2018 IL App (1st) 171865-U

FIRST DIVISION
May 29, 2018

Nos. 1-17-1865 & 1-17-2604 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CHICAGO HOUSING AUTHORITY, Plaintiff-Appellee, v. SHARA JENKINS, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 17 M1 350054 The Honorable Joseph Panarese, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order of possession in favor of plaintiff is vacated because plaintiff failed to present any proof that defendant breached the parties' settlement agreement.

¶ 2 Plaintiff Chicago Housing Authority (CHA) filed a forcible entry and detainer action against defendant Shara Jenkins. The parties entered into a settlement agreement memorialized in a circuit court order. The circuit court subsequently concluded that defendant failed to comply with the settlement agreement and entered an order of possession in favor of CHA. The circuit

court denied defendant's motion to reconsider and defendant appeals. For the reasons that follow, we vacate the circuit court's order of possession and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On January 19, 2017, CHA filed an eviction complaint against defendant asserting that she was in breach of her lease agreement and was wrongfully withholding possession of 6117 North Kedzie Avenue, Unit B, Chicago, Illinois. Defendant filed a *pro se* appearance, although attorneys from the law firm of Chicago Tenants Right Law appeared in court on her behalf.[1] Defendant did not file any counterclaims or affirmative defenses. The circuit court set a trial date of June 6, 2017.

¶ 5 In May 2017, CHA filed an emergency motion to transfer defendant to a new housing unit. The motion asserted that defendant was notified in September 2015 that the 6117 North Kedzie Avenue building would be closing for renovations, defendant refused to vacate her unit, and she was the only remaining tenant in the building. CHA stated that a unit in a different building was available for her. CHA further stated that, during the pendency of the eviction case, defendant had been offered two other units into which she could transfer but she had refused. The circuit court denied CHA's emergency motion.

¶ 6 The circuit court held a pretrial hearing on May 30, 2017, which defendant attended. There is no transcript of the May 30 hearing. After the hearing, the circuit court entered a handwritten order stating, "Defendant shall move to 925 [North] California [Avenue], Unit #111, Chicago, Illinois[,] on or before June 5[,] 2017, with [CHA's] moving assistance. If [d]efendant fails to transfer[,] an order of possession shall be entered *instanter*." The matter was continued to June 6, 2017, for compliance status. On June 6, 2017, an order of possession was entered in favor

[1]The record on appeal contains numerous filings made on defendant's behalf by the law firm Chicago Tenants Right Law, although the record does not contain any appearance filed by that firm or any of the attorneys associated with that firm.

of CHA and against defendant and all known and unknown occupants of 6117 North Kedzie Avenue, Unit B. There is no verbatim transcript of the June 6, 2017, hearing included in the record on appeal.

¶ 7 On June 22, 2017, defendant, through new counsel, filed a motion to reconsider the June 6, 2017, order of possession. The motion was supported by defendant's affidavit, which reasserted and verified the substance of her motion, and by a verified "Bystander's Report of Laura Boggioni," defendant's prior attorney. Defendant's motion set forth the following facts. She asserted that she had been locked out of her unit until June 2. She stated that "through no fault of [defendant's], CHA's relocation specialist did not meet with [her] until June 6, 2017, and then scheduled the transfer for June 12, 2017." Defendant asserted that she spoke with David Robinson, a CHA relocation specialist, on June 1, and that Robinson informed her that he needed to visit her unit before he could schedule the move. Defendant alleged that Robinson stated that he was not available on June 2 or June 5, and scheduled his initial visit for June 7. Defendant further asserted that Boggioni informed the circuit court on June 6 that defendant had an appointment with Robinson for the following day. Boggioni purportedly asked for a short continuance, but the circuit court, without conducting an evidentiary hearing, entered an order of possession against defendant. The motion to reconsider further stated that defendant contacted Robinson on June 6, Robinson visited defendant's unit that day, and he scheduled defendant's move for June 12, 2017. Robinson contacted defendant later on June 6 to inform her that the staff at 925 North California refused to sign the forms approving the move.

