14 Fla. L. Weekly Supp. 145d

Landlord-tenant -- Security deposit -- Retention by landlord -- Appeal of verdict in favor of tenant and denial of landlord's motion for directed verdict in action to recover security deposit and last month's rent retained by landlord -- Where tenant paid rent through April 21, but landlord did walk-through of property on April 1 with knowledge that tenant and his belongings were gone, end date of tenancy was April 1 -- Trial court correctly determined that landlord was not entitled to retain deposit and rent where landlord had more than thirty days actual notice of vacancy, and notice declaring landlord's interest in retaining security deposit was untimely when measured from date of actual vacancy -- No error in ruling against landlord on counterclaim for damages allegedly incurred in fixing up unit where landlord presented only speculative damage figure

ANDREW MITTELMAN, Defendant/Appellant, vs. STEVEN HONZIK, Plaintiff/Appellee. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 05-15691 (03). L.C. Case No. 02-18018 COCE 54. September 26, 2006. Counsel: Robert Bissonette, Fort Lauderdale. Sally Seltzer, Fort Lauderdale.

ORDER

(PATTI ENGLANDER HENNING, J.) THIS CAUSE came before the Court upon the appeal of Defendant, Landlord ANDREW MITTELMAN, from the Lower Court's Final Order of September 19, 2005, Final Judgment of September 30, 2005, and the Order Denying Motion for Directed Verdict of October 14, 2005. After non-jury trial, the Lower Court ruled in favor of Plaintiff STEVEN HONZIK on his Complaint, and against Appellant on his Counterclaim. This Court has considered relevant Florida law, the matters being appealed, the transcript of non-jury trial, all briefs, and all evidence and submissions filed by the parties and before the Lower Court, and after careful consideration thereof, it is

ORDERED AND ADJUDGED:

1. That this Court has jurisdiction over the parties and subject matter of this appeal pursuant to Fla. R. App. P. Rule 9.030.

2. This Court affirms the Final Order, Final Judgment, and Order Denying Appellant's Motion for Directed Verdict.

3. When deciding whether a Motion for Directed Verdict should have been granted, the standard of review is *de novo.* This Court has reviewed the evidence and inferences of fact in a light most favorable to the nonmoving party.[1] After reviewing this Motion and the law and evidence presented at trial, this Court determines that Appellant has not in any way or at any time herein established that a proper view of the evidence could not sustain a verdict for Plaintiff/Tenant HONZIK. Furthermore, *de novo* review of this entire matter leads this Court to determine that the Lower Court's rulings were proper and correct under the law.

4. The Trial Judge made its decisions consistent with Fla. Stat. 83.49, et seq., and the substantial, competent evidence before it, and properly determined that the weight of the evidence was in favor of Tenant HONZIK on all issues from which appeal is taken. Furthermore, the Trial Court properly determined that Appellant/Landlord did not present sufficient, competent evidence to prove his claims of having given timely notice to Tenant under F.S. 83.49(3), or any entitlement to retain the security deposit and last month's rent, nor did Appellant present legally sufficient, competent evidence of monetary damages to support a verdict in his favor on his Counterclaim.

5. This Court is aware that the parties stipulated that the portion of the Final Order that reads: "Defendant did not send any such notice to Plaintiff's mother," was corrected to consider that the mother did receive notice. That change does not affect this Court's ruling, however, because *de novo* review of the file led this Court to conclude that the end date of this tenancy was when the property was surrendered by Tenant on April 1, 2002, and Tenant had paid the Landlord rent through April 21, 2002. The notice sent to the mother was therefore not timely nor in compliance with Section 83.49(3).

