2015 IL App (1st) 142302-U

No. 1-14-2302

Fifth Division
March 31, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ERIK BORCZON, Plaintiff-Appellant, v. PEAK PROPERTIES, LLC, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 13 CH 25902 The Honorable Kathleen G. Kennedy, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed a tenant's complaint where the $250 fee charged by the landlord did not violate the Chicago Residential Landlord and Tenant Ordinance because the tenant did not propose a sublease to the landlord.

¶ 2 Plaintiff Erik Borczon leased an apartment from defendant Peak Properties, LLC. Plaintiff decided to move out of the apartment prior to the expiration of his lease term and found an individual willing to sublease the apartment. Defendant charged plaintiff a $250 fee, which is the subject of the instant lawsuit. Plaintiff filed suit, alleging violations of the

Chicago Residential Landlord and Tenant Ordinance (RLTO) (Chicago Municipal Code § 5-12-010 *et seq.*), breach of contract, and violation of the Consumer Fraud Act. Defendant filed a motion to dismiss, and the trial court dismissed the complaint under section 2-619(a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(9) (West 2012)). Plaintiff appeals, and we affirm.

¶ 3 BACKGROUND

¶ 4 I. Complaint

¶ 5 On November 18, 2013, plaintiff filed a complaint in the circuit court of Cook County "to secure redress against the illegal imposition of fees by defendant." The complaint alleges that plaintiff leased an apartment at 2357 W. Ohio St. in Chicago (the apartment) from defendant. In October 2013, plaintiff decided to move out of the apartment "and he therefore sought to and did find a suitable subtenant for the apartment." Plaintiff "proposed that subtenant to defendant" and the subtenant passed defendant's background and credit checks. Defendant "charged plaintiff a fee of $250 for subletting," which plaintiff paid.

¶ 6 Count I of the complaint alleges that defendant's fee violates the RLTO "in situations where the tenant finds a suitable sublease on his or her own." Count II of the complaint alleges that the provisions of the RLTO were part of the lease agreement, as was the $250 fee, and that by charging the fee when defendant "accept[ed] a sublease proposed by the tenant," defendant breached its contract. Count III of the complaint alleges that defendant violated section 2 of the Consumer Fraud and Deceptive Business Practices Act (the Consumer Fraud Act) (815 ILCS 505/2 (West 2012)) by charging the fee when defendant "accept[ed] a sublease proposed by the tenant" because "[d]efendant was well aware that its

conduct was illegal as it attached a copy of a summary of the Chicago RLTO to its tenants' leases."

¶ 7 Attached to the complaint were several exhibits. Exhibit A consists of a photocopy of a receipt dated October 18, 2013, showing that plaintiff paid $250 for payment of a "processing fee." Exhibit B consists of a document bearing defendant's letterhead that is entitled "RE-LETTING / SUB-LET AGREEMENT." The beginning of the agreement states:

> "Please note you must sign this agreement to re-let, sub-let, or buy out your lease. Fill out the exact date you will move out, enclose a $250.00 administrative charge, and your sub-let/Re-Let will begin."

Near the end of the agreement are two statements, both in all capitalized letters and bold-faced:

> "Please note: if your apartment is not re-rented, you, as the tenant, are responsible for the rent until it is re-rented or the expiration of your lease unless you choose to buy-out your lease.
>
> It is further understood lessee is not released in any manner from any obligation contained in the lease by reason of the listing of this apartment for re-renting."

¶ 8 On the same day that he filed the complaint, plaintiff also filed a motion for class certification, asking for an order determining that the action could proceed on behalf of several classes of individuals against defendant.

¶ 9 II. Motion to Dismiss

¶ 10 On February 18, 2014, defendant filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code, claiming that "based on undisputed facts and as a matter of law, plaintiff did not sublet the Apartment, and Peak lawfully charged an administrative fee

for re-letting and not subletting the Apartment to a new tenant." Defendant also argued that if the complaint was dismissed, the court should also dismiss any class allegations, as there would be no named plaintiff.

¶ 11 Attached to the motion to dismiss was an affidavit of Michael Zucker, defendant's managing member. Zucker stated that on April 29, 2013, defendant entered into an agreement with plaintiff and Rick Zuno, whereby defendant agreed to rent the apartment to plaintiff and Zuno for a period of one year beginning on May 1, 2013, and ending on April 30, 2014, in exchange for monthly rent payments of $1,395. Before the lease expired, plaintiff informed defendant that he was moving out of the apartment. "Peak entered into the agreement with plaintiff which provided that Peak would charge plaintiff a $250.00 administrative fee to re-let the Apartment." A new tenant, Matthew Seeberg, was subsequently found and defendant entered into a new lease agreement with Seeberg for the duration of the original lease. "Mr. Borczon did not present any form of sublease agreement to Peak, did not inform Peak of the existence of a sublease agreement with the new tenant, nor was he a signatory on the new lease."

