SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5475-15T4

JOSE ROSARIO and ITALIA VIGNIERI,

Plaintiffs-Respondents,

v.

SAE KIM,

Defendant-Appellant.

Argued November 28, 2017 – Decided March 9, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6080-15.

Bruce D. Nimensky argued the cause for appellant (Gray Law Group, attorneys; Bruce D. Nimensky, on the brief).

Carolina Calderon argued the cause for respondents.

PER CURIAM

Defendant, plaintiffs' landlord, appeals from a judgment – entered after a bench trial – awarding the plaintiff-tenants $6564.43, plus attorneys' fees, based on their claim defendant breached the implied warranty of habitability for failing to

provide adequate heat to the condominium unit they rented for a two-year term, commencing April 15, 2014, at a monthly rental of $2800. Defendant contends:

> POINT III
>
> THE FACTUAL FINDINGS OF THE TRIAL COURT ARE UNSUPPORTED [BY] AND INCONSISTENT WITH THE EVIDENCE IN THE CASE BELOW.
>
> A. NOTICE
>
> (I) NOTICE OF DRAFTY WINDOWS
>
> (II) NOTICE THAT THE HEATING UNITS "DO NOT WORK VERY WELL"
>
> (III) THE APRIL 7, 2015 NOTICE
>
> B. FAULTY HEATING SYSTEM
>
> (I) THE ORIGINAL FOUR HEATING UNITS
>
> (II) THE FOUR NEW HEATING UNITS
>
> C. THE UTILITY BILLS
>
> D. WINDOWS
>
> (I) DEFENDANT ADDRESSED THE "PROBLEM" WITH THE WINDOWS
>
> (II) BEFORE AND AFTER THE HEATING UNITS WERE REPLACED THE PREMISES MAINTAINED SUFFICIENT HEAT TO WARM THE PREMISES
>
> POINT IV
>
> THE COURT BELOW ERRED IN NOT FINDING THAT THE PLAINTIFFS' FAILURE TO USE THE HEATERS CONSTITUTED A WAIVER OF THE ALLEGED "DEFECT" AND ESTOPPED THE PLAINTIFFS FROM COMPLAINING.

POINT V

THE COURT BELOW ERRED IN FINDING AS A MATTER OF LAW THAT THE PREMISES WERE UNINHABITABLE.

POINT VI

THE COURT BELOW ERRED IN FINDING THAT THE DEFENDANT AND THE PLAINTIFFS HAD MUTUALLY AGREED TO AN EARLY TERMINATION OF THE LEASE AND A RELEASE OF THE PLAINTIFF[S'] OBLIGATION TO PAY RENT.

POINT VII

THE COURT BELOW ERRED IN FINDING THAT PLAINTIFFS WERE ENTITLED TO LEGAL FEES AND ERRED DENYING THE DEFENDANT THE RECOVERY OF HIS LEGAL FEES.

POINT VIII

THE COURT ERRED IN ITS CALCULATION OF THE DAMAGES AWARDED TO THE PLAINTIFF[S]; DEFENDANT SHOULD BE AWARDED LEGAL FEES PURSUANT TO [RULE] 4:58-1 (OFFER OF JUDGMENT).

Although we affirm the judge's finding that defendant breached the warranty of habitability, we remand the case for further findings of fact and recalculation of damages.

The scope of our review of a non-jury case is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). The trial judge's findings will "not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice.'" Campione v. Soden, 150 N.J. 163, 188 (1997) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). On the other hand, questions of law and the legal

consequences that flow from established facts are subject to de novo review. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In Marini v. Ireland, 56 N.J. 130, 144 (1970), our Supreme Court held all residential leases contain an implied covenant or warranty of habitability. A tenant may initiate an action to recover part or all of the rent paid to his landlord "where he alleges that the [landlord] has broken his [or her] covenant to maintain the premises in a habitable condition." Berzito v. Gambino, 63 N.J. 460, 469 (1973). In order to succeed on the claim, "[t]he condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person." Ibid. "At a minimum, the necessities of a habitable residence include sufficient heat and ventilation, adequate light, plumbing and sanitation and proper security and maintenance." Trentacost v. Brussel, 82 N.J. 214, 225 (1980). However, a tenant must also provide his landlord with notice and sufficient time to effectuate repairs. Berzito, 63 N.J. at 469.