6. The record supported, as well, that Section 83.49(5), Fla. Stat., clearly provides that a tenant does not waive any right to a security deposit if written notice is not provided.[2] Appellant's argument seems to overlook this language or, instead, to cloud the issue of when this tenancy ended, a determination that may be decisive on the issue of whether Landlord gets to keep his Tenant's funds. Landlord's argument that its 83.49(3) notice was timely issued would require this Appellate Court to ignore the record, which demonstrates both an end date to this tenancy of April 1, 2002, when Landlord did an actual "walk through" of the unit with one of Tenant's friends with clear knowledge that the tenant was by then gone, as were his belongings, and therefore Landlord's actual notice of vacancy by the Tenant of this unit extended beyond 30 days; yet, Landlord's subparagraph (3) letter went out thereafter, rendering that letter untimely and ineffective to declare an interest in retaining the subject funds under Fla. Stat. 83.49 (3). Landlord would have the Court conclude the tenancy existed beyond April 1st in order for it to also conclude that the Fla.Stat. 83.49(3) letter was timely. The facts do not support this. Landlord's direct communications with the Tenant and his mother, including her several writings after the unit was emptied requesting return of the money Landlord was holding, and Landlord's actual, physical presence at the unit when emptied and his knowledge of the actual moving out of tenant, demonstrate his clear and actual knowledge of the Tenant's departure and vacancy of the unit, and thus, when the "walk through" was done, Landlord's knowledge that this tenancy was done is irrefutable. This leads unavoidably to a finding of the untimeliness and, therefore, ineffectiveness of this Landlord's subparagraph (3) letter to retain funds.

7. Simply put, considering this matter in its entirety, on a *de novo* basis, this Court concludes that the Trial Judge properly applied the law to the facts before it and found that this unit was vacated before the date to which Landlord has testified, and, despite Landlord's untenable claims of ignorance, it is this Court's ruling that the weight of the evidence did not support Landlord's late mailing of the letter, or his subsequent retention and alleged use by Landlord, who claims his right to the money paid under F.S. 83.49(3) and, less directly, F.S. 83.49(5).

8. Upon *de novo* review of this matter, pursuant to the Motion for Directed Verdict or, in the Alternative, For New Trial, argued at the close of Plaintiff's case as well as in written Motion thereafter, it is the opinion of this Court that Appellant has misapplied the law of F.S. Chapter 83.49, et seq., to the specific and, if not unusual, then at least detailed and fact-specific nature of this particular case, and based its appeal on an erroneous conclusion both of law and fact. This Court's review did lead to a conclusion that Landlord presented less than credible testimony to buttress his case, and also failed to present proper evidence supporting any damage award on its counterclaim due to failure to present any clear testimony, other than an admitted figure of a speculative nature, unsupported or substantiated by any supporting documents of alleged payment to others to "fix up" the unit. In short, it is this Court's holding that as concern the issues on appeal, Landlord simply failed to demonstrate error sufficient to disturb the Lower Court's ruling given that that ruling appears both accurate and appropriate to this Court upon careful, *de novo* review.

9. This Court finds that the Trial Court's award of prejudgment interest is supported by the law. Specifically, prejudgment interest applies pursuant to Section 55.03, Fla. Stat. See also, *Argonaut Ins. Co. v. May Plumbing Co.,* 474 So.2d 212 (Fla. 1985) ("Prejudgment interest is allowed on only

liquidated claims; that is, sums which are certain but which the defendant refuses to surrender.").

10. Summarizing the foregoing, this Appellate Court finds that there was, based upon a *de novo* review of the matter in its entirety, substantial, competent evidence to support the appealed rulings of the Lower Court, and this Court concurs with those rulings based upon the law and proffered evidence from which this appeal is taken. Appellant bears the burden to demonstrate error. It has not done so. Certainly, Appellant has not in any way or at any time herein established that a proper view of the evidence could not sustain a verdict for Tenant HONZIK. On the contrary, a proper view of the evidence does sustain such a verdict.

11. It appears clear to this Appellate Court that the proper rulings were made, and that the trial judge properly considered Sections 83.49(3) and 83.49(5), Fla. Stat., and determined that the evidence, at the conclusion of trial, strongly supported a verdict for Tenant, HONZIK, and such a verdict was required and supported by the weight of the evidence.

WHEREFORE, the Lower Court's Final Order, Final Judgment and Order Denying Motion for Directed Verdict or for New Trial, are AFFIRMED.

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[1] *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088 (Fla 4th DCA 2001).

[2] In relevant part, the statute provides: "Failure to give such notice shall relieve the Landlord of the notice requirement of paragraph (3)(a) but shall not waive any right the tenant may have to the security deposit or any part of it."

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