¶ 12 Attached to Zucker's affidavit were the documents referenced in his affidavit. The agreement that included the $250 fee was previously described, as it was also attached to plaintiff's complaint. The lease naming plaintiff and Zuno as tenants was signed, including an acknowledgement that both tenants had received a copy of the RLTO. The lease naming Zuno and Seeberg as tenants listed the beginning date of the lease as November 1, 2013, and the ending date as April 30, 2014, and also included an acknowledgement that both tenants had received a copy of the RLTO.

¶ 13 III. Response to Motion to Dismiss

¶ 14 On April 3, 2014, plaintiff filed a response to defendant's motion to dismiss, arguing that defendant mischaracterized the fee as a "re-let" fee when its agreement and the conduct of its employees made it clear that the fee was a sublease fee. Additionally, plaintiff argued that even it was a re-let fee, such a fee would also be prohibited by the RLTO.

¶ 15 Attached to plaintiff's response was a declaration of plaintiff, in which he stated that on May 1, 2013, he leased the apartment from defendant. On October 1, 2013, plaintiff went to defendant's office to inquire about subleasing his apartment. When he arrived at defendant's office, he spoke with defendant's receptionist about subleasing the apartment, specifically using the word " 'sublease.' " The receptionist referred plaintiff to a manager with defendant, Mr. Clemente,[1] as a person who had decision making authority. While at defendant's office, plaintiff spoke with Clemente on the phone, notifying him that plaintiff wished to sublease the apartment as the living situation with his roommate had become untenable; plaintiff specifically used the word " 'sublease.' " Clemente informed plaintiff that his lease "prevented [him] from subleasing the *** apartment, and if [he] attempted to do so [he] would be liable to Peak for an unauthorized sublease." Clemente "then stated that in order for Peak to consider authorizing a sublease [plaintiff] would have to find a replacement tenant, have the sublease approved by Peak, pay a non-refundable $250 sublease fee, and turn in a completed sublease agreement. [Clemente] used the word 'sublease.' " At no time did Clemente or any other representative of defendant offer to assist plaintiff with finding a subtenant, and "[i]t was also stressed that Peak would not review or approve a sublease

[1] Clemente's first name is not contained in the record on appeal.

candidate unless [plaintiff] first paid the $250 non-refundable sublease fee mentioned beforehand."

¶ 16 Plaintiff's declaration stated that after the phone conversation with Clemente, plaintiff began searching for a subtenant, posting multiple ads online, exchanging emails and interviewing candidates, and showing the apartment. On October 8, 2013, Seeberg[2] responded to plaintiff's online posting expressing interest in subleasing the apartment. The next day, plaintiff interviewed Seeberg and gave him a tour of the apartment, after which Seeberg expressed interest in subleasing the apartment. On October 19, 2013, plaintiff again visited defendant's offices, notifying the receptionist that plaintiff had found a sublessee who wished to sublet the apartment. Plaintiff turned in a completed sublease agreement and paid the $250 nonrefundable sublease fee. Upon accepting the agreement and fee, defendant's receptionist issued a receipt and indicated that defendant's representative would contact plaintiff.

¶ 17 Plaintiff's declaration stated that after plaintiff's visit to defendant's office, Seeberg informed plaintiff that defendant had approved Seeberg as a subtenant but would not accept his paperwork because Zuno, the remaining tenant, had not signed the paperwork. On October 23, 2013, plaintiff spoke with Clemente on the phone, where Clemente informed plaintiff that defendant would not accept Seeberg as a sublease candidate if Zuno did not sign the paperwork. Plaintiff inquired about the $250 sublease fee that he had paid and Clemente stated that the fee would not be refunded regardless of whether defendant approved a sublease or not. During the same phone conversation, "Clemente stressed that even if Rick Zuno signed the sublease documents, Peak could 'go after' Ryan Seeberg, Rick Zuno, or

[2] Plaintiff's declaration refers to Seeberg as "Ryan Seeberg," not "Matthew Seeberg." However, the record indicates that Seeberg's full name was Matthew Ryan Seeberg.

[plaintiff] since Peak would have leases with all parties." At the conclusion of the conversation, "Clemente stated that none of the paperwork Ryan Seeberg or [plaintiff] sign[ed] explicitly release[d] [plaintiff] from liability if a new tenant's rental payments to Peak [became] delinquent."

¶ 18 Plaintiff's declaration stated that he moved out of the apartment and Seeberg moved in prior to November 1, 2013. At no time did defendant assist plaintiff in finding a subtenant or replacement tenant, nor was plaintiff aware of any time where defendant actively or passively looked for a replacement tenant after plaintiff notified defendant of his intention to leave. Finally, plaintiff's declaration stated that he never communicated with, spoken to, or corresponded with Zucker.