¶ 8 Defendant argued that CHA breached the parties' settlement agreement set forth in the May 30, 2017, order by failing to provide any moving assistance. She contended that it was CHA's burden to establish that it complied with the May 30, 2017, order, and that CHA's breach

precluded it from obtaining an order of possession. Defendant asserted that she was entitled to rescission of the May 30, 2017, settlement agreement based on CHA's breach. Alternatively, she requested that the circuit court reform the May 30, 2017, order to require CHA to provide moving assistance and permit defendant to move as originally agreed.

¶ 9 Boggioni's verified "bystander's report" was dated June 16, 2017. Boggioni's verified statement averred that "the following occurred in court at the June 6, 2017, status hearing." She stated that neither CHA nor defendant presented any witnesses at the June 6, 2017, hearing. Boggioni asserted that she told the circuit court that defendant "was not present in court because she had complied with the previous court order and arranged with CHA to move." Boggioni stated that a CHA representative told defendant "that they were unable to move her that quickly and that the soonest date they could come to her unit was Wednesday, June 7." Boggioni stated that defendant agreed to that date and that CHA stated it "would be at her apartment at 10 a.m. on Wednesday, June 7 to assess how much property she had and how many boxes and movers would be required." Boggioni further asserted that CHA informed the circuit court on June 6 that it had "agreed to move [defendant] on Monday, June 5 but [defendant] had requested that [it] come on Wednesday, June 7," and that CHA represented to the circuit court that it "did not have an appointment with [defendant] on Wednesday, June 7 at 10 a.m." Boggioni further stated that she "reminded the [c]ourt that CHA had been mistaken about [defendant] being illegally locked out of her building and perhaps this was a miscommunication on CHA's part as well." She averred that she asked the circuit court "for a short continuance but the [c]ourt denied my request," and that the circuit court "decided that [defendant] had not complied and entered an order for possession, *instanter*."

¶ 10 On July 6, 2017, the circuit court denied defendant's motion to reconsider. Defendant filed a notice of appeal on July 19, 2017, identifying the circuit court's June 6, 2017, order of possession and the July 6, 2017, order denying defendant's motion to reconsider. Defendant's appeal was docketed in this court as no. 1-17-1865.

¶ 11 On August 23, 2017, defendant filed in the circuit court a motion to settle and certify Boggioni's bystander's report. The motion stated that defendant served CHA with the bystander's report on August 2, 2017, and that CHA did not serve any objections, proposed amendments, or an alternative bystander's report. At an initial hearing, the circuit court stated on the record that "this is the first time I've been seeing the bystander's report," and granted CHA leave to file a written response. In its response, CHA argued that there was no indication that the proposed bystander's report, which had previously been attached to defendant's motion to reconsider, was "prepared as a proposed report of proceedings." CHA's response included its own proposed bystander's report from its counsel, Ramon Estrada.

¶ 12 Estrada's proposed verified bystander's report stated that at the hearing on June 6, 2017, he advised the circuit court that, "through three independent conversations, that [defendant] had created roadblocks for CHA to provide moving assistance." Estrada stated that he informed the circuit court that he had asked CHA's property manager to be "proactive in her attempts to contact [defendant] and meet with [defendant] to facilitate [defendant's] access to the building," and that CHA's asset manager informed Estrada that "CHA's moving assistance team was ready to perform the move as soon as [defendant] allowed it." Finally, Estrada stated that he had informed the circuit court that defendant had told Robinson that she was not available to move by June 5, 2017, and could only move on June 7, 2017, which was after the date by which she had agreed to move. Defendant replied to CHA's proposed bystander's report, arguing that it was

untimely and that it did not contradict Boggioni's statements. Defendant argued in the alternative that both bystander's reports should be accepted "for the sake of completeness."

