2012 IL App (3d) 110004-U

Order filed April 30, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

OZKAN BAKIRDAN,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-11-0004
	)	Circuit No. 10-LM-1375
	)	
PAULA FERGUSON,	)	Honorable
	)	Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Lytton concurred in part and dissented in part.

ORDER

¶ 1 *Held:* (1) The trial court erred when it determined that (a) plaintiff had not breached the implied warranty of habitability and (b) defendant had not proved her counterclaim based on tenant's right to repairs; (2) the trial court properly denied the defendant's claim for retaliatory eviction; and (3) the defendant was provided an opportunity to cross-examine the city inspector.

¶ 2 The defendant, Paula Ferguson, was evicted from an apartment owned by the plaintiff, Ozkan Bakirdan, after she failed to pay two months rent. On appeal, the defendant contends that:

(1) the trial court erred when it did not award costs for the repairs defendant made to the unit and did not award a credit for the time the apartment was uninhabitable; (2) she was the victim of retaliatory eviction; and (3) she was not provided an opportunity to cross-examine the city inspector.

¶ 3 FACTS

¶ 4 On August 4, 2007, the defendant entered into a written lease with the plaintiff. The lease provided that the defendant would pay the plaintiff $550 rent on the first day of each month for the full term of the lease.

¶ 5 On June 25, 2010, the defendant contacted the plaintiff and requested that he repair several plumbing problems in her unit. The problems included the toilet not flushing, water leaking from the air conditioner, and mold growth. At trial, the plaintiff reported that his air conditioner repairman inspected the unit and found no mold. However, the defendant alleged that the plaintiff had not made the requested repairs by June 30, 2010. As a result, the defendant contacted the city of Peoria to request an inspection.

¶ 6 On July 1, 2010, two city inspectors conducted an initial inspection of the defendant's apartment. Their report noted that the toilet was not working and the air conditioner was leaking. A follow-up inspection was conducted on July 6, 2010. The report from this inspection stated that the toilet was in working condition and that the defendant had complained of a bad smell from the mold coming from the air conditioner. The report concluded that no mold or bad smell was noticed in the apartment, and the case was closed. A later report indicated that the unit was in compliance as of July 21, 2010.

¶ 7 At trial, the plaintiff asked the court to call the city inspector to testify. The inspector testified that she told the plaintiff to fix a leak underneath the sink, but she did not find any mold. The inspector found a leak at the air conditioner but did not detect an odor or mold around the unit. The inspector also said that the toilet was working when she was in the unit on July 1, 2010. The defendant inquired why the inspection report said that the toilet was not working, and the inspector replied that it must have been fixed by the time she came back into the apartment for the reinspection. Before dismissing the witness, the court asked if either party had any final questions. Neither party responded, and the inspector was dismissed.

¶ 8 The defendant alleged that on July 15, 2010, she sent a certified letter to the plaintiff stating that there was still a leak in the laundry room and that the defendant had 14 days to make repairs or she would exercise her right to make repairs. The plaintiff said that he tried to have his plumber make the repairs, but the defendant refused access. On August 3, 2010, the defendant hired a plumber to fix the leak in her apartment. The defendant paid the plumber $149.88 to repair the leaking pipes.

¶ 9 The plaintiff filed a complaint for forcible detainer on August 25, 2010. The complaint alleged that the defendant unlawfully withheld possession of the apartment and owed $1,380 in unpaid rent for the months of July and August, plus fines and costs. The defendant filed a counterclaim that alleged facts supporting a breach of the implied warranty of habitability, tenant's right to repair, and retaliatory eviction. The defendant claimed that she was forced to find alternative housing and incurred $110.30 in hotel bills because the apartment was unfit for human habitation.

¶ 10 The court entered a judgment for the plaintiff in the amount of $1,380 plus $160 in costs, and it denied the defendant's counterclaim.

¶ 11 ANALYSIS

¶ 12 Initially, we note that an appellee's brief was not filed. However, we reach the merits of the case because the record is simple and the claimed errors can easily be decided without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 13 A. Implied Warranty of Habitability

¶ 14 The defendant argues that the trial court erred when it denied her counterclaim for the costs she incurred because she could not live in the apartment.

¶ 15 The implied warranty of habitability is included in all contracts for the lease of a residential apartment in a multiple unit dwelling. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351 (1972). The warranty requires that a dwelling be habitable and fit for living. *Glasoe v. Trinkle*, 107 Ill. 2d 1 (1985). A breach of the implied warranty occurs when a substantial defect renders the premises unsafe or unsanitary. *Vanlandingham v. Ivanow*, 246 Ill. App. 3d 348 (1993). Whether there has been a breach of the warranty is a question of fact to be determined on a case-by-case basis. *Glasoe*, 107 Ill. 2d 1. In determining whether there has been a breach, courts have considered the following: the nature of the deficiency, its effect on habitability, the length of time it persisted, the amount of the rent, whether the tenant waived the defects, and whether the defects resulted from abnormal or unusual use by the tenant. *Vanlandingham*, 246 Ill. App. 3d 348. The defect complained of must render the premises uninhabitable in the eyes of a reasonable person. *Id.* Damages for a breach are awarded based on the difference in value

between the fair rental value of the premises, if it had been as warranted, and the fair rental value as it is in the defective condition. *Glasoe*, 107 Ill. 2d 1.

¶ 16 In the present case, the defendant's apartment was arguably rendered uninhabitable by the lack of a working toilet. However, it is not clear from the record how long the toilet was not working and the severity of this defect. Therefore, we remand the case to the trial court for a hearing to determine if there was a breach of the implied warranty of habitability and whether a rent credit is necessary to remedy the breach.

¶ 17 B. Tenant's Right to Repair

¶ 18 The defendant further argues that the trial court erred when it denied her counterclaim for the plumber's bill.

