SIXTH DIVISION
April 20, 2012

No. 1-11-1048

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LA'TOSHA FOSTER, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 10 M1 171915
JOHN P. TUCKER, Defendant-Appellant.	)	Honorable Joseph D. Panarese, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Where landlord failed to return balance of security deposit to former tenant along with itemization of damages, award of treble damages to tenant under city's ordinance was warranted, and record did not support landlord's claim of additional damage to the unit; the judgment of the trial court was affirmed.

¶ 2 Defendant John P. Tucker appeals the circuit court's award of damages to plaintiff La'Tasha Foster, based on the court's finding that defendant violated the Evanston Residential Landlord and Tenant Ordinance (the Ordinance) (Evanston Municipal Code, § 5-3-1 *et seq*. (eff. Feb. 2008)) by failing to return or otherwise account for plaintiff's security deposit in writing

within 21 days after plaintiff vacated his rental unit. On appeal, defendant contends: (1) the circuit court erred in concluding he violated the Ordinance because plaintiff did not provide a new address at which she could be contacted; (2) the court applied a setoff to plaintiff's award that did not include all damage to the apartment; and (3) by failing to promptly return the key upon vacating the unit, plaintiff created a holdover tenancy for which defendant should be compensated. We affirm.

¶ 3 On August 9, 2010, plaintiff filed a complaint alleging that in March 2008, she began renting an apartment in the City of Evanston from defendant and submitted to defendant a $2,500 security deposit. The property was in the same structure occupied by defendant and his wife, Merie Tucker. Plaintiff's tenancy was scheduled to end on March 31, 2010, and she alleged in the complaint that although she vacated the property on that date, defendant did not refund her security deposit or provide a written account of the amounts deducted from the deposit, as required by section 5-3-5-1(C) of the Ordinance.

¶ 4 A bench trial was held at which the following relevant testimony was adduced. Defendant was called as an adverse witness by plaintiff and testified plaintiff moved out of the apartment on March 31 but did not return the key until April 7. After that date, defendant inspected the apartment and discovered "a lot of damage" to the unit.

¶ 5 Defendant testified that when he received a letter on or about May 10 from an attorney representing plaintiff, he faxed a letter to the attorney on May 13 stating his intent to retain plaintiff's entire security deposit as compensation for the damage to the unit. A copy of that letter, which purportedly documents more than $6,000 in damage, was entered into evidence before the trial court but is not included in the record on appeal. Defendant said he did not attempt to mail a copy of the letter to plaintiff because he did not know the address to which she had moved.

¶ 6 Plaintiff testified she did not drop off the key on the last day of her tenancy because it was 9 p.m. and she wanted the landlords to inspect the unit before she returned the key. Plaintiff testified she returned the key to Merie Tucker on April 4, at which time the women walked through the unit and discussed damage to a mirrored closet door for which plaintiff agreed to pay. Plaintiff said she submitted a request that the post office forward her mail from defendant's unit to her new address.

¶ 7 Candy James, a friend of plaintiff, testified she helped plaintiff clean the apartment before moving out and that a mirror was broken in one of the bedrooms. Merie Tucker testified she and plaintiff walked through the unit on April 7 and discussed damage to a mirror and other items, including carpeting and a toilet.

¶ 8 Defendant testified he did not return the security deposit within 21 days of plaintiff's move because "that depends [upon] if the house is returned in good order." Defendant stated the damage totaled $6,630 and that "[a]ll I want is to repair my property and then I'll give her her money."

¶ 9 The court concluded plaintiff had established defendant did not return her security deposit in the manner required by the Ordinance. The court awarded plaintiff the amount of her $2,500 security deposit and additional damages equal to twice the deposit amount, for a total damage award of $7,500. The court offset that amount by $496.40, which represented the documented damage to the mirror, which the court noted was not in dispute. The court also awarded plaintiff $500 in attorney fees, for a total judgment of $7,503.60, as well as $304 in court costs.

¶ 10 On appeal, defendant contends the court erred in concluding that he violated the Ordinance. Defendant asserts that he did not mail his itemization of the damage to his property because plaintiff did not provide a forwarding address.

¶ 11 Section 5-3-5-1(C) of the Ordinance provides, in pertinent part, for the return of a tenant's security deposit:

> "Upon termination of the tenancy, property or money held by the landlord as security or prepaid rent may be applied to the payment of accrued rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with [provisions of the Ordinance requiring the tenant to maintain the dwelling], all as itemized by the landlord in a written notice delivered to the tenant together with the amount due twenty one (21) days after tenant has vacated his unit. Any security or prepaid rent not so applied, and any interest on such security due to tenant shall be paid to the tenant within twenty one (21) days after tenant has vacated his unit." Evanston Municipal Code, § 5-3-5-1(C) (eff. Feb. 2008).

¶ 12 Section 5-3-5-1(F) of the Ordinance sets out damages for the failure to return a security deposit in accordance with that rule:

> "If the landlord fails to comply with subsection (C) hereof, the tenant may recover the property and money due him together with damages in an amount equal to twice the amount wrongfully withheld and reasonable attorney's fees." Evanston Municipal Code, § 5-3-5-1(F) (eff. Feb. 2008).

¶ 13 The trial court's factual determinations regarding a violation of an ordinance will not be reversed unless those factual findings are contrary to the manifest weight of the evidence. *County of Kankakee v. Anthony*, 304 Ill. App. 3d 1040, 1048 (1999).

