

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-022

OCTOBER TERM, 2006

Ram Sinha		}	APPEALED FROM:
	}		
	}		
v.		}	Chittenden Superior Court
	}		
Christopher Kina, et al.		}	DOCKET NO. S0890-05 CnC

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Tenants Christopher Kina and Sallyanne O=Donnel appeal a superior court order granting landlord Ram Sinha possession of the premises and damages for unpaid rent, attorneys= fees and costs. Tenants claim that the trial court (1) erred in denying their counterclaims for trespass and intentional infliction of emotional distress, (2) awarded unreasonable attorneys= fees, and (3) miscalculated the amount of back rent owed. We affirm in part, reverse in part and remand for further consideration of tenants= trespass claim and recalculation of back rent.

The following facts are not in dispute. Landlord and tenants entered into an agreement on November 23, 2004 to lease a house on Sledrunner Road in Shelburne for twelve months and one week. The lease obligated tenants to pay \$2000 each month. In the spring, tenants began having problems making rental payments on time. On June 28, 2005, landlord sent tenants a notice of termination for nonpayment of rent. The notice stated that no rental payments were received for May or June 2005, and set a termination date of July 31, 2005. Tenants failed to pay rent and landlord filed a complaint for eviction on August 11, 2005, claiming that tenants failed to pay rent for May, June, July and August. In their answer, tenants asserted landlord violated the warranty of habitability and counterclaimed for intentional infliction of emotional distress, intentional misrepresentation of the rental premises and trespass. The court granted landlord=s motion for payment of rent into court, and tenants paid \$2533 on September 29, 2005 for the remainder of September and all of October. Tenants did not make any further payments into the court escrow.

On November 3, 2005, the court held a hearing with all parties present. Landlord was represented by counsel, and tenant Christopher Kina represented tenants pro se. At the hearing, landlord testified that tenants failure to pay rent began in March. Landlord also filed a bank statement in support of his contention that tenants did not pay rent for March. Tenant Kina testified that tenants paid rent for March and April. Tenant Kina explained that the March payment was initially returned for insufficient funds, but that a replacement check was successfully cashed. In a ruling from the bench, the superior court found landlord=s testimony to be more credible and ruled in favor of landlord on his claim for rent and on tenants= counterclaims. The court awarded landlord \$16,000 in back rent, representing eight months of unpaid rent. The court also awarded landlord costs and attorneys= fees of \$6,285.51. Tenants appealed, reasserting their counterclaims, and challenging the amount of back rent and attorneys= fees awarded.

On appeal, we will not disturb the trial court's findings of fact unless they are clearly erroneous. Highgate Assoc., Ltd. v. Merryfield, 157 Vt. 313, 315 (1991). In addition, we will uphold the court's conclusions of law if reasonably supported by its findings. Id. at 316.

First, we address the award of back rent. At the merits hearing, landlord testified that tenants did not pay rent beginning in March. [1] Tenant Kina admitted that rental payments were not current, but testified that the first unpaid month was May. When the court announced its ruling from the bench that awarded landlord eight months of rent, tenant Kina objected, reiterating that tenants had paid March and April. The court stated that based on landlord's testimony, it found tenants had not paid March and April rent. Tenant Kina explained that he had no notice that March and April were in dispute because all of the termination notices stated that rent was unpaid beginning in May. Tenant Kina offered to provide proof of payment, and the court invited him to submit it with a written motion. In a motion to correct judgment, filed on November 7, 2005, tenants filed cancelled checks as evidence of payment. The court did not respond to this motion, and on December 13, 2005, the trial court granted judgment for landlord and awarded back rent of \$16,000. In his brief, landlord now admits that tenants paid rent for March and April, and stipulates to a \$4,000 decrease in the judgment for back rent. Although the trial court is in the best position to judge the evidence at trial, Kanaan v. Kanaan, 163 Vt. 402, 405 (1995), in this instance the evidence does not support the trial court's finding of \$16,000 in back rent. Therefore, we remand this issue for consideration of tenants' evidence and recalculation of back rent.

