2012 IL App (1st) 102645-U

FIFTH DIVISION
February 10, 2012

No. 1-10-2645

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARIELLE S. WEININGER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 M1 121020
	)	
KAY HALDES,	)	Honorable
	)	Rhoda Davis Sweeney,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The Chicago RLTO does not permit a landlord to deduct from the tenant's security deposit the cost of repainting an apartment that was not damaged. The trial court did not abuse its discretion in denying a motion to continue that was unsupported by affidavit.

¶ 2 Plaintiff Arielle S. Weininger brought this action under the Chicago Residential Landlord Tenant Ordinance ("RLTO") to recover damages after her landlord, defendant Kay Haldes, withheld part of the security deposit to repaint the apartment. Holding that defendant had wrongfully withheld funds, the trial court entered judgment for plaintiff. On appeal, defendant contends that the trial court

erred (1) in ruling that the deduction was impermissible, and (2) that the trial court should have granted a continuance so that defendant could attend and testify at trial. For the reasons discussed below, we affirm.

¶ 3 BACKGROUND

¶ 4 The parties tried the case without a court reporter. The three-page agreed report of proceedings prepared by the parties pursuant to Supreme Court Rule 323(c), Ill. S. Ct. R. 323(c) (eff. December 13, 2005), establishes that plaintiff was a tenant in defendant's Chicago apartment pursuant to a one-year lease. Paragraph 10 of the lease prohibited plaintiff from "making any alterations to the premises" without defendant's prior written consent. Paragraph 3 provides, "[i]f Lessee [plaintiff] has failed to perform or comply with any of the provisions in this Lease, then Lessor [defendant] shall deduct any damages from the security deposit." During her tenancy, plaintiff painted the living room walls a medium gray color without obtaining defendant's consent. After plaintiff vacated the unit, defendant hired a painter to restore the walls to the original off-white color. The cost of painting was $195.00, which defendant deducted from plaintiff's security deposit of $950.00.

¶ 5 Plaintiff brought suit, claiming that defendant had violated the RLTO, §5-12-010, *et seq.*, by deducting the cost of repainting from the security deposit, as well as by commingling the security deposit with rent monies.

¶ 6 At the first court date, defendant's son, George Haldes, appeared with a power of attorney. George requested a four-month continuance because defendant "had a back condition." George presented a note from defendant's physician regarding her condition but presented no affidavit from her or the physician. The trial court granted a six-week continuance of the trial date.

¶ 7 On the date of trial, defendant once again failed to appear. George requested another continuance but again had no affidavit addressing his mother's incapacity. The trial court denied the continuance but allowed George to participate in the trial as a witness for defendant.

¶ 8 At trial, plaintiff and George testified to the above undisputed facts. George also testified that he had personal knowledge of the condition of the apartment, having helped defendant to rent it and make repairs. George testified that after plaintiff vacated the apartment, he hired a painter to repaint the living room because the neutral color "appealed to the largest number of people." To show commingling of funds, plaintiff testified and introduced a copy of her check for security deposit and of her rent check, which were both allegedly deposited into the same account for defendant.

¶ 9 The trial court found that defendant had violated the RLTO by deducting the cost of repainting from plaintiff's security deposit and awarded plaintiff twice the amount of the security deposit ($1,900.00), plus attorney fees and other costs. The trial court also found that the lease did not prohibit plaintiff from painting the living room walls. The agreed report of proceedings is silent as to whether the trial court ruled on the issue of commingling funds.

¶ 10 ANALYSIS

¶ 11 *1. Whether Defendant May Deduct from Security Deposit for an "Alteration"*

¶ 12 Defendant chiefly argues that she was entitled to retain a portion of the security deposit because plaintiff violated the lease by "altering" the apartment by painting the living room walls medium gray. The lease provisions in question are paragraph 10, which prohibits "alterations to the premises" that are made without defendant's written consent, and paragraph 3, which allows defendant to deduct from the security deposit to compensate for lease violations, which would include unauthorized "alterations" under paragraph 3. In support of her argument that these lease

provisions are enforceable, defendant cites several contract cases from non-RLTO jurisdictions.

¶ 13 We do not address whether the paint was an alteration in this case because regardless, under the facts of this case, a deduction would not be permissible under the RLTO. The RLTO provides:

> "(d) The landlord shall, within 45 days after the date that the tenant vacates the dwelling unit * * *, return to the tenant the security deposit or any balance thereof and the required interest thereon; provided, however, that the landlord, or successor landlord, may deduct from such security deposit or interest due thereon for the following:
>
> "(1) Any unpaid rent which has not been validly withheld or deducted pursuant to state or federal law or local ordinance; and
>
> "(2) A reasonable amount necessary to repair any damage caused to the premises by the tenant or any person under the tenant's control or on the premises with the tenant's consent, reasonable wear and tear excluded * * * ." Chicago Municipal Code §5-12-080(d).

