SIXTH DIVISION
MARCH 29, 2011

No. 1-10-1890

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EXECUTIVE PROPERTY MANAGEMENT, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 09 M6 00468
v.	)	Honorable Martin D. Coghlan, Judge Presiding.
GREGORY WATSON,	)	
Defendant-Appellant.	)	

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

ORDER

Held: The verdict in favor of plaintiff is affirmed since defendant did not establish that he was entitled to rescind the contract based on impossibility of performance. The case is remanded to the trial court for the purpose of determining the amount of attorney fees to be awarded to plaintiff pursuant to the terms of the lease.

Plaintiff, Executive Property Management, Inc., brought suit for breach of a lease agreement against defendant, Gregory Watson, who executed the lease as guarantor for his son Bryan's performance. Defendant raised the affirmative defense of impossibility of performance.

After a bench trial, the trial court found in favor of plaintiff and entered judgment against defendant in the amount of $4,000 for damages and $800 in attorney fees. Defendant appeals and we affirm.

BACKGROUND

The facts of this case are not in dispute. On or about September 28, 2008, plaintiff entered into a written lease agreement with Bryan Watson (Bryan)[1] for the rental of a studio apartment in Chicago Heights from October 1, 2008, through September 30, 2009. Defendant also executed the lease agreement, guaranteeing Bryan's performance under the lease. The lease provided that the apartment would have three occupants: two adults and one child. At the time of execution of the lease, Bryan was to live in the apartment with Kiona Kelly[2] (Kiona), who was pregnant.

On October 25, 2008, Kiona gave birth to Bryan Watson Jr. (child). The child was considered a "medically complex child" with conditions of "central hypoventilation syndrome, seizure disorder, feeding intolerance, and tracheostomy and ventilator dependencies." As a result of his medical problems, the child was disabled and required special medical treatment and equipment. After he was born, the child was referred to the University of Illinois Division of Specialized Care for Children (DSCC), which administered a Home Care Waiver Program for children "who need home nursing services, special equipment and/or home modifications to be

[1] Bryan's name is spelled both "Bryan" and "Brian" in the record. For the sake of consistency, we refer to him as "Bryan."

[2] The record does not disclose whether Kiona was Bryan's wife or girlfriend.

cared for safely in their home and community." Bryan and Kiona (collectively, parents) received specialized training through the DSCC to be the child's primary caregivers. Additionally, on January 30, 2009, the DSCC visited the parents' apartment to evaluate its suitability for their child. The DSCC determined that the apartment was not suitable because it did not have adequate space for the child's medical equipment, did not have a bedroom for the parents outside of the child's area, and did not have the necessary electrical power service or electrical outlets to support the medical equipment that was required. As a result, the DSCC did not permit the parents to take their child home until they secured the required housing.

The record is not clear as to the exact time that the parents vacated the apartment, but the record indicates that it occurred sometime between February and April 2009.[3] Bryan paid rent on the apartment through February 2009, but did not pay rent for the period of March 2009 to August 2009. On November 30, 2009, plaintiff filed suit for breach of contract against defendant, seeking past-due rent, late fees, and attorney fees as provided by the terms of the lease. Plaintiff also sought damages for Bryan's failure to maintain the apartment in good condition as required by the lease.

There is no record of defendant filing an answer to the complaint, but on May 12, 2010, defendant filed a brief "in support of rescission of lease agreement as a matter of law," in which he claimed that the lease was entitled to be rescinded because "defendant ha[d] asserted the defense of 'impossibility of performance.' " Defendant argued that it was impossible under the

[3] However, pursuant to the stipulation, that was not an issue for the trial court to determine.

circumstances for Bryan to have received any benefit from the lease "based upon factors completely outside of his control and power." In response, plaintiff argued that despite the unfortunate circumstances concerning the child, Bryan "was still capable of paying rent, whether or not the apartment he rented was suitable for his son or not."

On June 2, 2010, the case came before the court for trial. The parties stipulated to the facts and the amount of damages and stipulated that, as guarantor, defendant was entitled to assert any defense available to Bryan. The parties further stipulated that the question before the trial court was "[w]hether the circumstances concerning Brian Watson's child give rise to an Affirmative Defense of impossibility of performance of the lease agreement on behalf of Brian Watson (which, it has been stipulated, would then apply to the defendant, Gregory Watson, who signed the lease agreement as guarantor of Brian Watson)." The trial court found that the "physical disabilities" of Bryan's child did not give rise to the affirmative defense of impossibility of performance. The court found in favor of plaintiff on all issues and entered judgment against defendant in the amount of $4,000 in damages as well as reasonable attorney fees of $800. Defendant timely appealed.