¶ 19 IV. Court Ruling

¶ 20 On July 10, 2014, the trial court entered an order dismissing all three counts of plaintiff's complaint with prejudice. Plaintiff filed a timely notice of appeal, and this appeal follows.

¶ 21 ANALYSIS

¶ 22 On appeal, plaintiff argues that the trial court erred in dismissing his complaint under section 2-619 of the Code. "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology*, 221 Ill. 2d at 579; *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). When reviewing "a motion to dismiss under

section 2-619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz*, 231 Ill. 2d at 488. "In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. *Raintree*, 209 Ill. 2d at 261 (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 23 In the case at bar, all three of the counts of plaintiff's complaint turn on the issue of whether the $250 fee charged by defendant violated the RLTO. Plaintiff argues that the $250 fee violated sections 5-12-120 and 5-12-140 of the RLTO. Section 5-12-120 is entitled "Subleases" and provides:

> "If the tenant terminates the rental agreement prior to its expiration date, except for cause authorized by this chapter, the landlord shall make a good faith effort to re-rent the tenant's dwelling unit at a fair rental, which shall be the rent charged for comparable dwelling units in the premises or in the same neighborhood. The landlord shall accept a reasonable sublease proposed by the tenant without an assessment of additional fees or charges.
>
> If the landlord succeeds in re-renting the dwelling unit at a fair rental, the tenant shall be liable for the amount by which the rent due from the date of premature termination to the termination of the initial rental agreement exceeds the fair rental

subsequently received by the landlord from the date of premature termination to the termination of the initial rental agreement.

If the landlord makes a good-faith effort to re-rent the dwelling unit at a fair rental and is unsuccessful, the tenant shall be liable for the rent due for the period of the rental agreement. The tenant shall also be liable for the reasonable advertising costs incurred by the landlord in seeking to re-rent the dwelling unit." Chicago Municipal Code § 5-12-120 (amended Nov. 6, 1991).

¶ 24 Section 5-12-140 of the RLTO is entitled "Rental agreement" and provides, in relevant part:

"Except as otherwise specifically provided by this chapter, no rental agreement may provide that the landlord or tenant:

(a) Agrees to waive or forego rights, remedies or obligations provided under this chapter." Chicago Municipal Code § 5-12-140 (amended Nov. 6, 1991).

With respect to this section, plaintiff argues that requiring plaintiff to sign the agreement providing for the $250 fee violated this section, since the fee violated section 5-12-120.

¶ 25 Plaintiff's arguments focus on the sentence in section 5-12-120 providing that "[t]he landlord shall accept a reasonable sublease proposed by the tenant without an assessment of additional fees or charges." Chicago Municipal Code § 5-12-120 (amended Nov. 6, 1991). However, we agree with defendant that this sentence does not apply to the instant case because there is no allegation that there was a "reasonable sublease proposed by the tenant." Plaintiff's complaint alleges that "he *** sought to and did find a suitable subtenant for the apartment," he "proposed that subtenant to defendant" and the subtenant passed defendant's background and credit checks. Additionally, in his declaration attached to his response to the

motion to dismiss, plaintiff stated that on October 19, 2013, plaintiff visited defendant's offices, notifying the receptionist that plaintiff had found a sublessee who wished to sublet the apartment. He turned in a completed sublease agreement and paid the $250 nonrefundable sublease fee. Thus, plaintiff's complaint and his declaration make clear that plaintiff found Seeberg and "proposed" Seeberg to defendant. However, there is no allegation that plaintiff actually entered into any sort of agreement with Seeberg; instead, the lease attached to defendant's motion to dismiss demonstrates that Seeberg entered into a lease with defendant, not a sublease with plaintiff. This is a distinction that makes a difference, as the sentence prohibiting additional fees only applies if the tenant proposes a *sublease*, not merely a subtenant that then enters into a separate lease with the landlord. We note that in his brief on appeal, plaintiff states that "[t]he plain language of § 5-12-120 requires a landlord to accept a reasonable subtenant without the assessment of any additional fees." However, as defendant points out, the RLTO does not speak of accepting a reasonable "subtenant" but only of accepting a reasonable "sublease."

