 1-11-1590

the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed. *Kedzie and 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 17 In this case, the plaintiff's complaint alleged that he "was not in default" when he vacated the apartment. This legal conclusion is not supported by any allegations of specific fact. The plaintiff's affidavit did not controvert the defendant's contention that he was habitually late in paying his rent and frequently failed to pay the additional rent of \$5 per day, which was supported by the copies of the plaintiff's rent checks and the deposition testimony and affidavits of Smith, which explained the history and record of his rent payments. In addition, though the plaintiff's affidavit attested that he had "used a steam cleaner to clean the apartment" and that "there were no stains on the carpet," these assertions did not contradict the defendant's contention that the plaintiff had failed to comply with the lease provision requiring the plaintiff to "have all carpeting professionally steam cleaned within 30 [days] before vacating the premises." Because the defendant raised affirmative matter that was not contradicted by the plaintiff's affidavit, we find no procedural error in the circuit court's consideration of the defendant's section 2-619 motion to dismiss.

¶ 18 The plaintiff also contends that his claim for interest on his security deposit was improperly dismissed. This argument is without merit.

¶ 19 The Security Deposit Interest Act mandates that a landlord pay interest on a security deposit "except when the lessee is in default under the terms of the lease." 765 ILCS 715/1, 2 (West 2008). The term "default" is defined as "[t]he omission or failure to perform a legal or contractual duty." Black's Law Dictionary, 449 (8th ed. 2004).

¶ 20 Here, it is undisputed that the plaintiff's lease obligated him to pay his rent by the first day

No. 1-11-1590

of each month and to pay additional rent of \$5 for every day that his rent was late. The lease also provided that, upon expiration, its terms and conditions "shall automatically renew and continue thereafter from month to month" until terminated by either party. In support of its motion to dismiss, the defendant presented the affidavits and deposition testimony of Smith, as well as photocopies of the plaintiff's rent checks. These evidentiary materials established that, for several months during his tenancy, the plaintiff paid his rent late and failed to pay the additional rent due for late payments. This evidence was not controverted by the plaintiff. Accordingly, the circuit court properly determined that he was in default under the lease, and the defendant was not obligated to pay interest on his security deposit.

¶ 21 In reaching this conclusion, we reject the plaintiff's assertion that, by accepting his late rent payments in an amount that was less than was owed, the defendant waived its right to collect the full amount of rent to which it was entitled under the lease. See *Pros Corporate Management Services, Inc. v. Ashley S. Rose Ltd.*, 228 Ill. App. 3d 573, 582, 592 N.E.2d 609 (1992) (holding that the landlord did not waive his right to collect past-due rents by accepting rental payments for less than the full amount due). We also reject the plaintiff's contention that the circuit court's decision must be reversed because the record of his rent payments and the copies of his rent checks were not admissible. The record affirmatively demonstrates that the circuit court did not consider the rent-payment record, but relied only on the photocopies of the plaintiff's rent checks, which bore the date on which he had tendered his rent payments. In so doing, the court observed that the copies of the plaintiff's checks were admissible because they constituted an admission of a party. See *People v. Cruz*, 162 Ill. 2d 314, 374-75, 643 N.E.2d 636 (1994) (holding that admissions of a party are

No. 1-11-1590

admissible as an exception to the hearsay rule).

¶ 22 We next address the plaintiff's argument that the circuit court erred in dismissing his claim under the Security Deposit Return Act. We disagree.

¶ 23 The Security Deposit Return Act provides, in relevant part, as follows:

"A lessor of residential real property *** may not withhold any part of [a security] deposit as compensation for property damage unless he has *** furnished to the lessee *** an itemized statement of the damage allegedly caused to the premises and the estimated or actual cost for repairing or replacing each item on that statement, attaching the paid receipts, or copies thereof, for the repair or replacement. If the lessor utilizes his or her own labor to repair any damage caused by the lessee, the lessor may include the reasonable cost of his or her labor to repair such damage. 765 ILCS 710/1 (West 2008).