ANALYSIS

On appeal, defendant argues that the trial court erred when it found that the defense of impossibility of performance did not apply to plaintiff's claim for breach of contract. As a threshold matter, we must determine what standard of review to apply. Defendant asks us to review the trial court's decision *de novo*, while plaintiff argues that we should determine whether the court's decision was against the manifest weight of the evidence. Typically, the manifest

weight standard is used to review findings of fact made by the trial court. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998), and *Reese v. E.M. Melahn*, 53 Ill. 2d 508, 512-13 (1973)). However, when a trial court draws a legal conclusion based on uncontested facts, we review the trial court's decision *de novo* as we are instructed by the Illinois Supreme Court. *Norskog v. Pfiel*, 197 Ill. 2d 60, 70-71 (2001) (citing *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723-24 (1998)) ("If the facts are uncontroverted and the issue is the trial court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the trial court's judgment."); *Danada Square, LLC v. KFC National Management Co.*, 392 Ill. App. 3d 598, 608 (2009) (citing *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 952 (2004)); *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 836 (2005) (citing *Norskog*, 197 Ill. 2d at 70-71); *MQ Construction Co. v. Intercargo Insurance Co.*, 318 Ill. App. 3d 673, 679 (2000).

However, we find that neither standard of review applies to the case at bar. Since defendant argues that Bryan was entitled to rescind the lease because performance was impossible, we apply the standard of review applicable to rescission. Rescission is an equitable remedy, and a court's decision granting or denying a request to rescind a contract is reviewed for an abuse of discretion. *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 5 (2010); *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 757 (2008). Accordingly, we consider whether the trial court abused its discretion in denying rescission.

Although the lease in the case at bar was in Bryan's name, plaintiff brought suit only

against defendant as the guarantor of Bryan's performance under the lease. As guarantor, defendant's liability is limited by and no greater than Bryan's liability, and if there could be no recovery against Bryan, there can be no recovery against defendant. *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 927 (1992); see also *Holm v. Jamieson*, 173 Ill. 295, 300 (1898); *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460, 464 (1882). Thus, if Bryan was entitled to rescind the lease due to its impossibility of performance, defendant would similarly not be liable under the lease.

Defendant claims that the circumstances surrounding the housing requirements of Bryan's child entitled Bryan to rescind the lease based on the affirmative defense of impossibility of performance. A lease is a contract between the landlord and tenant and normal principles of contract interpretation apply. *Midland Management Co. v. Helgason*, 158 Ill. 2d 98, 103 (1994); *Clarendon America Insurance Co. v. Prime Group Realty Services, Inc.*, 389 Ill. App. 3d 724, 729 (2009) (citing *Sears, Roebuck & Co. v. Charwill Associates Ltd. Partnership*, 371 Ill. App. 3d 1071, 1076 (2007)). Generally, where parties have entered into a contract, "they must abide by the contract and make the promise good, and subsequent contingencies, not provided against in the contract, which render performance impossible, do not bring the contract to an end." *Leonard v. Autocar Sales & Service Co.*, 392 Ill. 182, 187 (1945). However, the defense of impossibility of performance provides that if the continued existence of a particular person or thing is necessary for the performance of the contract, death or destruction of that person or thing will excuse performance. *Leonard*, 392 Ill. at 187 (citing *Martin Emerich Outfitting Co. v. Siegel, Cooper & Co.*, 237 Ill. 610, 615-16 (1908)).

Defendant argues that the trial court should have applied the defense of impossibility of performance to the situation here. Defendant analogizes his case to three different situations in which impossibility of performance has been recognized. The first analogy is to the situation exemplified by the United States Supreme Court decision of *North German Lloyd v. Guaranty Trust Co. of New York*, 244 U.S. 12 (1917) (*The Kronprinzessin Cecilie*). In that case, a German ship firm was hired to transport gold from New York to ports in England and France on its way to its destination in Germany. *Kronprinzessin Cecilie*, 244 U.S. at 20. On its way, the ship's captain received a message from its employer that war had broken out and the ship turned back. *Kronprinzessin Cecilie*, 244 U.S. at 21. Germany declared war on Russia the next day. *Kronprinzessin Cecilie*, 244 U.S. at 22. The owner of the ship was sued for breach of contract. *Kronprinzessin Cecilie*, 244 U.S. at 20.

