

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000059-MR

MARIA BORELL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 12-CI-04025

WALNUT SPRINGS, L.L.C.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Maria Borell appeals from the denial of a motion for continuance and the grant of summary judgment for breach of a lease.

On May 11, 2010, owner Walnut Springs, L.L.C., and lessee Borell entered into a written lease for a three-month rental of a barn, paddocks and a house. Borell was responsible for paying \$2,500 rent per month. The lease

provided the parties could negotiate for an extension of the lease but also contained a holdover provision:

If, without the execution of a new lease or written extension and with the consent of Owner, Lessee shall hold over after the expiration of the term of this Lease, by lapse of time or otherwise, Lessee shall be deemed to be occupying the Premises as a tenant-at-sufferance, and shall pay the Owner rent on a month-to-month basis . . . , which monthly rent payment shall continue for the period of time the Lessee remains in such possession. The provisions contained in this section do not waive any rights of re-entry or any other rights provided in this Lease Agreement.

Borell agreed to take the property “as is” after inspecting it. Borell was responsible for maintaining the premises “in a clean, orderly, and neat condition and appearance at all times[,]” and agreed to “be responsible for routine maintenance[.]” Upon expiration of the lease, Walnut Springs was entitled to bill Borell for expenses due to “repairing any damages to the Premises, which are the responsibility of the Lessee[.]” In the event of default, Walnut Springs was entitled to “pursue the full value of any damage to the Premises” and Borell agreed “to reimburse the Owner for all court costs and reasonable attorney fees and expenses incurred in connection with enforcement of any rights under this Agreement.”

Borell occupied the property beyond the three-month lease period and became a tenant-at-sufferance in accordance with the holdover provision, responsible for paying rent on a month-to-month basis. In 2012, Borell failed to pay July or August rent. Walnut Springs provided her with a default notice in

accordance with the terms of the lease. On September 5, 2012, Walnut Springs simultaneously commenced forcible detainer proceedings in district court and filed a complaint against Borell in circuit court for breach of contract alleging she currently owed \$5,000 in back rent. Walnut Springs sought a judgment and damages for “unpaid rent and all sums due under the Lease” and attorney fees and costs. Borell filed a *pro se* answer denying these allegations.

On September 11, 2012, the district court granted judgment in favor of Walnut Springs in the detainer action and permitted Borell to remain on the property until September 21, 2012.

On October 23, 2012, Walnut Springs filed a motion for summary judgment in its circuit court action, alleging Borell owed rent for July, August and September. It also alleged that when it regained possession of the premises, it discovered significant damage to the hardwood floors, subfloor and carpet of the residence caused by her dogs. Accordingly, Walnut Springs requested an entry of summary judgment for unpaid rent of \$7,500, late fees, \$9,470 for reimbursement of repair costs to replace the subfloor, hardwood floor and carpet, and \$2,203 in attorney fees and costs. Walnut Springs filed the affidavit of its agent confirming Borell failed to pay July and August rent and documenting the damage to the residence and cost to repair it, photos of the damage, an itemization of the repair costs and an affidavit by its attorney to establish the amount of attorney fees.

Borell did not file a responsive pleading to Walnut Springs’ motion for summary judgment. The matter came before the circuit court for a hearing on

November 9, 2012. Borell did not appear. Before the hearing, Borell's father contacted the court and Walnut Springs requesting a continuance. Walnut Springs objected to a continuance because Borell had not appeared at the hearing or made the request. The circuit court rescheduled the hearing to November 30, 2012.

On November 30, 2012, Borell did not appear. An attorney appeared in the limited capacity of requesting a continuance of the hearing, but indicated he was not hired as Borell's counsel. The circuit court denied the request for a continuance, orally granted the motion for summary judgment and stated if the attorney were retained, he could file a motion to set aside the judgment. A written judgment was entered on December 11, 2012, in which the circuit court analyzed the lease agreement, applied its provisions to the evidence and considered the defenses Borell raised in her answer before granting summary judgment in favor of Walnut Springs in accordance with its motion.

Borell did not retain trial counsel or file a motion to set aside the judgment. Instead, she filed a *pro se* appeal and later retained appellate counsel.

Borell argues that the circuit court abused its discretion by denying her motion for an additional continuance to obtain counsel and respond to the motion for summary judgment. The following factors, along with the totality of the circumstances, are considered in determining whether a continuance to retain counsel should be granted in a civil matter:

- 1) length of delay;
- 2) previous continuances;

- 3) inconveniences to litigants, witnesses, counsel, and the court;
- 4) whether the delay is purposeful or is caused by the [party];
- 5) availability of . . . competent counsel;
- 6) complexity of the case; and
- 7) whether denying the continuance will lead to identifiable prejudice[.]

Guffey v. Guffey, 323 S.W.3d 369, 372-373 (Ky.App. 2010) (quoting *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991)).

Applying these factors and considering the totality of the circumstances, we determine that the circuit court appropriately acted within its discretion. Borell was granted a three-week continuance to obtain counsel and file a responsive pleading but failed to do so. This was a simple case and the continuance provided ample time to retain competent counsel. Under these circumstances, the denial of her second request for a continuance was warranted.

We review Borell’s appeal from summary judgment to determine whether the circuit court correctly found there were no genuine issues as to any material fact and Walnut Springs was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Granting of a summary judgment motion “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

“[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steelvest*, 807 S.W.2d at 482.

However, if the motion for summary judgment is not properly supported and a genuine issue of material fact remains, summary judgment cannot be granted simply because the party opposing the motion for summary judgment only relied upon his pleadings to make an issue of fact and failed to make some showing to offset the evidence in support of the motion. *Hartford Ins. Grp. v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky.App. 1979).

Borell argues the circuit court was not justified in awarding damages for the cost to repair the property because the complaint only indicated she owed damages under the lease, stated the amount of outstanding rent and did not specify she owed money for repairs. Kentucky is a notice pleading state which only requires “a short and plain statement of the claim” and “a demand for judgment for the relief to which he deems himself entitled.” CR 8.01(1). *See Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957). Claims need not be stated with technical precision so long as they are adequate to give fair notice. *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962). Itemization of the damages in the pleading is not essential and may be ascertained through a simple interrogatory. *Lee*, 300 S.W.2d at 254.

The complaint adequately conformed to notice pleading requirements. It notified Borell damages were sought for her breach of the lease and the lease

contained provisions allowing Walnut Springs to collect damages for unpaid rent and repairs. Additionally, the motion for summary judgment clarified the exact nature of the damages being sought after assessment upon Walnut Springs' reentry. We determine the complaint sufficiently complied with notice pleading to allow summary judgment on damages for the cost to repair the flooring.

Borell argues she was not bound by the attorney fee provision of the lease once she became a tenant-at-sufferance and the evidence did not establish the attorney fees were reasonable. Borell's argument is not well taken. The lease provides for attorney fees and the holdover provision states the provisions of the lease continue to apply to a tenant-at-sufferance. The amount of attorney fees was within the circuit court's discretion, established by the attorney's affidavit and reasonable under the circumstances. Therefore, summary judgment was appropriately granted on this issue.

Accordingly, we affirm the Fayette Circuit Court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred R. Simon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Carroll M. Redford, III
Lexington, Kentucky