2012 IL App (1st) 112245-U

THIRD DIVISION
September 26, 2012

No. 1-11-2245



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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| SWEDISH COVENANT HOSPITAL,<br><br>Plaintiff-Appellant and Counterdefendant-Appellee,<br><br>v.<br><br>ARKADIY LUKOVENKOV,<br><br>Defendant-Appellee and Counterplaintiff-Appellant<br><br>(Mathew George; Isaac Plamoote, and Devon Bank & Trust, Trust No. 5960-8,<br><br>Defendants). | ) | Appeal from the Circuit Court of Cook County<br><br>No. 06 L 010280<br>cons. with 09 M1 723934<br><br>Honorable Allen S. Goldberg, Judge Presiding. |

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JUSTICE STERBA delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

**ORDER**

*Held*: The trial court's finding against plaintiff on its claim for breach of lease was not against the manifest weight of the evidence where plaintiff did not prove the breach caused its damages. Nor was it error for the court to find in favor of plaintiff on defendant's complaint for the cost of repair of the heating, ventilation

and air-conditioning units where there was no evidence the units were in disrepair at the time plaintiff left the premises. The court did, however, err in finding that plaintiff was constructively evicted from the premises and that defendant was therefore not entitled to recover on his claim for unpaid rent.

¶ 1 Plaintiff-appellant and counterdefendant-appellee Swedish Covenant Hospital (Swedish) filed suit against its landlord, defendant-appellee and counterplaintiff-appellant Arkadiy Lukovenkov, for damages resulting from Lukovenkov's alleged failure to replace the roof of the leased premises and keep it in good repair, in accordance with the terms of the lease. Lukovenkov filed a counterclaim alleging that Swedish breached the lease by deviating from its approved build-out plans. Lukovenkov also filed his own complaint seeking past due rent and costs of the replacement and repair of tenant-installed heating, ventilation and air-conditioning (HVAC) units. Following a bench trial in which the complaints were consolidated, the court found in favor of Lukovenkov with respect to Swedish's complaint, and in favor of Swedish with respect to Lukovenkov's counterclaim and complaint. On appeal, both Lukovenkov and Swedish contend that the trial court's decision was against the manifest weight of the evidence. For the following reasons, we affirm in part, and reverse in part and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 On September 13, 1999, Swedish entered into a lease of property located at 3452-54 West Devon Avenue with defendants Mathew George, Isaac Plamoote, and Devon Bank & Trust, who were the original landlords. Lukovenkov purchased the property from the original landlords in November 1999 and assumed their responsibilities under the lease, which ran from October 12, 1999 through September 30, 2004, with the option to renew for an additional two five-year terms. Swedish exercised this renewal option for one additional five-year term beginning

October 1, 2004, and ending September 30, 2009.

¶ 4 In a complaint filed on September 29, 2006, Swedish alleged the violation of paragraphs 30 and 31 of the rider to the lease. Paragraph 30 provides that the lessor is responsible for "all repairs, structural and otherwise, to the Premises," and paragraph 31 obligates the lessor to replace the roof at the premises with a "new rubberize roof to be installed not later than September 30, 1999." Swedish maintained that Lukovenkov had failed to replace the roof at the property or otherwise keep it in good repair, which caused leaks that increased in severity from 2004 to 2009. The increase in the frequency and volume of leaks prompted Swedish's subtenant, Chicagoland Retinal Consultants (Chicagoland Retinal), to seek a 50% rent reduction, which Swedish granted from May 1, 2007 to May 1, 2009. At that point, Chicagoland Retinal informed Swedish that it was vacating the property due to the leaks and ceased paying rent. In turn, Swedish discontinued paying rent to Lukovenkov for the remaining five months of the lease.

¶ 5 In response to Swedish's complaint, Lukovenkov filed a counterclaim alleging that Swedish breached paragraph 12(B) of the rider to the lease, which prohibits the lessee from making holes in the roof to support any additions or alterations to the premises, with the exception of alterations made in connection with the lessee's previously approved build-out plans. Specifically, Lukovenkov contended that Swedish improperly installed two HVAC units on the roof when the build-out plans indicated that only one HVAC unit would be installed. Lukovenkov also filed his own suit against Swedish for unpaid rent and for the cost to repair and replace the damaged HVAC units, which was Swedish's responsibility pursuant to paragraph 11(I) of the rider to the lease. The complaints were consolidated and the case proceeded to trial.