The United States Supreme Court held that an exception to the contract was necessarily implied, stating that "[t]he seeming absolute confinement to the words of an express contract *** has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. [Citation.] Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. [Citation.]" *Kronprinzessin Cecilie*, 244 U.S. at 22. The court noted that, had it been certain that the ship would have been seized upon reaching England, there was no doubt that the ship would have been justified in turning back. *Kronprinzessin Cecilie*, 244 U.S. at 23. The court then held that the ship owner was justified in

taking reasonable precautions to avoid such a seizure, and found that the result was the same despite the fact that the captain had turned the ship back the day before war was actually declared. *Kronprinzessin Cecilie*, 244 U.S. at 23-24.

Kronprinzessin Cecilie is distinguishable from the case at bar. That case concerned the reasonable seizure of a ship and its passengers during a time of war and involved the very real probability that they would be detained by an enemy. That factual scenario is a far cry from the situation here, where the argument is over whether defendant is liable for rent on an apartment. Unlike in *Kronprinzessin Cecilie*, there is no war preventing defendant from being able to fulfill his part of the contract, and we do not find the two cases similar.

Defendant also contends that the case at bar is similar to *Lion Brewery of New York City v. Loughran*, 226 N.Y.S. 656 (1928), in which a New York court found that the proprietor of a saloon was excused from performance by the enactment of "Prohibition." The enactment of a law or other governmental action can be a valid application of the defense of impossibility of performance. See *e.g.*, *Innovative Modular Solutions v. Hazel Crest School District 152.5*, Nos. 1-10-0212, 1-10-0554, 1-10-0642 (cons.), slip op. at 10-11 (Ill. App. Feb. 9, 2011) (performance by school district became legally impossible when the state of Illinois divested the school district of power over its finances). However, defendant is not arguing that Bryan was legally prevented from paying rent by operation of law. He is arguing that the particular facts of the instant case rendered performance impossible. Thus, this line of cases is also unpersuasive.

Defendant's strongest argument is the claim that this case is analogous to the "Arthur Murray cases," *Davies v. Arthur Murray, Inc.*, 124 Ill. App. 2d 141 (1970), and *Parker v. Arthur*

Murray, Inc., 10 Ill. App. 3d 1000 (1973). In *Davies*, the plaintiff was a retiree who contracted to take dancing lessons at the defendant's dance studio. *Davies*, 124 Ill. App. 2d at 144. The plaintiff took lessons for several years, until an alleged illness and surgery caused him to discontinue his lessons. *Davies*, 124 Ill. App. 2d at 144. The plaintiff sought a refund for the lessons that were prepaid but unused, and brought suit when he did not receive one. *Davies*, 124 Ill. App. 2d at 144.

The *Davies* court noted that there was " 'no hard and fast rule on the subject of rescission,' " and that the right to rescission usually depended on the facts of the particular case. *Davies*, 124 Ill. App. 2d at 153 (quoting Williston, *Law on Contracts* §1467 at 187-88 (3d ed. 1970)). The court also pointed to the rule in the Restatement of Contracts, which has been accepted in the state of Illinois, that " '[w]here the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise . . . is discharged if the thing or person subsequently is not in existence in time for reasonable performance,' " unless there was a contrary intention or the promisor contributed to causing the nonexistence of the person or thing. *Davies*, 124 Ill. App. 2d at 154 (quoting Restatement of Contracts §460(1) (1932)).

The court held that, from the nature of the contract, it was "quite reasonable that the parties contemplated that a term would be implied concerning the continued ability of the plaintiff to take dancing lessons at the defendant's studio." *Davies*, 124 Ill. App. 2d at 154. However, the court ultimately found that the plaintiff had not provided sufficient proof of his

physical incapacity. *Davies*, 124 Ill. App. 2d at 154-55.

Similarly, in *Parker*, the plaintiff had contracted to take dancing lessons at the defendant's studio. *Parker*, 10 Ill. App. 3d at 1001-02. The plaintiff was severely injured in an automobile accident and was unable to continue his dancing lessons. *Parker*, 10 Ill. App. 3d at 1002. The plaintiff sought a refund of the money that he had prepaid for lessons, and brought suit against the defendant when his money was not refunded. *Parker*, 10 Ill. App. 3d at 1002.