¶ 26 We find the case of *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885 (2005), a decision authored by the late Justice Joseph Gordon, to be instructive. There, the tenants broke their lease with the landlord and the landlord did not refund their security deposit. *Turner*, 355 Ill. App. 3d at 887. The tenants filed suit, alleging, *inter alia*, that the landlord had violated section 5-12-120 of the RLTO by withholding the security deposit in an attempt to enforce a termination fee provided by the lease, which was prohibited by the RLTO. *Turner*, 355 Ill. App. 3d at 887. On appeal, the court first noted that there was never any attempt to enforce the termination fee. *Turner*, 355 Ill. App. 3d at 896. Additionally, "[m]ore overridingly," even if there would have been an overt attempt to enforce the early

termination fee, it would not have violated section 5-12-120 of the RLTO. *Turner*, 355 Ill. App. 3d at 897. The court noted that the tenants did not allege that they ever arranged for a sublease of their apartment, and, "[h]ence, the protection against early termination fees provided under the specific language of section 5-12-120 would not be applicable." *Turner*, 355 Ill. App. 3d at 897. The court rejected the tenants' argument that they were protected by the provision because the landlord shared in the burden of procuring a subtenant by pointing out that the language of the RLTO clearly indicated that it was the tenants' burden to procure a subtenant, and also found that:

> "[e]ven more specious is the [tenants'] follow up contention that would appear to have us redefine subleases to even include those leases directly entered into by a landlord with a new tenant during a period encompassed under the original lease. Not only does this contention suffer from the same statutory impediment pointed out above with respect to their contention that landlord share the burden of procuring a subtenant under a sublease, but would urge an interpretation of the term contrary to the clear meaning of the term sublease as a lease between an existing tenant as a sublessor and his tenant as a sublessee for the duration or a portion of the duration of the term remaining under the sublessor's lease with the landlord. [Citation.]" *Turner*, 355 Ill. App. 3d at 897.

¶ 27 In the case at bar, we have a lease directly entered into by a landlord with a new tenant during a period encompassed under the original lease, which is the exact situation described by the *Turner* court as "an interpretation of the term contrary to the clear meaning of the term sublease." *Turner*, 355 Ill. App. 3d at 897. While it is clear that plaintiff had involvement in procuring Seeberg as a subtenant, the sentence in the RLTO relied on by plaintiff applies

only if plaintiff proposed a "reasonable sublease," which he clearly did not do under the facts before us.

¶ 28 We do not find persuasive plaintiff's argument that defendant was merely attempting to rename a prohibited charge by characterizing the fee as a "re-let fee." While plaintiff correctly notes that we have rejected such attempts by landlords in the past (see *Friedman v. Krupp Corp.*, 282 Ill. App. 3d 436 (1996)), this is not the situation presented by the facts before us. Again, additional fees are prohibited under section 5-12-120 of the RLTO when there is a "reasonable sublease proposed by the tenant." Here, there was no such sublease proposed by plaintiff. If defendant attempts to charge this fee in a situation where there was a sublease proposed, we could consider plaintiff's argument at that point. However, under the facts before us in this case, that sentence of the RLTO simply does not apply.

¶ 29 The same reasoning defeats plaintiff's arguments concerning the "RE-LETTING / SUB-LET AGREEMENT" signed by plaintiff. We agree with plaintiff that the language of this form *could be* interpreted as imposing a fee for subletting an apartment. However, we cannot agree that this agreement "is evidence that the defendant *was charging* a $250.00 fee for allowing tenants to sublease apartments managed by defendant." (Emphasis added.) The only evidence before us is that plaintiff found Seeberg and that defendant entered into a new lease with him. While plaintiff points to facts indicating that he used the word "sublease" in his communication with defendant's representatives, as noted, there are no allegations that there was ever an actual sublease between plaintiff and Seeberg. Consequently, there is no evidence that defendant charged a fee for accepting a sublease. Again, if defendant charged a fee for accepting a sublease in a different case, we would likely conclude that such a fee violated section 5-12-120 of the RLTO. However, that factual scenario is simply not before

us in this case. Accordingly, we cannot find that the trial court erred in dismissing all three counts of plaintiff's complaint, all of which were based on a finding that the $250 fee charged by defendant violated the RLTO.

¶ 30 As a final matter, plaintiff argues that this fee was impermissible even if defendant re-rented the unit on its own, as the RLTO does not specifically provide that the landlord may charge any fees other than the balance of the rent or advertising expenses. However, section 5-12-120 does not expressly prohibit any additional charges other than the situation in which there is "a reasonable sublease proposed by the tenant." "The language of a statute is the most reliable indicator of the legislature's objectives in enacting a particular law." *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill. 2d 103, 117 (2007). "We must not depart from the plain language of [a statute] by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Town & Country Utilities*, 225 Ill. 2d at 117. We cannot read into the RLTO a prohibition against charging an administrative fee when such a prohibition is nowhere in the language of the RLTO.

¶ 31 CONCLUSION

¶ 32 The trial court properly dismissed plaintiff's complaint under section 2-619 of the Code where the fee charged by defendant was not prohibited by the RLTO.

¶ 33 Affirmed.