

FIFTH DIVISION  
May 9, 2014

No. 1-12-3775

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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H. J. RUSSELL & CO., as Property Manager for	)	Appeal from the
CHICAGO HOUSING AUTHORITY,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11 M1 350754
	)	
MICHELE PEARSON,	)	Honorable
	)	Leonard Murray,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE PALMER delivered the judgment of the court.  
Justice Taylor concurred in the judgment.  
Presiding Justice Gordon specially concurred.

**O R D E R**

¶ 1 *Held:* Judgment finding that defendant did not owe plaintiff rent under the principle of novation affirmed.

¶ 2 Plaintiff H.J. Russell & Co. filed a complaint against defendant Michele Pearson for recovery of possession of certain premises and for unpaid rent. The trial court entered a partial summary judgment for defendant on the possession issue, and, following a bench trial, entered judgment in favor of defendant on the monetary issue. In this appeal from that judgment,

plaintiff maintains that the trial court erred in finding it waived its right to collect the monies due from defendant under the principle of novation, and that it is entitled to judgment in the amount of \$7,096.

¶ 3 On May 19, 2009, defendant and her son entered a lease agreement with defendant, a Chicago Housing Authority (CHA) management company, for a CHA apartment located in Cabrini Green at 982 North Hudson Avenue in Chicago (Hudson lease). Defendant's income-based rent for this unit was \$495 per month. To facilitate the shutdown of the Hudson CHA property, defendant was relocated to another CHA property at 846 North Cambridge Avenue in Chicago by court order. On September 6, 2011, plaintiff sent a notice to defendant at the Cambridge address, demanding unpaid rent in the sum of \$3,236, for her prior residency at the Hudson address. Defendant did not comply with the demand.

¶ 4 On December 1, 2011, plaintiff filed a complaint against defendant for possession of the property located at 846 North Cambridge Avenue. Plaintiff alleged that defendant has not paid rent for the Hudson property from March 1, 2011, to September 30, 2011, and requested all unpaid rents for such property in the amount of \$3,236 plus all rents accruing through the date of trial plus costs.

¶ 5 On January 30, 2012, plaintiff filed a motion for summary judgment alleging that on September 1, 2011, it served defendant with a landlord's notice of termination of the Cambridge lease for unpaid rents on the Hudson lease. Plaintiff alleged that through February 2012, defendant is in arrears in rents to plaintiff in the amount of \$5,711.

¶ 6 On April 6, 2012, defendant responded to plaintiff's motion for summary judgment alleging that she and her son signed the Hudson lease providing for income-based rent on May 19, 2009. Her son later lost his job and defendant applied for a readjustment of rent with the CHA, and was informed that an adjustment to her rent would be made based upon defendant and her son earning no income. She later moved to the Cambridge property for which she had not signed a lease.

¶ 7 On April 23, 2012, defendant, alone, entered into a formal written lease agreement with plaintiff for the Cambridge address (Cambridge lease) with the income-based rent set at a monthly amount of \$0, for the term beginning July 1, 2012, and ending June 30, 2013. The parties also executed a change to the lease and contract for the Cambridge property, which provided that effective May 1, 2012, the rent for the Cambridge property would be \$0 per month.

¶ 8 On June 1, 2012, the trial court denied plaintiff's motion for summary judgment. In addition, the court issued a written order providing that the "order for use and occupancy is modified to \$0 rent."

¶ 9 On August 16, 2012, defendant filed a motion for a partial summary judgment on plaintiff's claim for possession of the Cambridge property. Defendant noted that plaintiff was seeking possession of the Cambridge property, and monetary damages owing to plaintiff for unpaid rents under a prior lease agreement, the Hudson lease. Defendant alleged that the parties, however, entered a new lease, the Cambridge lease, thereby establishing a new tenancy on the Cambridge property. Defendant alleged that by entering into a new lease, plaintiff

acknowledged that defendant is rightfully entitled to possession of the Cambridge property for the term of the lease.

