ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-342

MARCH TERM, 2009

Chris Khamnei d/b/a Green Mountain Real Estate	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Jay Behrman	}	DOCKET NO. S0418-08 CnC
		Trial Judge: Matthew I. Katz

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

Tenant appeals from the trial court's order in this eviction proceeding. He raises numerous claims of error. We affirm the court's decision.

The record indicates the following. Tenant rented an apartment from landlord, and a portion of his rent was paid through Section 8, a federal rent-subsidy assistance program. See generally 42 U.S.C. § 1437f. Tenant's lease expired by its own terms on February 28, 2008. Landlord did not extend or renew tenant's lease. In October 2007, landlord provided written notice to tenant that the lease would not be renewed. Landlord also declined a request by the Burlington Housing Authority (BHA) to renew tenant's lease. Tenant did not vacate the apartment upon the expiration of his lease, and in mid-March 2008, landlord filed this eviction action. In conjunction with his complaint, landlord filed a motion under 12 V.S.A. § 4853a to have tenant's total rent of $665—$476 of which was paid through Section 8 and $189 from tenant—to be paid into court. This motion was granted in April 2008, apparently with respect to that portion of the rent owed by plaintiff personally.

In June 2008, landlord learned that tenant was in jail and that he was likely to remain there for a long time. On or about June 23, landlord placed a padlock on the door of tenant's apartment, in part because he was concerned about the security of the existing apartment lock. A key was later provided to tenant's attorney on tenant's motion.* The court found no evidence that tenant had been out of jail at any time after the padlock was installed or that he had suffered any actual harm from the use of the padlock. To the contrary, the court explained, the

---

* Tenant later filed a counterclaim, alleging that he was unable to enter the apartment between July 1 and July 10 due to the padlock, and that he suffered $3000 in damages as a result. Tenant claimed that landlord's action violated the Vermont Residential Rental Agreements Act, 9 V.S.A. §§ 4463(b) and (c), as well as the Vermont Consumer Fraud Act, 9 V.S.A. § 2453.

lock had served to better secure tenant's potentially valuable belongings. The padlock was removed on July 10.

Landlord entered tenant's apartment twice in the weeks before the July 17 court trial. The first entry was without tenant's permission, although landlord posted notice of his intent on tenant's door. Landlord entered the apartment because he believed it was filthy and that it posed a potential nuisance to other tenants. Landlord observed numerous fruit flies in the apartment and he removed five bags of garbage, three of which were present in the apartment when he arrived. The court found that landlord had taken reasonable steps to prevent a nuisance to nearby apartments. It noted that landlord had also looked through tenant's belongings when he was in the apartment, but there was no evidence that anything other than garbage was removed from the apartment. Landlord entered the apartment a second time with tenant's attorney at her request.

Based on these and other findings, the court concluded that landlord was entitled to possession of the apartment. It explained that landlord provided written notice that his lease would not be renewed, and landlord engaged in no acts that could be construed by tenant as renewing the lease. Although landlord acted contrary to law by padlocking the door, the court found that tenant failed to demonstrate any resulting harm. Tenant was in jail during this period, and he was not barred from accessing the apartment in any way shown by the evidence at trial. Because tenant suffered no actual damages, he was not entitled to exemplary damages under the Consumer Fraud Act. The court thus concluded that the tenancy was properly terminated, and it denied tenant's "motion for judgment." It awarded possession of the apartment to landlord, as well as back rent and costs. Tenant appealed.

Our review of the trial court's decision is deferential. We will not disturb factual findings unless clearly erroneous, and we will "uphold the trial court's conclusions as long as they are reasonably supported by the findings." Waterbury Feed Co. v. O'Neil, 2006 VT 126, ¶ 6, 181 Vt. 535 (mem.). As discussed below, we find no grounds to disturb the court's decision here.

Tenant first asserts that, under federal law, landlord could not terminate his lease without cause and without providing appropriate notice to BHA of "any changes in the rental contract." Assuming arguendo that the lease was properly terminated, tenant maintains that a new tenancy was created in January 2008 when the BHA sent notice of a rental payment adjustment to landlord and tenant. Tenant also asserts that landlord waived his right to evict tenant by accepting rental payments during the pendency of these proceedings.