¶ 6 At trial, Gary Krugel, the senior vice-president of Swedish, and the property manager of all its properties, including the property that is the subject of this litigation, testified for Swedish. Krugel testified that he was unaware of the leaks at the unit when Swedish renewed its lease in 2004, but became aware of the problem prior to the time the sublease with Chicagoland Retinal was signed on July 25, 2005. However, he could not remember whether or not Chicagoland Retinal was informed of the leaks prior to signing the sublease. After receiving continuous complaints about the leaks from Chicagoland Retinal, Swedish, through its attorneys, contacted Lukovenkov to make him aware of the leak problem in the summer of 2006. Lukovenkov, also through his attorney, responded that he believed the leaks were due to the improper installation of the HVAC unit and agreed to make repairs to the roof only if Swedish would pay for those repairs. According to Krugel, no repairs were made and the leaks continued. As a result, Swedish agreed to give Chicagoland Retinal a 50% rent reduction beginning on May 1, 2007 and continuing until the leaks stopped. When the leaks did not stop, Chicagoland Retinal moved out prior to the end of the sublease on May 1, 2009, and Swedish ceased paying rent because it did not have another subtenant. On cross-examination, Krugel stated that the premises were fit for use as a doctor's office, and that Swedish had no problems operating a doctor's office from the unit.

¶ 7 Eileen Clough of Chicagoland Retinal confirmed that leaks occurred in the subject unit soon after they moved in, and further testified that the leaks presented an inconvenience, as patients and electrical equipment had to be moved away from locations where they occurred. She went on to diagram where the leaks initially appeared in the unit in 2005, and testified that

these leaks "escalated" and spread to other portions of the unit throughout the course of Chicagoland Retinal's occupancy. Clough stated that the leaks were the sole reason Chicagoland Retinal vacated the unit early. When Chicagoland Retinal left in May 2009, the air-conditioning and heating was working.

¶ 8 Another tenant of the property since May 2004, Lawrence Feld, testified that his unit also experienced leaks for several years. He informed Lukovenkov of these leaks and eventually they stopped. Later, Lukovenkov testified that Feld's leaks stemmed from a sealing pipe issue with the HVAC system above Feld's unit.

¶ 9 Several witnesses on both sides testified regarding the cause of the leaks. Saliba Kokaly, the associate vice-president of facilities and construction at Swedish, testified that he had heard complaints of leaks as early as the summer of 2000, but they became worse after April 2007. In April 2007, he inspected the property and found the roof in poor condition. Specifically, he saw standing water on the roof and noted that there were four layers of roofing materials on the property. Because the leaks were occurring below the HVAC units, he also inspected those and found that they were tightly sealed and properly installed. As an explanation for why the leaks would occur in the area of the HVAC units, he testified that when a roof has several layers, water entering in one area may travel to another before infiltrating the property. Ultimately, he concluded that the roof was the source of leaks. On cross-examination, it was revealed that Kokaly was not certified or licensed with regard to roof or HVAC installation.

¶ 10 As Kokaly was involved in the build-out of the property, he also testified to modifications from the original plans. He stated that the original landlords had approved the initial drawing,

which indicated that only one ten-ton HVAC unit would be installed. Later, a second drawing was prepared which reflected that two five-ton HVAC units would be installed. While there was no written confirmation that this second drawing had been approved by Lukovenkov, Kokaly testified that as a matter of course, approval would have been requested prior to the installation.

¶ 11 Kevin Hotter, an HVAC technician who serviced the HVAC units at the subject property four or five times, also testified to the source of the leaks. He testified that he was called to determine the source of a water leak in May 2007. At that time, he did not find any evidence of leaks coming from the HVAC units or notice any pooling around the units. However, he could not determine whether the base for the HVAC unit was installed correctly. He believed that leaks were occurring below an exhaust fan in the roof, which could have been a result of improper flashing.