¶ 10 Plaintiff responded that the recertification of defendant's tenancy did not constitute a waiver of its right to seek eviction because recertification is a necessary step in qualifying for Department of Housing and Urban Development (HUD) assistance payments, and thus does not constitute a waiver of the breach of the lease. Plaintiff alleged that defendant is a resident of the CHA and as such her tenancy is subsidized by HUD, and under the HUD Regulations, the housing authority is required to periodically recertify defendant's tenancy. In addition, the circuit court ordered defendant to recertify her tenancy with plaintiff on April 23, 2012. Plaintiff maintained that because plaintiff's April 23, 2012, change to lease and contract, and lease were required by HUD and issued as part of the recertification process, it does not constitute a waiver of plaintiff's right to proceed herein. Plaintiff alleged that defendant was not entitled to summary judgment based on its execution of the lease and change to lease and contract on April 23, 2012.

¶ 11 Defendant filed a reply alleging that plaintiff's claim that the new lease entered into between them was required by HUD was unsupported by law. Defendant maintained that the HUD regulations merely require that the lease provides for redetermination of rent and family composition on a periodic basis, and that there is no requirement that a tenant's HUD-subsidized tenancy be renewed pursuant to a new lease.

¶ 12 The trial court granted defendant's motion for partial summary judgment with respect to plaintiff's claim for possession. The matter then proceeded to a bench trial on the remaining

allegation of unpaid rent. No transcript was made of the trial, and, on appeal, the parties have provided an agreed report of proceedings (Ill. S. Ct. R. 323(d) eff. Dec. 13, 2005), in its stead.

¶ 13 This report shows that plaintiff's witness, Sheri Tucker, testified that she was the property manager at defendant's development and that defendant currently resided at the Cambridge address pursuant to a lease entered on April 23, 2012. Prior to that, defendant lived at a different property on Hudson Avenue, and had not paid any rents due under the Hudson lease since February 2011, and that as of trial, she owed \$7,096 under the Hudson lease. Tucker testified that defendant had been transferred to the Cambridge address pursuant to a court order in a previous lawsuit filed against defendant to facilitate the shutdown of the Hudson property. Tucker acknowledged the subsequent Cambridge lease, but believed that she entered it in error. Tucker further testified that she recertified defendant, and as a result, her rent was reduced to \$0. Consequently, defendant was not in default under the Cambridge lease since her rent was reduced to \$0 at her recertification.

¶ 14 Defendant testified that her son lived with her as a tenant under the Hudson lease, but that he lost his job in December 2010, and vacated the unit in December 2011, leaving with her no income to pay rent since she was currently unemployed. Defendant also testified to personal incidents with the property manager over a possible eviction and opposition to being relocated to another property, and sought to be recertified directly without going through the property manager. She was recertified on April 23, 2012, and acknowledged that she did not attempt to recertify with any of plaintiff's management agents during the time period in question, and that she had not paid plaintiff any rent since February 2011. In rebuttal, plaintiff's witness, Tucker,

testified that only on-site management staff could conduct the recertification, and that the assistant manager or CEO of CHA cannot recertify.

¶ 15 Plaintiff argued briefly that the execution of the new lease with defendant did not waive its right to pursue a judgment for rents that accrued prior to the execution of the new lease and under the old lease, and that it could still pursue judgment for all monies due and owing under the prior lease. Defendant argued that plaintiff waived its right to pursue a judgment by entering into the new lease, and also under the theory of novation.

¶ 16 The trial court entered judgment in favor of defendant with prejudice. The court found that the execution of a new lease waived plaintiff's right to collect or sue for any monies due and owing under the old lease citing the principle of novation. The court noted that the new lease did not reserve or require the payment of the past-due rent under the old lease.