These arguments are without merit. Tenant misreads the relevant federal regulations. The first regulation cited by tenant, 24 C.F.R. § 982.310(a), provides that an owner participating in the Section 8 program may not terminate a tenancy "[d]uring the term of the lease," except on certain specified grounds. (Emphasis added.); see also 42 U.S.C. § 1437f(d)(1)(B)(ii) (providing that "during the term of the lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause" (emphasis added)). The phrase "during the term of the lease" was specifically added to eliminate the so-called "endless lease rule," whereby "landlords participating in the Section 8 program could not evict

a tenant without establishing good cause, even if the tenant was at the end of a lease term." Rosario v. Diagonal Realty, LLC, 872 N.E.2d 860, 864 (N.Y. 2007); see also Carol Rickert & Assocs. v. Law, 2002-NMCA-096, ¶ 13, 54 P.3d 91 (describing legislative history of amendment); S. Rep. No. 105-21, at 36-37 (1997) (stating that one of the key reforms made by Congress in revising Section 8 program was to eliminate so-called "endless lease" rule and conform Section 8 leases to generally accepted leasing practices). Thus, as the plain language of the regulation indicates, a showing of good cause to terminate is required only "when the termination occurs 'during the term of the lease.' " Rosina v. Parra, 853 N.Y.S.2d 458, 459 (N.Y. App. Div. 2007); Law, 2002-NMCA-096, ¶ 14 (statutory change "was intended to relieve landlords from the burden of showing good cause before they may refuse to renew a Section 8 lease"). Landlord here chose not to renew tenant's lease when it expired, and accordingly, he had no obligation to provide tenant with grounds for his decision. See Rosina, 853 N.Y.S.2d at 459 (rejecting argument similar to that raised here, and holding that federal regulations did not require landlord to provide grounds for nonrenewal of tenant's lease); see also Law, 2002-NMCA-096, ¶ 14 (same).

Tenant also mistakenly cites 24 C.F.R. § 982.310(e)(2)(ii) as support for his assertion that landlord was required to send notice of any changes in the rental contract to the housing agency at the same time notice was sent to the tenant. Like § 982.310(a), § 982.310(e)(2)(ii) concerns termination of tenancies "during the term of the lease," and it is not applicable here. Tenant's related assertion—that his tenancy did not end when his lease expired—is apparently based on tenant's construction of the federal regulations above, which as previously discussed, we find without merit. Finally, we reject tenant's assertion that the notice of rent adjustment, sent by the BHA to tenant and landlord, somehow created a new tenancy. This letter plainly did not override the notice of nonrenewal that landlord provided to tenant, and it did not create a new lease agreement between landlord and tenant.

Tenant next argues that by accepting rental payments during the pendency of this case, landlord waived his right to evict tenant. We reject this assertion. Landlord provided tenant with written notice that his lease would not be renewed, and he commenced eviction proceedings when tenant refused to vacate the apartment. See 9 V.S.A. § 4467(e) (where there is a written rental agreement, notice to terminate for no cause shall be at least sixty days before the end or expiration of the term of the rental agreement if the tenancy has continued for more than two years). Under 9 V.S.A. § 4467(j)(1), landlord's acceptance of full or partial rent payment by or on behalf of a tenant after the termination of the tenancy or at any time during the ejectment action shall not "constitute a waiver of the landlord's remedies to proceed with an eviction action." Landlord here in no way waived his right to evict tenant. As part of his argument, tenant refers to alleged events that occurred following trial. This information is not part of the record before us, and we therefore do not address it. See Hoover v. Hoover, 171 Vt. 256, 258 (2000) (Supreme Court's review on appeal is confined to the record and evidence adduced at trial; Court cannot consider facts not in the record).