The RLTO also provides that "no rental agreement may provide that the landlord or tenant * * * [a]grees to waive or forego rights, remedies or obligations provided under this chapter." §5-12-140(a). Thus, landlords have an indisputable obligation to return a tenant's entire security deposit unless there has been damage to the apartment or unpaid rent.

¶ 14 In light of the exclusive RLTO provisions, we need not determine whether the painting was an "alteration" under the terms of the lease. Even if painting the walls medium gray was an "alteration," an alteration is not synonymous with "damage" to the apartment under the RLTO. §5-12-080(d). On appeal, defendant apparently recognizes this point, briefly arguing that plaintiff's

application of medium gray paint to the apartment walls "can be considered 'damage' for purposes of deducting for repairs." We conclude, however, that the use of the medium gray paint did not "damage" the apartment under the RLTO. Defendant, as a landlord, has an obligation to return plaintiff's entire security deposit unless plaintiff damaged the apartment or failed to pay rent. §5-12-080(d). These obligations may not be waived. §5-12-140(a). Paragraph 3 of the lease purports to allow defendant to withhold plaintiff's security deposit to compensate for any lease violation, including "alterations" to the apartment, regardless of whether they constitute "damage." As the RLTO only permits deductions for "damage" or unpaid rent, the lease provision in this case, if found to be enforceable, would constitute an impermissible waiver of the landlord's obligation to return the security deposit as required by the RLTO. See §5-12-140(a). Thus, we find no error in the trial court's award to plaintiff.

¶ 15 We feel compelled to note that defendant was not without a remedy under the RLTO if plaintiff's painting was deemed an "alteration" of the apartment. The RLTO provides that a landlord's remedy for a lease violation is to "recover damages and obtain injunctive relief," §5-12-130(b), i.e., to file suit against the tenant.

¶ 16 *2. Whether the Trial Court Abused its Discretion by Denying a Continuance*

¶ 17 Defendant also argues that the trial court abused its discretion by (1) granting a six-week continuance at the first court date rather than the four months requested by defendant's son George and (2) denying a request for a second continuance on the date of trial. We review the trial court's decision to deny a motion for a continuance under an abuse of discretion standard. *In re Marriage of Chesrow*, 255 Ill. App. 3d 613, 618 (1994) (citing *Martinez v. Scandroli*, 130 Ill. App. 3d 712, 714 (1985)).

¶ 18 The Illinois Code of Civil Procedure provides for continuances: "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." 735 ILCS 5/2-1007 (West 2008). There is, however, no absolute right to a continuance. *In re D.P.*, 327 Ill. App. 3d 153, 158 (2001) (citing *Village of Maywood v. Barrett*, 211 Ill. App. 3d 775, 782 (1991)). A motion for a continuance, except when based on statutory cause, "is addressed to the sound discretion of the trial court." *Needy v. Sparks*, 51 Ill. App. 3d 350, 358 (1977) (citing *Continental Illinois National Bank & Trust Co. of Chicago v. Eastern Illinois Water Co.*, 31 Ill. App. 3d 148, 157 (1975); *Thomas v. Thomas*, 23 Ill. App. 3d 936, 940 (1974)). "The granting or denying of a motion for continuance will not be disturbed on appeal unless there has been a manifest abuse of discretion or a palpable injustice." *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 927 (1997) (citing *Maslanka v. Blanchett*, 239 Ill. App. 3d 548, 553 (1992)).

¶ 19 Supreme Court Rule 231(a) requires a party to attach an affidavit to a motion for a continuance based on the unavailability of material evidence, including witnesses. Ill. S. Ct. R. 231(a) (eff. January 1, 1970). A litigant's failure to comply with the rule "is, of itself, grounds for denial of a motion for continuance." *Bullistron v. Augustana Hospital*, 52 Ill. App. 3d 66, 70 (1977) (citing *Parker v. Newman*, 10 Ill. App. 3d 1019 (1973)).

¶ 20 Here, neither defendant nor an attorney (or even her son, George) presented an affidavit addressing defendant's incapacity to the trial court, or her potential testimony. George presented only a note from defendant's physician, which defendant does not argue to be an affidavit that satisfies Rule 231(a). The defendant's failure to present an affidavit to support her motion for a continuance was a sufficient basis for the trial court to deny the motion. See *id.* Additionally, on the first court

date, the trial court granted a six-week continuance, during which time defendant could have prepared and presented an affidavit in support of another motion to continue. Moreover, we cannot say that the trial court's rulings caused an injustice to defendant: George, who had first-hand knowledge of the facts, was allowed to testify at trial on her behalf.

¶ 21 We therefore conclude that the trial court did not abuse its discretion by its ruling on the requests for continuances by defendant's representative.

¶ 22 CONCLUSION

¶ 23 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.