Next, we address tenants' counterclaims of trespass and intentional infliction of emotional distress. Tenants claim that landlord committed six instances of trespass where his agents entered the property surrounding the house without notice. Tenants claim that several times persons blocked the driveway and surrounded the house. The alleged instances occurred between February 2005 and June 2005. Landlord acknowledges that his representatives were on the property and the access road to the house, but denies blocking tenants' access to the house. Landlord further argues that his presence on the property was consistent with the law because the statute requiring notice before entry applies to the dwelling unit and not the surrounding premises. See 9 V.S.A. ' 4460 (outlining under what circumstances landlord may enter the dwelling unit). At the hearing, the court dismissed the trespass claim, concluding that landlord had an unlimited right of entry after rent was unpaid beginning in March. This conclusion is based on incorrect findings. As described above, both parties now agree that rent was unpaid beginning in May, not March. Five of the six entrances tenants complain of occurred before May 1, 2005. In addition, even if rent was delinquent, landlord does not have an unlimited right of entry until landlord is granted a writ of possession. See 9 V.S.A. ' 4468 (explaining landlord may bring action for possession if tenant remains in possession after termination). Because the basis of the court's ruling is erroneous, we reverse the dismissal of the trespass counterclaim and remand for reconsideration in light of landlord's argument.

Tenants also allege that landlord's repeated entrances amounted to a pattern of abuse constituting intentional infliction of emotional distress. The trial court entered judgment for landlord on this claim, and we affirm. To sustain a claim for intentional infliction of emotional distress, tenants must demonstrate that landlord engaged in outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct. @ Fromson v. State, 2004 VT 29, & 14, 176 Vt. 395 (quotations omitted). This is a heavy burden requiring a showing that landlord committed conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community. @ Id. (quotations omitted). Tenants failed to sustain this burden. Entering tenants' driveway, driving past the property, or parking nearby, even if done several times, is not a significantly outrageous act. A [1] incidents that are in themselves insignificant should not be consolidated to arrive at the conclusion that the overall conduct was outrageous. @ Denton v. Chittenden Bank, 163 Vt. 62, 67 (1994).

Finally, we turn to the issue of attorneys' fees. The court awarded attorneys' fees based on a provision

in the lease granting landlord the right to recover reasonable attorney fees and court costs resulting from enforcement of the lease. After the court ordered judgment for landlord, landlord=s attorney submitted an affidavit summarizing the fees. The affidavit outlined the number of hours worked and the billing rate, but no billing records were submitted. Tenants argue that the award is erroneous because no testimony was offered to support the reasonableness of the amount.

Determination of attorneys= fees is a question of fact and requires the court to consider several factors. Fine Foods, Inc. v. Dahlin, 147 Vt. 599, 605 (1987). These include the nature of the business, the usual prices charged for similar services in the area, the amount of time involved, the importance of the matter and the amount of responsibility carried. Id. Here, landlord=s attorney submitted an affidavit outlining the amount of time each attorney spent on the matter, the billing rate and the expertise of each attorney. See Brutaeger v. Zeller, 147 Vt. 247, 254-55 (1986) (explaining that the plaintiff has the burden of establishing the reasonableness of fees). This was adequate information for the trial court to determine reasonableness, especially because the court conducted both hearings in the matter and was acquainted with the entire proceeding. See Burlington Free Press v. University of Vermont, 172 Vt. 303, 310 (2001) (emphasizing that the trial court=s discretion in awarding attorneys= fees is an important element because of the relationship with the parties).

Reversed and remanded for proceedings consistent with this entry order.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

[\[1\]](#) On appeal, tenants claim that landlord=s incorrect statements constitute perjury and obstruction of justice. We do not reach the merits of these claims. Perjury and obstruction of justice are criminal offenses that would have to be charged and heard in a separate proceeding; our review is limited to the matters already heard. See Hoover (Letourneau) v. Hoover, 171 Vt. 256, 258 (2000) (A[O]ur review is confined to the record and evidence adduced at trial.@).