¶ 13 The circuit court heard oral argument on September 21, 2017. The circuit court adopted CHA's bystander's report, and ordered that it be supplemented to include

> "that there was a compliance hearing on June 6[] and information was provided by *** Estrada and information was provided by Ms. Boggioni, and after hearing with information and testimony from both Mr. Estrada and Ms. Boggioni that it was found that [defendant] was not in compliance with the agreed order of compliance and that at that time an order of possession *instanter* was entered."

The circuit court, however, did not identify any "testimony" presented at the June 6 hearing. It is undisputed that the only participants at that hearing were Estrada and Boggioni and that no witnesses were called to give any testimony.

¶ 14 The circuit court entered an order certifying CHA's bystander's report with the changes discussed during the hearing. CHA filed the bystander's report on October 6, 2017. Defendant filed a notice of appeal on October 19, 2017, identifying the circuit court's September 21, 2017, order. Defendant's notice of appeal was docketed in this court as no. 1-17-2604. We allowed defendant's motion to consolidate her appeals.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant raises three issues. First, she argues that the circuit court denied her due process by not conducting an evidentiary hearing prior to entering the order of possession because there were conflicting factual claims regarding compliance. Second, defendant argues that the circuit court erred in denying her motion to reconsider because CHA failed to provide any counteraffidavits or other evidence disputing the sworn statements of defendant and

Boggioni. Finally, defendant contends that CHA had agreed to extend the time in which defendant could move and the circuit court erred in refusing to reform the May 30, 2017, order to give defendant more time to move. We agree with defendant that the circuit court erred when it entered the order of possession on June 6, 2017, without hearing any evidence regarding compliance.

¶ 17 It is evident from the record that the circuit court did not conduct an evidentiary hearing on June 6, 2017, from which it could make any findings of fact prior to entering the order of possession in favor of CHA. Instead, the circuit court relied on the parties' oral argument and the record in reaching its decision. We therefore review the entry of the June 6, 2017, order of possession *de novo*. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007).

¶ 18 As an initial matter, we find that we are not limited to considering the certified bystander's report of the June 6, 2017, compliance hearing. At no point during the proceedings with respect to settlement and certification of the bystander's report did CHA deny or dispute Boggioni's statement in her proposed verified bystander's report that she informed the circuit court on June 6 that defendant attempted to schedule a meeting with Robinson, but was told "that the soonest date they could come to her unit was Wednesday, June 7." Instead, at the hearing to settle and certify the bystander's report, the circuit court simply stated that Boggioni's statement was "not correct." When defendant's counsel asked the circuit court what Boggioni did say, the circuit court responded, "That's not my job to do. I believe that Mr. Estrada's bystander's report is correct as to what happened on both sides." But Estrada's proposed verified bystander's report was completely silent as to what Boggioni said at the hearing. Estrada's proposed bystander's report included five consecutive paragraphs asserting what he said during the hearing, but did include a single statement as to what Boggioni said. The circuit court ordered Estrada to

supplement his bystander's report with a "compromise" paragraph that makes a general reference to "information provided by Ms. Boggioni," but does not give any indication of what that information was. We are therefore not confident that the bystander's report certified by the circuit court accurately reflects all of the proceedings that took place on June 6, 2017. We therefore find it necessary to consider Boggioni's proposed verified bystander's report in reaching our decision. See *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002) (finding that the purpose of Supreme Court Rule 323(c) is "unacceptably compromised" when the circuit court "fails to satisfy its obligation to certify an accurate bystander's report" by certifying a report that is "deficient").

¶ 19 Forcible entry and detainer actions are summary proceedings designed to determine the limited question of which party is entitled to possession of a property. *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 861 (2004). The plaintiff bears the burden of establishing its right to possession and must do so by a preponderance of the evidence. *Circle Management, LLC v. Oliver*, 378 Ill. App. 3d 601, 609 (2007). Due process considerations require the plaintiff to present evidence to support its right to possession. *Eckel v. MacNeal*, 256 Ill. App. 3d 292, 296-97 (1993).