¶ 17 On appeal, plaintiff contends that the trial court erred in finding that by executing a new lease with defendant, it waived its right to collect unpaid rents under the old lease under the principle of novation. Plaintiff maintains that the Cambridge lease was not a novation of the Hudson lease, but a wholly new obligation for a new term with all rights and duties of the parties thereto on a going-forward basis only in relation to a different property; and that defendant's rent obligation under the Hudson lease remained unchanged by the Cambridge lease.

¶ 18 Defendant responds that plaintiff's inconsistent actions of entering into a new lease with her for \$0 a month in rent, resulted in a waiver of any remedies it may have had for the breach of the original lease. Defendant further alleges that by allowing her continued tenancy with CHA

without reserving any rights between the parties relating to the past due rent, the "renewed lease" operated as a waiver of plaintiff's rights to later claim relief from the breach of the original lease.

¶ 19 In general, a novation occurs when there is a substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished or the substitution of a new debt or obligation for an existing one which is hereby extinguished. *Pielet v. Pielet*, 2012 IL 112064, ¶52. Novation has also been defined as the substitution of a new debt or obligation for an existing one, which is thereby extinguished. *Faith v. Martoccio*, 21 Ill. App. 3d 999, 1003 (1974). The essential elements of a novation are: 1) a previous valid obligation, 2) a subsequent agreement of all the parties to the new contract, 3) the extinguishment of the old contract, and 4) the validity of the new contract. *Pielet*, 2012 IL 112064, ¶52.

¶ 20 The intention of the parties to extinguish a debt is not presumed, and the party claiming discharge has the burden of proving novation by a preponderance of the evidence. *Pielet*, 2012 IL 112064, ¶52. Whether a novation existed, is determined by the trier of fact from all of the facts and circumstances of each case, and a reviewing court will not disturb the trial court's findings unless they are clearly contrary to the manifest weight of the evidence. *Thomas v. Frederick J. Borgsmiller, Inc.*, 155 Ill. App. 3d 1057, 1062-63 (1987).

¶ 21 In this case, the record shows that the parties initially entered a valid prior obligation when they signed the CHA lease for the property at 982 North Hudson Avenue on May 19, 2009, with an income-based rent set at \$495 per month. On September 1, 2011, defendant was moved to the CHA property at 846 North Cambridge Avenue. Plaintiff and defendant subsequently entered into a new agreement, signing a lease for the Cambridge property on April 23, 2012,

where the income-based monthly rent was set at \$0 per month. Thus, there was a valid prior obligation, *i.e.*, the Hudson lease, and the parties subsequently entered a new agreement by signing a new valid contract, *i.e.*, the Cambridge lease, thereby satisfying the first, second, and fourth requirements of novation. *Pielet*, 2012 IL 112064, ¶52.

¶ 22 As for the third requirement, extinguishment, we observe that the extent to which an old contract has been extinguished is dependent upon the interpretation of the extent to which the new agreement operates as a discharge. *Faith*, 21 Ill. App. 3d at 1003. Here, the same parties entered into a new CHA property lease for a different CHA property. In executing that agreement, as noted by the court, the parties did not reserve or require the payment of any past-due rent under the old lease. Since the parties did not provide in the new lease that defendant's obligations under the old CHA lease were not discharged (*Vintaloro v. Pappas*, 310 Ill. 115, 117-18 (1923)), it appears that any residual responsibilities of defendant under the old lease were discharged when the lease was executed (see *H.K.H. Development Corp. v. Metropolitan Sanitary Dist. of Greater Chicago*, 97 Ill. App. 2d 225, 239-40 (1968)). Accordingly, we find that the court's determination that there was a novation extinguishing the old CHA lease obligations was not clearly contrary to the manifest weight of the evidence, and we affirm its judgment to that effect.

¶ 23 Affirmed.

¶ 23 PRESIDING JUSTICE GORDON, specially concurring.