The statute further provides that the landlord is liable to pay the tenant twice the amount of the security deposit, plus court costs and reasonable attorney's fees, if it has "supplied such statement in bad faith." 765 ILCS 710/1 (West 2008).

¶ 24 In this case, the language of the statute and established case law demonstrate that the defendant was not required to provide the plaintiff with receipts for the cleaning of his apartment and carpeting because all of the work was performed by its own employees. See *Evans v. International Village Apartments*, 165 Ill. App. 3d 1048, 1051, 520 N.E.2d 919 (1988) (holding that, where a landlord uses his own labor to clean or repair the leased premises, he is not obligated to provide receipts, since no such receipts exist).

No. 1-11-1590

¶ 25 In addition, the plaintiff acknowledges that he timely received an itemized statement of the deductions from his security deposit and a check for the remaining amount due on that deposit, as required by the statute. However, he contends on appeal, as he did in his response to the motion to dismiss, that the itemization was in bad faith because the cleaning of the apartment and of the carpet either was not performed or was not necessary. This contention is based on the allegation that the apartment "was thoroughly cleaned" and on his attestation that he had "used a steam cleaner to clean the apartment" and determined that "there were no stains on the carpet." He also asserts that the amount of the cleaning charges was unreasonable and arbitrary because the defendant did not provide detailed records establishing the amount of time and the cost of the supplies required to perform those cleaning services.

¶ 26 Yet, the record demonstrates that the lease specifically required that the carpet be "professionally steam cleaned," and the plaintiff did not assert that this was done. Moreover, Smith testified at his deposition that the "turn sheet" checklist reflected that the plaintiff's apartment was inspected by Alfredo Correa, a maintenance worker for the defendant, and that Correa indicated the apartment required a "medium" amount of cleaning, which was over and above that required for normal wear and tear. This included extra cleaning of the stove and refrigerator, replacement of light bulbs, repair of the bathtub grout, and spot painting. According to Smith, the cleaning of the plaintiff's apartment and carpet would have involved two or three days' work.

¶ 27 Smith further testified that he personally monitored the work of his employees and that the carpeting in every apartment must be professionally steam cleaned if the tenant does not do so before moving out. Smith stated that Correa used a large industrial steam cleaner, which was owned by the

No. 1-11-1590

defendant, to clean the carpet in the plaintiff's apartment. According to Smith, that task would have taken between two and three hours, and Correa earned \$14 per hour. Based on these factors, plus the cost of the machine and supplies, Smith testified that a charge of \$60 to steam clean the carpet was fair and reasonable.

¶ 28 As noted above, the Security Deposit Return Act specifically provides that if a landlord uses his own labor to repair any damage caused by the lessee, the landlord "may include the reasonable cost of his or her labor to repair such damage." Smith's deposition testimony and the "turn sheet" checklist constituted evidence of the reasonableness of the cleaning charges. Moreover, although the plaintiff alleged that the cleaning charges deducted from the security deposit were for "ordinary cleaning," this allegation did not provide the factual basis for a claim of bad faith under the Security Deposit Return Act where no such claim was asserted in the complaint. The assertion that the defendant had provided the itemization in bad faith was raised for the first time in the plaintiff's response to the motion to dismiss.

¶ 29 Contrary to the plaintiff's assertion, we find no error in the circuit court's determination that the evidence presented by the defendant supported the conclusion that the cleaning charges were reasonable and that the itemization of the cleaning-charge deductions was not in bad faith. Consequently, dismissal of count 2 was proper.

¶ 30 Finally, we agree with the circuit court's finding that the plaintiff's breach-of-contract and consumer-fraud claims were subject to dismissal because they are premised on the same facts underlying the claims for interest and return of his security deposit. Though the consumer-fraud claim is also based on broad allegations that the defendant falsely represented its obligation to pay

No. 1-11-1590

interest on security deposits and failed to disclose that it had a policy and practice of retaining security deposits, these general assertions are not predicated on any specific allegations of fact, and no evidence to support these conclusions was presented.

¶ 31 Based on our review of the record, we find that the circuit court did not err in dismissing the plaintiff's complaint. Accordingly, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.