Like the *Davies* court, the *Parker* court noted the Restatement's language concerning legal impossibility. *Parker*, 10 Ill. App. 3d at 1002. The defendant acknowledged that the doctrine of impossibility of performance was "generally applicable to the case at bar," but argued that the language of the contract indicated that the doctrine was inapplicable. *Parker*, 10 Ill. App. 3d at 1003. The defendant claimed that the contract showed the parties' mutual intent to waive their rights to invoke the doctrine of impossibility through bold-faced language providing " 'NONCANCELLABLE CONTRACT,' " " 'NONCANCELLABLE NEGOTIABLE CONTRACT,' " and " 'I UNDERSTAND THAT NO REFUNDS WILL BE MADE UNDER THE TERMS OF THIS CONTRACT.' " *Parker*, 10 Ill. App. 3d at 1003. The court found that the parties had not waived their rights to assert the defense of impossibility of performance and, since "overwhelming evidence supported plaintiff's contention that he was incapable of continuing his lessons," found that the trial court had correctly found in the plaintiff's favor. *Parker*, 10 Ill. App. 3d at 1003.

We find these cases inapposite. The Arthur Murray cases demonstrate the rule that "in contracts to whose performance the continued existence of a particular person or thing is

necessary, a condition is always implied that the death or destruction of that person or thing shall excuse performance." *Leonard*, 392 Ill. at 187. The continued existence of the plaintiff was necessary for the contracted dancing lessons, and the plaintiff's injury operated as a type of "destruction" that excused performance. We do not have the same situation in the case at bar. The contract at issue is a lease, not a contract for personal services. The physical ailments of a nonparty to the lease, however unfortunate, are not an excuse for performance. In fact, there is no case law that the physical ailment of a party to a lease would excuse performance.

Defendant's argument is that the circumstance present in the case at bar is unexpected and unique. Defendant attempts to characterize the situation as an "extraordinarily unforseen circumstance[]." However, there are a number of factual situations in which a leased apartment can become not suitable that would be implicated should we allow defendant to prevail. For instance, a tenant could sustain a broken leg and be unable to reach his apartment on the second floor, or could have needed to move because his job relocated him. A decision in defendant's favor would imply that the leases in any number of situations could be rescinded due to impossibility, which is counter to the narrowness of the doctrine of impossibility. See *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6 (2010) (quoting *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987)) (the doctrine of impossibility of performance "has been narrowly applied 'due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances.' ").

Defendant argues that Bryan contracted for "the possession and use of the plaintiff's

apartment for himself and his family," which included a child to be born. The child is born with disabilities that prevent him from living in the apartment. Defendant also argued that there were no acts by Bryan or his family that participated in the cause of them being unable to live in the premises.

However, we find it relevant that Bryan is the only person listed on the lease. The lease provides that two adults and one child may reside in the apartment, but does not specify who those occupants are. The parties did not contract for "Bryan, Kiona, and the child" to live in the apartment as a family. Bryan contracted for the use and possession of plaintiff's apartment in exchange for rent. While the circumstances of this case are truly unfortunate, neither side of the contract is impossible to perform under existing case law. The trial court did not err in rejecting the defense.

Finally, plaintiff makes the argument that a right to rescind a contract must be exercised promptly, and Bryan did not provide such notice. Plaintiff did not raise this argument before the trial court, and we will not consider it for the first time on appeal. *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278, 308 (2000) (citing *Employers Insurance v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 161 (1999)) ("Issues raised for the first time on appeal are waived."). However, we do note that the party seeking to rescind the contract must do so promptly. *Testa Produce*, 381 Ill. App. 3d at 757. None of the letters in the record supporting defendant's argument for rescission are addressed to plaintiff. Moreover, other than the letter to the parents from the DSCC, the letters in the record are dated November 2009 and February 2010, well after Bryan stopped paying rent on the apartment in March 2009. Bryan waited almost a year after receiving notification from

DSCC that the apartment was not suitable for the special medical needs of Bryan's newborn child. This evidence does not show prompt action on the part of Bryan in exercising any possible right of rescission.

CONCLUSION

The trial court did not abuse its discretion in finding in favor of plaintiff because the undisputed facts surrounding the special medical problems of the child did not give rise to the affirmative defense of impossibility of performance. We remand the case to the trial court to determine the amount of attorney fees, if any, that should be awarded to plaintiff under the terms of the lease.

Affirmed and remanded with instructions.