¶ 12 Swedish also called Thomas McKeown, a project manager with Jones & Cleary Roofing, to testify to the cause of the leaks. McKeown inspected the roof of the subject property in September 2008. He found that the roof had five to six layers, which was well in excess of the customary one to two layers. The top layer of the roof was composed of a material known as modified bitumen. McKeown explicitly testified that application of this material is not equivalent to a roof replacement in the industry. He went on to state that the re-roofing process was poorly performed, in that the seams were not properly sealed, there was no evidence of torch welding, and no flashing. As a result of this poor installation, he found water infiltration in the seams. He testified that water between the roof layers could migrate through the roof and leak through any vertical penetration in the roof deck, such as HVAC ductwork. He determined that

the number of layers in the roof and the improper installation of the modified bitumen caused the leaks. McKeown specifically stated that the leaks would occur even if the HVAC units were not present.

¶ 13 Dwight Rogers, the roofer who had installed the rubber roofing material on the subject property in 1999, testified for Lukovenkov. Rogers testified that he torched down the new material without removing the existing roofs. He also stated that he used plastic cement to seal certain areas of the roof. Rogers maintained that he never received a call complaining of leaks and that Lukovenkov had not requested that he honor the 10-year warranty on his work.

¶ 14 Lukovenkov then called John Chiattello, a roofer for 20 years, and William Decker, a licensed and certified home inspector, to give their opinions regarding the cause of the leaks. Chiattello inspected the roof in March 2007 pursuant to a request by Swedish. He found a leak around the north HVAC unit, and testified that it looked as though water was coming into the building through the HVAC ductwork, or perhaps dripping from the curb on which the HVAC sat. Chiattello also noted that the legs on the base of the HVAC unit were penetrating into the roof. According to Chiattello, this was not a result of improper installation, but of deterioration over time. Because Chiattello did not do HVAC work, he recommended that if leaks continued, an HVAC serviceperson should be called to investigate.

¶ 15 Decker inspected the property two years after Chiattello, on June 17, 2009, pursuant to a request by Lukovenkov. He noted that the two main areas where the leaks were occurring inside the building corresponded directly to where the north HVAC unit and the exhaust fan were located on the roof. Decker testified that neither the exhaust fan nor the HVAC unit had been

properly installed. Specifically, he noted that these appliances were not properly flashed. Decker defined "flashing" as a membrane that is put on the roof in any area where there is penetration. On cross-examination, he acknowledged that there was non-professional patching work on the roof which could also be the site of water infiltration. Further, he testified that water under the roof membrane could travel, and a leak could occur away from the source of the water infiltration. Nevertheless, he concluded that it appeared the improper installation and flashing of the HVAC unit and the exhaust fan caused the leaks in the subject unit.

¶ 16 Lukovenkov also called as witnesses Glenn Harrison and Simon Elkind, both of whom had inspected the HVAC units at his request. Harrison, a commercial service technician at Shavitz Heating & Air Conditioning, inspected the north HVAC unit on July 9, 2009. He found that the Schrader core and the evaporator coil were leaking and recommended summer maintenance. He did not see any water leaking from the unit. Harrison concluded that although the unit was functioning and cooling, it was only a matter of time before the leaks would recur. Elkind, the owner of Simon's Heating and Air Conditioning Company, was called to inspect the units at the end of September 2009. He determined that the north unit needed to be replaced, as the Schrader core was leaking, and no gas or refrigerant was inside. Additionally, he found that the south unit needed a new compressor. Both Elkind and Harrison testified that the units were approaching the end of their useful life.