We next consider tenant's argument that the court erred by failing to award him damages for landlord's violation of 9 V.S.A. § 4463. Tenant argues that he was harmed by landlord's illegal action because, although he was in jail, his stepfather tried to access the

apartment and could not do so. Tenant also suggests that he is entitled to damages, as a matter of law, because landlord violated § 4463.

We reject these arguments. Section 4463 prohibits a landlord from directly or indirectly denying a tenant access to and possession of the tenant's personal property, or denying him access to and possession of the rented premises, except through proper judicial process. Id. § 4463(b), (c). Section 4464(a) of Title 9, V.S.A., provides that "[a]ny tenant who sustains damage or injury as a result of an illegal eviction may bring an action for injunctive relief, damages, costs and reasonable attorney's fees." The trial court found that landlord acted contrary to law by padlocking tenant's door, but it concluded that tenant failed to prove that he suffered any harm. We agree. As recounted by the trial court, tenant's stepfather did not testify at trial that he was denied access to the apartment, nor did tenant offer any other evidence to show actual harm. The trial court also found while the use of the padlock was contrary to law, it actually served to better secure tenant's potentially valuable belongings. Under the circumstances presented here, and given the absence of any proof of actual damages, we find no error in the court's decision not to award nominal damages to tenant. Tenant bore the burden of proving his damages, and he failed to meet that burden here.

We turn next to tenant's assertion that the landlord violated the Vermont Consumer Fraud Act. According to tenant, landlord is engaged in the business of renting property to consumers and his act of rummaging through tenant's belongings and padlocking the door violated the Act. While the Act can apply to transactions involving landlords and tenants, see L'Esperance v. Benware, 2003 VT 43, ¶ 14, 175 Vt. 292, tenant fails to show that the Act applies to the situation presented here. The Consumer Fraud Act prohibits "unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). A "deceptive act or practice" is "a material representation, practice or omission likely to mislead a reasonable consumer." Bisson v. Ward, 160 Vt. 343, 351 (1993). To state a claim under the Consumer Fraud Act, "(1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product." Greene v. Stevens Gas Serv., 2004 VT 67, ¶ 15, 177 Vt. 90 (quotation omitted). Tenant offers no specific argument as to how this standard was satisfied here, and we fail to see how padlocking the door, "rummaging through" tenant's belongings, or removing trash from the apartment, was fraudulent. The fact that these acts may have arguably been improper does not render them fraudulent. The Consumer Fraud Act addresses "deceptive acts or practices," not allegations of trespass or breach of a condition of tenant's rental agreement. See, e.g., id. ("[A] mere breach of contract cannot be sufficient to show consumer fraud."). We agree with the trial court that tenant's claim under the Consumer Fraud Act, including his request for attorney's fees, fails.

Finally, we address tenant's assertion that the trial court committed reversible error by "secretly entering [tenant's] district court records into evidence." We agree that the trial court acted improperly in obtaining the docket entries for tenant's pending criminal case. See Condosta v. Condosta, 139 Vt. 545, 547 (1981) ("The judgment and proceedings in a case other than that on trial, even between the same parties, is not to be taken notice of by the court of its own motion."). Nonetheless, tenant fails to show that this action warrants reversal. It was

evident at trial that tenant was in jail—as the trial court stated, tenant came to court as the result of a transport order and he was escorted by personnel from the Department of Corrections. Landlord also testified that he had learned that tenant was incarcerated and that tenant would remain incarcerated for a long time. Moreover, there is no suggestion that the trial court's decision was in any way based on the district court records. The court granted relief to landlord after finding that tenant's lease expired. Tenant presented no evidence that he had been released from jail or that he had personally tried to access the apartment during the time it was padlocked. Any error in obtaining this information was harmless. This is equally true for the remaining evidentiary claims raised by tenant. We discern no harm from the inclusion of a non-admitted exhibit in the court's file, or from the inclusion of the email exchange referenced by tenant. We fail to see the significance of the fact that certain admitted exhibits, such as a photograph of the padlock, were inadvertently omitted from the trial court's file. This is particularly true given that tenant has included these exhibits in his printed case. We find no basis to disturb the trial court's order.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice