IN THE
TENTH COURT OF APPEALS

No. 10-14-00309-CV

ALEXIS NICOLE SWAN AND TERRISA D. SWAN,
Appellants

v.

BIENSKI PROPERTIES, LP,
Appellee

From the County Court at Law No. 1
Brazos County, Texas
Trial Court No. 13-001511-CV-CCL1

DISSENTING OPINION

This is a classic case where both litigants set out to prove a point asserting that "it is the principle of it all." Contrary to popular culture, it is not the type case that lawyers love, even when they have collected their fee up front. Invariably, such cases develop with much greater complexity of the law, the procedures, and the evidence than anyone anticipated. In the end, there are no winners. At best, winning is measured by the extent of who lost the least. Invariably, there is an issue of first impression that fascinates an appellate specialist, but which may never arise again. The myriad of case types in which

it-is-the-principle that becomes the mantra of the case is virtually limitless; but landlord/tenant disputes are a rich source. That is what we have here.

The landlord is an active hands-on operator of a residential rental business managed by its owner, Tasha Bienski. The location could be any college town, USA. But, for reasons that will become obvious, this one is best situated in Texas; south central Texas; College Station, Texas. The home of Texas A&M University. The University provides a steady stream of new tenants looking for a place to live.

The property to be rented was unusual. It seemed ideal. It was perfect if you needed to keep your horse handy. Yes; a horse. Yes, Texas A&M University, where almost everyone knows that the "A" stood for "Agricultural." And, yes, Texas, where many folks still know how to ride a horse. But I digress. The property was not the typical student property. It was a three bedroom, one bath house, on approximately three acres with a barn and some other out-buildings suitable for protecting a horse and necessary supplies from the elements.

Alexis Swan, the student, was the tenant. Terrisa Swan is the mom. Mom signed the guarantee of the first lease. I say first lease, because there were two. Mom did not guarantee the second lease. Hereinafter, I use "Alexis" to refer to Alexis and Terrisa jointly as appellants, unless the context clearly is in reference to Alexis's capacity as the occupant/tenant/lessee.

The property was not without its warts. Like any property, it needed maintenance. Like most rental property, it needed a lot of maintenance. Country rental property can be even more of a challenge than the typical college student rental. And while I would

like to spend some time discussing the history of the property, how Alexis learned of the property and leased it, and how she functioned in it during the first lease, I must skip over most of that because this dispute and the legal battle have already lingered well beyond its expiration date. And because this is a dissenting opinion and the parties are very familiar with the facts and the law, I find it unnecessary to recite extensively from the record, their legal arguments, or the legal authorities which they cite or upon which I rely.

The previous tenants had animals on the property and had paid an "animal" deposit. It appears that Alexis took possession during what would have been the term of the previous tenant's lease. Alexis presented evidence that the animal deposit of the previous tenant was transferred/assigned for her benefit as the new/next/current tenant because everyone knew she was bringing at least a horse. Alexis disclosed this in the application which was incorporated into the lease agreement. So from the beginning, there was a problem that Alexis disclosed—she was arriving with a horse in tow, and had an animal deposit from the previous tenant assigned to her. But Bienski did not include the animal addendum referenced in the lease agreement. And in this regard, the animal clause in the lease was equally applicable to the horse as it was for the dog and cat which seemed to be such an issue in the trial.

And while some would say that is pretty much where the trouble began, I would disagree. For all practical purposes, the relationship must have been satisfactory to Alexis and Bienski. A second one year lease was signed without much fanfare. As the time to sign a third lease approached, toward the end of the second lease, Tasha sent a letter and

then a text to Alexis. Neither the letter nor the text indicated anything in the history of the first lease or to date under the second lease that there was any dissatisfaction with Alexis's compliance with the leases or continued occupation of the property as a tenant. In the letter, Tasha, the owner/landlord/manager, wrote:

> "You are a valued resident(s) and we want to continue our rental relationship with you. We are ready to get you started on your renewal process with us."

And in the text, Tasha wrote:

> "Hi! This is tasha with Bienski properties. Your email did not go through so that is why I am texting you. Do you plan on renewing your lease? If so the deadline is coming up on February 15. Let me know either way. Thanks! [phone number provided]"

Alexis decided she would not continue to rent the house that once seemed so ideal for her and her animals. And certainly under one view of the evidence, THAT is when the problems began. And by the time that the second lease term would have expired by its original terms, Alexis had been evicted and lawyers were engaged by both sides. Bienski filed suit first and Alexis countered.

After substantial discovery, the case was tried to a jury for three days. The charge contained 30 issues, many with multiple subparts. After just a little over two hours of deliberating, the jury had reached a verdict. Bienski subsequently moved for a judgment notwithstanding the verdict, moving to disregard 25 of the 30 issues. Alexis moved for judgment on the verdict and for damages for the fraud finding that Alexis contended were established as a matter of law. The judgment reflects that the trial court did not accept the totality of either party's post-verdict position, but for the most part, granted

Bienski's motion for judgment notwithstanding the jury verdict. For the most part, I find that, in light of the charge as given, the jury's answers are supported by legally sufficient evidence.