¶ 24 I must write separately because the outcome of this appeal is dictated by the degree of deference owed by a reviewing court to the trial court. The majority discusses the degree of deference, but I believe the reasons for this deference should be fully explained.

¶ 25 In the case at bar, the trial court granted partial summary judgment on the possession only, and that issue was not raised by the appellant in its brief to this court. Thus, the grant of partial summary judgment and the possession issue are not before us. *Supra* ¶ 2.

¶ 26 As the majority explains, the issue before us is the money issue: whether defendant owes money under the prior lease. Defendant claims that she does not because there was a novation. The four elements of a novation are: (1) a previous valid obligation; (2) a subsequent agreement of all the parties to a new contract; (3) the validity of the new contract; and (4) the intention of the parties to extinguish the old contract. *Supra* ¶ 20 (citing *Pielet v. Pielet*, 2012 IL 112064, ¶ 52.) The first three elements are not in dispute: the parties agree (1) that the prior lease was a valid obligation, (2) that the parties subsequently agreed to a new lease or contract, and (3) that the new lease was a valid contract.

¶ 27 The only issue is whether or not the parties intended to extinguish the old contract. "The intention of the parties to extinguish is not presumed, and the party claiming discharge has the burden of proving novation by a preponderance of the evidence." *Pielet*, 2012 IL 112064, ¶ 52. See also *supra* ¶ 20.

¶ 28 The trial court decided this intent element after a bench trial at which both Ms. Tucker, the CHA property manager, and defendant testified. As the majority observed, the trier of fact will determine whether a novation occurred from all the facts and circumstances before it, and a

reviewing court will not disturb the trial court's finding unless the finding was clearly contrary to the manifest weight of the evidence. *Supra* ¶ 20 (citing *Thomas v. Frederick J. Borgosmiller, Inc.*, 155 Ill. App. 3d 1057, 1062-63 (1987)).

¶ 29 Before deciding the intent of the two individuals who entered into the new lease, the trial court listened first-hand to their testimony. On appeal, not only do we lack live testimony as we do on any appeal, we also lack even an exact transcript. No transcript was made, and instead the parties provided an agreed report of proceedings.

¶ 30 The trial court heard the actual words as Ms. Tucker, the property manager, testified about entering into the new lease and admitting that she had made a mistake in doing so. *People v. Melchor*, 376 Ill. App. 3d 444, 454 (2007) (observing that when a witness testified live, his testimony led to an acquittal, but when the same testimony was merely read into the record, it led to a conviction).

¶ 31 A factfinder evaluates a witness' credibility based primarily on the witness' physical reaction to questions such as her demeanor and tone of voice. *Melchor*, 376 Ill. App. 3d at 453-54 (citing *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 548 (2007) (factfinder evaluates credibility based on "conduct and demeanor"), and *Best v. Best*, 223 Ill. 2d 342, 350 (2006) (same)). "That is why our system favors live testimony and defers to the fact finder who can observe witnesses firsthand." *Melchor*, 376 Ill. App. 3d at 454 (citing *Best*, 223 Ill. 2d at 350 (reviewing court defers to factfinder "because it is in the best position to observe the conduct and demeanor"), *Samour*, 224 Ill. 2d at 548 (same), and *Vicencio*

*v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 310 (2003) ("strong preference for live testimony")).

¶ 32 The trial court's finding about the parties' intent had to be supported by only a mere preponderance of the evidence. *Supra* ¶ 20 (citing *Pielet*, 2012 IL 112064, ¶ 52). To reverse this finding, we would have to find from a cold record that the trial court's conclusion was against the manifest weight of the evidence. *Supra* ¶ 20 (citing *Thomas*, 155 Ill. App. 3d at 1062-63).

Where the lease was a continuation of the tenant's ability to live in CHA housing, where it asked no money of the tenant, and where one of the two individuals who executed the lease admitted that she made a mistake, we cannot conclude that the trial court's preponderance finding was against the manifest weight of the evidence.