We affirm the trial judge's finding that defendant breached the implied warranty of habitability substantially for the reasons set forth by the trial judge in his written opinion attached as a rider to the judge's order of July 6, 2016. The judge found from testimony of plaintiffs and their witnesses — which he deemed to

be credible — "that there were significant problems with the heat and windows of the [a]partment which caused the [a]partment to be excessively cold during [the] fall/winter months (October 2014 through April 2015)." He concluded from the evidence that the apartment's "faulty windows caus[ed] air leaks and that the heating unit fixtures (prior to replacement by the [d]efendant) failed to function adequately," and that "the heating units could not adequately maintain a reasonable temperature in the [a]partment." The judge found that, even after the units were replaced,

> there clearly was a problem with the windows which was never addressed as all witnesses seem to acknowledge during the trial. Furthermore the heating units were not replaced until sometime in February 2016. Even once the heating units were replaced, the credible evidence presented reveals that the problems with the windows continued to greatly impact the ability for the [a]partment to retain heat during the winter months.

These findings, largely the product of the judge's credibility determination, are supported by the evidence and require our deference. The fact that some heat was supplied does not, as defendant now argues, mean that adequate heat was provided. The judge properly found the proofs — which included the extreme conditions endured by plaintiffs — showed the apartment was "uninhabitable in the eyes of a reasonable person." Berzito, 63 N.J. at 469.

We do not agree, however, with the judge's finding that plaintiffs' notice of the defects to defendant warranted an award of damages from October 2014 through April 2015. The judge found six documents entered into evidence[1] "identifie[d] that the [p]lantiffs . . . properly provided notice to the [l]andlord of the various alleged breaches of the implied warranty of habitability and breach of the applicable terms of the [l]ease." A review of those documents reveals the earliest notice given was January 8, 2015.[2] In calculating damages — including the rent abatement and reimbursement for utility bills — the judge did not consider the date the tenant provided notice or account for a "reasonable period of time to effect the repair[s]." Berzito, 63 N.J. at 469. We are therefore compelled to remand the case to the trial judge for a calculation of damages considering the date the landlord received notice, and the time it took to install the units; we do not compel the judge to find that the time to effect the repairs be taken into account — only to address the issue. His findings regarding the habitability of the apartment after the

[1] The documents included a series of text messages and letters exchanged between plaintiff and defendant's intermediaries from January to April 2015.

[2] Defendant testified that his agent notified him in late December that plaintiffs complained about the units, but the judge did not rely on this testimony when he made his findings.

installation may impact his conclusions. And we stress our affirmance of the methodology the judge used to calculate the rent abatement. A trial judge's determination on rent abatement "is a factual finding and will be affirmed if supported by credible evidence in [the] record." C.F. Seabrook Co. v. Beck, 174 N.J. Super. 577, 596 (App. Div. 1980).

We determine defendant's argument that the judge erred in awarding attorneys' fees to plaintiff and denying same to him to be without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E). The judge's finding that defendant breached the habitability warranty justified the award.

The remedies afforded to a tenant for a landlord's breach of the warranty of habitability include rent abatement, Berzito, 63 N.J. at 469, and a deduction of self-help repairs, Marini, 56 N.J. at 146. The trial judge correctly awarded the costs of materials — including heaters, insulation and drapes — purchased by plaintiffs in their self-help attempt to make the premises habitable; in that defendant offered no proof of those items' residual value — retained by plaintiffs — the full cost was the proper measure of damages. There was no authority, however, for the reimbursement of excess utility bills. The judge could have further abated the rent because of the costs plaintiffs incurred

trying to heat the apartment. But the judge erred in awarding a percentage of the utility costs.

Defendant's argument that plaintiffs waived the defect because they caused the apartment "to be cold" by only utilizing the heaters for three to four hours each night was advanced to the trial judge in a motion for a directed verdict at the conclusion of plaintiffs' case. The judge denied that motion without prejudice, and without explanation "subject to renewal at the end of the case." The motion was never renewed; defendant's counsel asked the judge only to "consider what [he] said about the motion as part of [his] closing." Inasmuch as we are remanding this matter, the judge can set forth his findings of facts and conclusions of law in compliance with Rule 1:7-4(a).

We reject defendant's contention that the trial judge erred in ruling the parties agreed to a mutual termination of the lease for the reasons set forth by the trial judge in his written opinion denying defendant's counterclaim. The judge found defendant did not meet his burden of proof when he claimed he was unable to re-rent the apartment because plaintiffs stayed in tenancy beyond the agreed-to July 31, 2015 termination date. Those findings are not "so wholly insupportable as to result in a denial of justice" and we leave them undisturbed. Rova Farms, 65 N.J. at 483-84 (quoting

Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div.), aff'd o.b., 33 N.J. 78 (1960)).

Because on remand the trial judge will have to recalculate damages, we leave any issue regarding defendant's offer of judgment to the judge.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.