¶ 17 Finally, Lukovenkov testified on his own behalf. He began by testifying that the roof of the subject property encompassed 9,000 square feet. The property contained six units occupied by five tenants. Of those tenants, only Swedish and Feld had complained of leaks. When

Lukovenkov inspected the roof in September 1999, he noted that it was brand new and observed the roofer performing the torch treatment. Lukovenkov testified that the first reported leaks were in the spring of 2000 by Swedish's officer manager. That summer, he went to the property and saw the spots leaking water. He had a conversation with Rogers, and as a result of the conversation conveyed to an employee of Swedish that the leaks were not his responsibility as they were caused by the HVAC installation. Nevertheless, he attempted sporadic repairs and patching between 2000 and 2004. At that time, he ceased making repairs, though he continued to receive complaints from both Swedish and Chicagoland Retinal. Finally, he testified that he was not informed of the change in the build-out plans reflecting the installation of two HVAC units.

¶ 18 After hearing closing arguments, the trial court found in favor of Lukovenkov with respect to Swedish's complaint, and in favor of Swedish with respect to Lukovenkov's counterclaim and complaint. The trial court found Lukovenkov breached the lease by failing to replace the roof in accordance with paragraph 30 of the rider to the lease, and Swedish breached paragraph 12(B) of the rider to the lease when it installed two HVAC units instead of the one that had been approved by the original landlords, and its installation of the units was improperly performed. However, the court did not believe either side had established that the other's breaches caused the leaks, and as such, found against both parties. Finally, the court held that Lukovenkov had failed to prove by a preponderance of the evidence that he was entitled to recovery on his complaint. Both parties timely filed their respective appeals.

¶ 19 ANALYSIS

¶ 20 A. Swedish's Appeal Against Lukovenkov

¶ 21 On appeal, Swedish argues that the trial court erred in finding that Lukovenkov was not liable for damages as a result of his failure to replace and repair the roof. A trial court's findings after a bench trial will not be reversed unless they are against the manifest weight of the evidence. *First Baptist Church v. Toll Highway Authority*, 301 Ill. App. 3d 533, 542 (1998). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 53 (2009). "It will not suffice to show that the record will support a contrary decision; rather, if the record contains any evidence to support the trial court's judgment, the judgment should be affirmed." *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill. 2d 471, 488 (2004).

¶ 22 We begin by noting that a lease is a type of contract and is generally governed by the rules of contract law. *Midland Management Co. v. Helgason*, 158 Ill. 2d 98, 103 (1994). In order to recover for a breach of contract, a party must show the existence of a valid and enforceable contract; performance by the plaintiff; breach of contract by the defendant; and resultant injury to the plaintiff. *Zirp-Bunham, LLC v. E. Terrell Associates, Inc.*, 356 Ill. App. 3d 590, 600 (2005). Here, there is no dispute as to the validity and enforceability of the lease. Further, the trial court explicitly found that Lukovenkov breached the lease by failing to replace the roof, a finding that is not challenged on appeal. However, the trial court was not persuaded that the failure to replace the roof was the cause of the leaks. Upon review, we do not believe this finding was against the manifest weight of the evidence.

¶ 23 As this is an ordinary civil case, Swedish was required to prove all the elements of its case, including causation, by a preponderance of the evidence. See *Avery v. State Farm Mutual*

*Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005). A proposition proved by a preponderance is one that is more probably true than not true.[1] *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 592 (2008). Swedish put on two witnesses who testified that the roof was in poor condition – Saliba Kokaly, an employee of Swedish, and Thomas McKeown, a commercial roofer. Both witnesses testified that the roof was the cause of the leaks, though Kokaly admitted he was not licensed with respect to roof installation. McKeown and Kokaly explained that the excessive layering of the roof facilitated the migration of water through the roof, which resulted in water infiltrating the property where vertical roof penetrations, such as HVAC units, were located. Other witnesses, including William Decker, a certified and licensed home inspector, provided contrary opinions as to the causes of the leaks. Decker testified that the improper installation of the north HVAC unit caused the leaks, and Kevin Hotter, an HVAC technician, opined that the improper flashing around the exhaust fan was the cause of the leaks. This evidence was bolstered by the fact that the leaks occurred directly below where the HVAC unit and exhaust fan were located on the roof. Further undercutting Swedish's claim that the failure to replace the roof caused the leaks was the fact that although the roof measured approximately 9,000 square feet, the leaks were largely confined to Swedish's two units. In light of this conflicting evidence, we cannot say that it was against the manifest weight of the evidence for the trial court to find that Swedish did not prove, by a

[1] The trial court erroneously defined the preponderance of the evidence standard as requiring "more evidence than not to establish [the] position." As neither party brought this misstatement to our attention, we conclude that the court merely misspoke and in fact evaluated the parties' claims utilizing the correct standard.

preponderance of the evidence, that the condition of the roof caused the leaks.

¶ 24 Alternatively, Swedish argues that the trial court erred when it failed to consider whether Lukovenkov breached paragraph 30 of the rider to the lease, which made him responsible for "all repairs, structural and otherwise, to the Premises." It is true that the court did not make a specific finding as to the breach of paragraph 30, but this alone does not support Swedish's contention that this lease provision was not considered in the court's decision. The trial court heard a great deal of evidence from both Swedish and Lukovenkov regarding the repairs, or lack thereof, to the roof, queried the witnesses on this issue, and listened to Swedish argue extensively in closing that Lukovenkov breached his duty to repair. Further, the court explicitly stated that in reaching its decision it considered all the testimony and exhibits provided to it as well as the arguments of counsel. It stands to reason that the court took into account Swedish's claims regarding Lukovenvkov's breach of duty to repair, but nevertheless did not believe Swedish was entitled to judgment in its favor. See *Hendle v. Stevens*, 224 Ill. App. 3d 1046, 1053 (1992) (where trial court's memorandum opinion did not make a finding of fact as to a specific theory asserted by the defendant, we nevertheless presumed the theory was considered given that it was set forth in the defendant's brief).

¶ 25 The trial court's finding on this issue was not against the manifest weight of the evidence. As discussed above, there was evidence from which the court could conclude that the cause of the leaks was not due to the condition of the roof. Swedish argues that even if the court accepted that the leaks occurred for another reason, such as improper HVAC installation, this still implicated Lukovenkov's duty to repair. We disagree. Where there is a provision for the making

of repairs in a lease, we have defined the word 'repair' according to its ordinary meaning, "to wit: restoration after decay, waste, injury, or partial destruction; supply of loss; reparation." *Kaufman v. Shoe Corp. of America*, 24 Ill. App. 2d 431, 435 (1960). Here, there is no evidence the leaks occurred because of any decay, injury, waste or destruction of the HVAC units or the exhaust fans; rather, the evidence is that these appliances were improperly installed to begin with. Nothing in the lease makes the landlord responsible for overseeing the installation or correcting an installation that was improperly performed. Accordingly, we conclude that there is evidence to support the trial court's finding against Swedish on its claims of breach of duty to replace and repair the roof, and we affirm.

¶ 26 B. Lukovenkov's Appeal Against Swedish

¶ 27 Lukovenkov maintains the trial court erred in finding that he could not recover on his complaint seeking past due rent and payment for the replacement and repair of the HVAC units.[2] Again, we consider whether these findings were against the manifest weight of the evidence. *First Baptist Church*, 301 Ill. App. 3d at 542.

¶ 28 We turn first to the allegations of unpaid rent. At trial, Swedish did not dispute that it had failed to pay rent for the five months preceding the end of the lease term, but initially maintained that Lukovenkov's breach of the lease in failing to replace the roof, standing alone, precluded him from recovery. See *George F. Mueller & Sons, Inc. v. Northern Illinois Gas Co.*, 32 Ill. App. 3d 249, 254 (1975) (a party may not recover upon a contract unless he has first performed his own

[2] Lukovenkov does not challenge the trial court's finding that he was not entitled to recover on his counterclaim alleging that Swedish breached the lease by improperly installing two HVAC units instead of one.

obligations under the contract). It is sufficient to note that this principle of contract law never been applied to lease agreements. Indeed, landlords have routinely prevailed on actions for unpaid rent even where tenants have established the landlord breached the lease. See, *e.g.*, *JMB Properties Urban Co. v. Paolucci*, 237 Ill. App. 3d 563, 566 (1992); *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 153 (1988). These and other cases establish that in order for non-payment of rent to be excused, a tenant must prove constructive eviction. Constructive eviction results when a landlord has done something of a serious and substantial character with the intent to deprive the tenant of the enjoyment of the premises. *Shaker & Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 134 (2000); see also *Home Rentals Corp. v. Curtis*, 236 Ill. App. 3d 994, 998 (1992). In order to establish a defense of constructive eviction, a tenant must abandon the premises within a reasonable time after becoming aware of the breach, and show that the premises were unfit for the purpose for which they were leased. *Dell'Armi Builders*, 172 Ill. App. 3d at 148-49 (1988).