¶ 19 The Residential Tenants' Right to Repair Act (Act) permits a tenant, under limited circumstances, to pay for repairs to her unit and deduct the cost of the repairs from her rent. See 765 ILCS 742/5 (West 2010). To make a valid rent deduction, a tenant may notify the landlord of a problem in writing by certified mail. *Id.* The landlord then has 14 days to make repairs. *Id*. If the landlord fails to make repairs in the statutory time frame, the tenant may have the repairs made in a workmanlike manner and in compliance with appropriate laws or local ordinance. *Id.* The tenant must submit the paid bill, from an appropriate tradesman, to the landlord. *Id.* Then the tenant may deduct from her rent the cost of repairs, not to exceed the lesser of $500 or one-half of her monthly rent. *Id.*

¶ 20 In the present case, the evidence indicates that the defendant complied with most or all of the provisions of the Act necessary to deduct the cost of the repairs from her rent. See 765 ILCS 742/5 (West 2010). First, she notified the plaintiff by certified mail that there was a water leak.

More than 14 days later, the defendant hired a plumber to repair the leak because the plaintiff had not fixed the problem. She then paid the plumber, and neither party contested the quality of the repairs or their compliance with the local laws and ordinances.

¶ 21 However, the record does not indicate that the defendant sent the plumber's bill to the plaintiff. Nevertheless, we find that the plaintiff received notice of the bill when the defendant filed her counterclaim with a copy attached. Furthermore, permitting the plaintiff to benefit from the defendant's payment for repairs that he was required to make would result in unjust enrichment. See *Hayes Mechanical, Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1 (2004). Therefore, we reverse the court's counterclaim ruling and remand with instruction to enter judgment for the defendant on the counterclaim in the amount of $149.88.

¶ 22 C. Retaliatory Eviction

¶ 23 The defendant next argues that the court's retaliatory eviction finding was in error.

¶ 24 The Retaliatory Eviction Act declares that it is against public policy for a landlord to evict a tenant because the tenant complained to a governmental authority of a *bona fide* violation of an applicable building code, health ordinance, or similar regulation. 765 ILCS 720/1 (West 2010). A *prima facie* case of retaliatory eviction requires that: (1) the tenant made complaints to a governmental authority; (2) violations were found; (3) the landlord was notified of the violations; and (4) the tenancy was terminated solely because of the tenant's complaints. *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39 (2009). We will not reverse a court's retaliatory eviction finding unless it was against the manifest weight of the evidence. *Id.*

¶ 25 We find that the court's denial of the defendant's retaliatory eviction claim was not against the manifest weight of the evidence. We acknowledge that the defendant complained to the city

inspectors, and the inspectors found violations and notified the plaintiff. However, the defendant did not establish that her lease was terminated solely because of the reporting. Rather, the record indicates that the defendant had not paid rent for the months of July and August. This provided an alternative ground for the termination. See *American Management Consultant, LLC*, 392 Ill. App. 3d 39.

¶ 26 Although the dissent argues that we should remand the case for consideration of the defendant's retaliatory eviction claim, we note that the trial court already ruled on this issue when it denied the defendant's counterclaim. After reviewing the record, we find that the trial court's ruling was not against the manifest weight of the evidence.

¶ 27 D. Cross-Examination of the City Inspector

¶ 28 Finally, the defendant argues that she was denied her right to cross-examine the city inspector who was called to testify by the plaintiff.

¶ 29 We find that the record does not support the defendant's contention. In the record, the court initiated the examination of the city inspector. The court then allowed the plaintiff to examine the witness, and the defendant was provided an opportunity to respond with her own questions. Additionally, the defendant attempted to impeach the city inspector's testimony with the report she filed following her inspection on July 1, 2010. Before dismissing the witness, the court inquired a final time if either party had any questions. Thus, we find that the defendant was provided ample opportunity to cross-examine the city inspector.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part, reversed in part, and remanded with direction.

¶ 32 Affirmed in part, reversed in part, and remanded with direction.

¶ 33 JUSTICE LYTTON, concurring in part and dissenting in part:

¶ 34 I concur with the majority's decisions to reverse and remand on defendant's counterclaim and to remand for a hearing on the implied warranty of habitability. However, I would also remand to determine the defendant's retaliatory eviction claim because it is intertwined with the implied warranty of habitability.

¶ 35 The majority concludes that the plaintiff was justified in evicting the defendant because she failed to pay rent in July and August. However, this presumes that rent was due during those months. If the plaintiff breached the implied warranty of habitability in July and August, then the defendant may have properly withheld rent during those months.

¶ 36 A tenant may use a landlord's breach of implied warranty as a shield to justify the withholding of rent. *Beese v. National Bank of Albany Park*, 82 Ill. App. 3d 932, 937 (1980). Alleged breaches of the warranty of habitability are germane to whether a tenant is indebted to a landlord for rent. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 359 (1972). If rent is not owed because the tenant's setoffs based on alleged violations of the landlord's breach of an implied warranty of habitability exceed the amount of rent the landlord claims to be owing, the tenant cannot be evicted for failing to pay rent. *Rotheimer v. Arana*, 384 Ill. App. 3d 569, 582-83 (2008); *Richardson v. Wilson*, 46 Ill. App. 3d 622, 624 (1977).

¶ 37 Issues of habitability directly affect whether the defendant was obligated to pay any part of the rent for the months of July and August. Thus, a remand is appropriate to determine if the defendant properly withheld rent. If she did, then she could not be evicted for failing to pay rent. See *Rotheimer*, 384 Ill. App. 3d at 582; *Richardson*, 46 Ill. App. 3d at 624. Since plaintiff's

obligation to pay rent and the warranty of habitability are directly related, both issues should be decided on remand.