¶ 20 Furthermore, "a settlement agreement is contract, and construction and enforcement of settlement agreements are governed by principles of contract law." *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. A breach of a contract is "material" when the breach is fundamental or defeats the purpose of the contract. *Commonwealth Edison Co. v. Elston Ave. Properties, LLC*, 2017 IL App (1st) 153228, ¶ 18. Factors to consider in determining whether a breach is material include the following: (1) the extent to which the injured party will be deprived of the benefit that he or she reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of

that benefit of which he or she will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his or her failure, taking account of all the circumstances, including any reasonable assurances; and (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Id.* ¶ 19 (citing Restatement (Second) of Contracts § 241 (1981)). "[T]he determination of whether a breach is material is a question of fact [and] we will only disturb the trial court's decision on the issue if it is against the manifest weight of the evidence." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006).

¶ 21 Here, the material terms of the parties' settlement agreement are reflected in the circuit court's May 30, 2017, order: defendant agreed to move to the new unit by June 5, 2017, and CHA promised to provide defendant with moving assistance. "It is a fundamental principal of the law that, in order for one to recover upon a contract, he must have performed his part of the contract." *Archibald v. Board of Education of Chicago*, 19 Ill. App. 2d 554, 561 (1958). A plaintiff therefore must prove that it substantially complied with all the material terms of the agreement before it is entitled to any relief. *George F. Mueller & Sons, Inc. v. Northern Illinois Gas Co.*, 32 Ill. App. 3d 249, 254 (1975). At the June 6, 2017, compliance hearing, it is undisputed that only two people appeared before the circuit court: counsel for CHA and counsel for defendant. Neither CHA nor defendant presented any witnesses, affidavits, or any other evidence regarding compliance or substantial compliance with the material terms of the parties' settlement agreement. And, contrary to the circuit court's recollection, there was no "testimony" from either side, only representations from opposing counsel about why defendant was not moved on June 5. The certified bystander's report for the June 6, 2017, hearing reflects that the

circuit court heard "the information provided by Ms. Boggioni and the information [Estrada] provided," and concluded that defendant "was not in compliance with the agreed order of compliance." This finding, however, could not have been based on any competent evidence because no evidence was submitted at the hearing.

¶ 22 Furthermore, Boggioni stated in her proposed verified bystander's report that she informed the circuit court that defendant had attempted to schedule the move but was told by Robinson that he could not visit her unit until June 7. Estrada told the circuit court that Robinson said it was defendant who was not available until June 7. Because neither defendant nor Robinson were present in court on June 6, 2017, the circuit court had no evidence from which to conclude that any delay in providing moving assistance was attributable to defendant. Whether CHA substantially complied with its obligation to provide moving assistance to facilitate defendant's move on or before June 5, 2017, was a question of fact that required the circuit court to consider admissible evidence before making its determination, particularly because it was CHA's burden to prove that it was entitled to possession by virtue of defendant's alleged breach of the settlement agreement and that the breach was a material breach that caused damages.

¶ 23 We therefore vacate the circuit court's June 6, 2017, order of possession and the July 6, 2017, order denying defendant's motion to reconsider, and remand for further proceedings. Given the severe ramifications of an adverse ruling for the defendant, we encourage the parties, with the valuable assistance of the circuit court, to use their best efforts to amicably resolve this dispute in their respective best interests.

¶ 24 In light of our disposition, we need not address defendant's remaining contentions on appeal. Furthermore, we find no need to provide defendant any separate relief in appeal no. 1-17-2604, and therefore dismiss that portion of defendant's appeal as moot.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the June 6, 2016, order of possession and the July 6, 2017, order denying defendant's motion to reconsider are vacated and we remand for further proceedings.

¶ 27 No. 1-17-1865, orders vacated, cause remanded.

¶ 28 No. 1-17-2604, dismissed as moot.