¶ 29 In the case *sub judice*, Lukovenkov contends that Swedish was not justified in its abandonment of the premises both because it could have used the premises for their intended purpose, and because it waited too long to abandon the premises. The trial court disagreed with Lukovenkov as to the latter proposition, but did not make a specific finding as to the former before determining that Lukovenkov could not recover on his claim for unpaid rent. We hold that this determination was in error.

¶ 30 The evidence adduced at trial points to the inexorable conclusion that the premises were fit for use as a doctor's office. To begin, Eileen Clough of Chicagoland Retinal testified that the

leaks posed an inconvenience and were the reason that Chicagoland Retinal moved out, but never stated that a doctor's office could not be operated from the premises. More significantly, Gary Krugel, the senior vice president and property manager for Swedish, explicitly testified that during the time Swedish was utilizing the space, the leaks did not prevent it from operating a doctor's office. Further, when Chicagoland Retinal vacated the premises with five months remaining on its sublease, the property continued to be fit for use for Swedish, as evidenced by the following testimony elicited from Krugel on cross-examination:

> "Q. Swedish Covenant Hospital had made a – Swedish Covenant Hospital hadn't made use of the property during those five months?
>
> A. No they did not.
>
> Q. There's no use that could have been made by Swedish Covenant?
>
> A. *Could have been but we did not.*
>
> Q. In other words, you didn't need to? You just didn't need the space, am I correct?
>
> A. We didn't have a tenant, a subtenant. *We had no need for the space*." (Emphasis added.)

Krugel's testimony, which was uncontradicted, conclusively established that the premises were fit for Swedish's use. It necessarily follows that Swedish did not prove constructive eviction. Because Swedish does not argue that Lukovenkov has failed to mitigate his damages as required under section 9-213.1 of the Code of Civil Procedure (735 ILCS 5/9-213.1 (West 2010)), we

conclude that Lukovenkov is entitled to the full amount of unpaid rent from May 2009 to September 2009, and the trial court's holding to the contrary is against the manifest weight of the evidence.

¶ 31 Next we turn to Lukovenkov's claim that Swedish was obligated under the terms of the lease to pay for the replacement and repair of the HVAC units. Specifically, paragraph 11(I) of the rider to the lease states that the lessee must yield up the leased premises "including *** HVAC equipment *** in clean and good order, repair and condition, damage by fire or other unavoidable casualty excepted." Lukovenkov argues that the HVAC units were not in good repair or condition at the time Swedish abandoned the premises, citing the testimony of HVAC technicians Glenn Harrison and Simon Elkind. While both witnesses testified to problems with the HVAC units, including leaking Schrader cores and evaporator coils, they did not inspect the units until July 9, 2009, and September 29, 2009, respectively. However, it is undisputed that Swedish abandoned the property months earlier, in May 2009. The only testimony regarding the condition of the units at the time of abandonment was from an employee of Chicagoland Retinal, who testified that the air-conditioning and heating was working. As such, it was not against the manifest weight of the evidence for the trial court to hold in favor of Swedish on this count, given the lack of evidence establishing that the HVAC units were in disrepair when Swedish vacated the premises.

¶ 32 In summary, we affirm the trial court's finding on Lukovenkov's claim for repair and replacement of the HVAC units, but reverse the court's finding on his claim for unpaid rent. The cause is remanded to the trial court for the determination of damages and attorney's fees to which

Lukovenkov is entitled under the terms of the lease.

¶ 33 CONCLUSION

¶ 34 For the reasons stated, we affirm in part, and reverse in part and remand for further proceedings.

¶ 35 Affirmed in part and reversed in part; cause remanded.