¶ 14 Pursuant to section 5-3-5-1(C), the landlord must list the itemized damages in a written notice and provide that itemization to the tenant along with the balance of the tenant's security deposit that is left after the total amount of itemized damages has been withheld. Evanston Municipal Code, § 5-3-5-1(C) (eff. Feb. 2008); see also *Nadhir v. Salomon*, 2011 IL App (1st) 110851 ¶ 20-22. Although the trial court received into evidence a copy of defendant's letter that purportedly itemized the damage to the apartment and stated that defendant intended to retain plaintiff's entire $2,500 security deposit, it is undisputed that defendant did not mail or otherwise deliver that document to plaintiff within 21 days after she vacated the unit, as required by the Ordinance.

¶ 15 Although defendant asserted he lacked a forwarding address for plaintiff, defendant nevertheless could have mailed the letter to the address vacated by plaintiff, as plaintiff has suggested. The letter therefore, ideally, would have been forwarded by the postal service to any new address on file. Such steps by defendant would have provided documentation of his attempt to comply with the Ordinance. The trial court's determination that defendant failed to comply with the Ordinance was not contrary to the manifest weight of the evidence.

¶ 16 Defendant next challenges the trial court's application of a setoff against plaintiff's award only for the damage to the mirror. He argues the court should have credited him for all of the itemized damages set out in his letter to plaintiff's attorney.

¶ 17 The measure of damages is a question of fact to be decided by the trier of fact, and this court will not disturb a damage award unless it is found that the trial court ignored the evidence or that its measure of damages was erroneous as a matter of law. *Fieldcrest Builders, Inc. v. Antonucci*, 331 Ill. App. 3d 597, 607 (1999). Here, the trial court accepted into evidence the document in which defendant set out his itemized damages, and after hearing testimony, the court awarded defendant a setoff only in the amount of the mirror damage.

¶ 18 Even if this court had any basis to independently review defendant's additional damage claims, defendant has not included in the record on appeal a copy of the written itemization of damages. As the appellant, it is defendant's burden to provide a sufficiently complete record to support his claims of error, and any doubts that arise from the incompleteness of the record will be resolved against him. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (absent a complete record, the trial court's order is presumed to be in conformity with the law and have a sufficient factual basis). The trial court's setoff in the amount of the mirror damage is affirmed.

¶ 19 Defendant's remaining contention on appeal is that when plaintiff did not return the apartment key to him on the final day of her tenancy, plaintiff violated the terms of her lease and became an illegal holdover tenant. Defendant therefore argues he is entitled to damages equal to the value of the use of the property during the holdover period.

¶ 20 It is impossible for this court to consider the terms of plaintiff's lease with defendant because no copy of the lease is included in the record on appeal. See *Foutch*, 99 Ill. 2d at 391-92. Nonetheless, a tenant who remains in possession of the premises after his or her lease expires or is terminated becomes a tenant at sufferance, who may, at the landlord's option, either be evicted as a trespasser or treated as a holdover tenant. *Hoffman v. Altamore*, 352 Ill. App. 3d 246, 250 (2004) (if landlord allows holdover tenancy, that tenancy is governed by terms of original lease). The court's determination of whether a tenant has retained possession of the premises beyond the end of a lease is reviewed under the manifest weight standard. *Hoffman*, 352 Ill. App. 3d at 250.

¶ 21 To constitute a "holding over" so as to trigger the landlord's option for a holdover tenancy, a tenant's continued possession of the premises upon the lease's expiration must be voluntary and must give the landlord reason to believe that the tenant intends to continue occupancy. *Hoffman*, 352 Ill. App. 3d at 250-52 (discussing *Commonwealth Building Corp. v.*

Hirschfield, 307 Ill. App. 533, 537-38 (1940)). This court has expressly declined to correlate a tenant's retention of a key with his or her desire to retain possession of a vacated property. *Hoopes v. Prudential Insurance Co. of America*, 48 Ill. App. 3d 146, 149-50 (1977). In *Hoopes*, the landlord argued that the commercial tenant retained possession by leaving lights on in the premises after the lease expired, leaving business decals on the building's exterior, and retaining a key to regain access to the premises to remove an item from the front door. *Hoopes*, 48 Ill. App. 3d at 147-48. The appellate court affirmed a directed verdict for the tenant, noting the tenant's expressed notice of its intent to vacate the property before the end of the lease and declining to give great weight to the tenant's retention of the key. *Hoopes*, 47 Ill. App. 3d at 151.

¶ 22 Here, the report of proceedings demonstrates that the trial court, relying in part on *Hoopes*, rejected defendant's argument that plaintiff created an extension of her lease by retaining a key for between four and seven days after the lease's expiration. According to the testimony of both defendant and his wife, plaintiff moved out of the unit on March 31 and returned only to walk through the empty residence and return the key. Plaintiff's actions did not exhibit an intent to continue occupying the unit after March 31. Thus, the evidence supported the trial court's conclusion that no holdover tenancy was created.

¶ 23 In summary, the evidence supported the trial court's conclusion that defendant violated section 5-3-5-1(C) of the Ordinance by failing to provide to plaintiff a written estimate of damages within 21 days of plaintiff's departure from the unit. Moreover, defendant's request for a setoff for damages greater than the $496.40 in damage to the mirror is not supported by the record, and plaintiff's retention of the key for several days after the expiration of her lease did not create a holdover tenancy.

¶ 24 Accordingly, the judgment of the trial court is affirmed.

¶ 25 Affirmed.