Alexis appealed and has filed a brief. Bienski also appealed, but that appeal was dismissed. Bienski has not filed a brief in response to the brief filed by Alexis. Bienski's attorney has, at least twice, stated in communications to this Court that he was retained for the case in the trial court only, and he had been instructed to not file a brief. This raises the first question that I find quite intriguing. If a party is awarded attorney's fees on appeal, and although there is an appeal, they hire no lawyer and are not represented on appeal by an attorney, are they still entitled to the amount awarded for attorney's fees on appeal? In such a situation, as here, the party incurred no attorney's fees for the appeal; so, why should the party be allowed to collect a judgment that is designed to compensate the party for incurring that type expense? But I am getting ahead of myself because under my analysis, Bienski would not be successful in this appeal and, accordingly, would not be entitled to that portion of the judgment.

There is, however, a more troubling aspect of this issue. If counsel was engaged by Bienski to represent Bienski only in the trial of the case and not on appeal, is Bienski properly before us in the appeal? Are our notices, which are being sent to the attorney that says he was not hired for this appeal, effective as notice to Bienski? I would much prefer to have this question answered before we proceed; but I find myself in the dissent, so I will move on to the other issues.

So let me turn back to the issues raised by Alexis in the appeal. But the failure to file an appellee's brief immediately arises again. I note that without the benefit of an appellee's brief, the Court conducted its own research and resolved issues against the appellant on a basis not previously argued by Bienski. I am not a big fan of that practice. I concede that we can affirm the trial court's judgment on any theory that finds support in the record. But the extent to which we do so should be circumscribed by our adversarial system. When we have been forced to review a judgment without an appellee's brief in criminal proceedings, we have limited our analysis to the arguments made by the appellee to the trial court. This keeps us from becoming advocates for the appellee on appeal. The area is murky and fraught with hidden dangers and traps.

In response to the opinion of the Court, I do not, however, find that a point by point analysis is required or helpful in this dissenting opinion. Given the age of the case and the need to get the Court's resolution of the dispute delivered to the parties without further delay, I will simply make, in summary form, the observations and conclusions that I believe are supported by the evidence, the charge as given, the post-verdict practice, the trial court's judgment, the Appellants' brief, and, of course, the law.

I will not here endeavor to discuss and resolve the lack of requiring an election of remedies or what may be conflicts in the jury's responses. Moreover, I note that the jury was not asked to decide if there was a "material" breach of the contract, and if there was more than one party that materially breached the contract, which party committed the first material breach that would thus excuse further performance by the other party. It must be remembered that both parties to a contract can commit fraud in the inducement

to enter into the contract and both can also breach the contract as well as prevail on a suit involving the fraud or breach.

Another fascinating legal conundrum presented in this case that may never occur again is that both parties asserted Fraud in a Real Estate Transaction, TEX. BUS. & COM CODE ANN. § 27.01 (West 2015), and breach of contract. But that only begins the conundrum. Bienski proved to the jury's satisfaction that Alexis committed fraud with regard to both leases but Bienski failed to prove that Alexis breached either lease. On the other side, Alexis proved that Bienski committed fraud with regard to both leases, and that Bienski breached the second lease. In this unusual posture, because Bienski sought damages and not rescission for the fraud, Bienski is entitled to recover for the fraud damages found by the jury, while Alexis is entitled to recover for the breach of contract damages found by the jury.[1]

With those concepts in mind, the damages found by the jury for Alexis's fraud in a real estate transaction, $412.06 for the first lease and $17.06 for the second lease, should be awarded to Bienski. Alexis, on the other hand, proved Bienski's fraud as to both leases and breach of only the second lease. Alexis does not, however, have a determination of damages for Bienski's fraud as to either lease, but the jury did determine damages in the

[1] The charge does not clarify in any manner the nature of the fraud or the breach found by the jury. Furthermore, it is not entirely clear to me if Alexis was seeking rescission of the contract for Bienski's fraud or if she was seeking damages for the fraud. The charge does not help. But it appears Alexis might have been seeking damages instead of rescission. However, the jury was not asked to determine the fraud damages and Alexis asserted post-verdict that damages were proven as a matter of law as the total rent paid under the fraudulently obtained leases. The trial court, however, held that the determination of damages for fraud was moot because the trial court determined that there was no evidence to support the jury's finding of fraud. A determination that is contrary to the record.

amount of $1,000.00, for the breach of the second lease. For Alexis's two other statutory claims, the jury also determined that Bienski withheld the security deposit in bad faith and that Bienski retaliated against Alexis. With regard to retaliation the jury determined damages of $1,071.02. The statutory damages for withholding the security deposit are based on the statute.[2]

Terrisa, *a.k.a.* Mom, should have been awarded a take nothing judgment as to Bienski's claims against her. The trial court erred in failing to do so, and that should be done as part of the judgment on appeal.

So everybody "prevailed" within the meaning of the relevant statutes and contracts. The attorney's fee determinations by the jury were not segregated by claims, and we do not attempt to segregate them now. Accordingly, attorney's fees should be awarded as determined by the jury for trial and to Alexis and Terrisa for appeal. Bienski should be awarded no attorney's fees on appeal because the appeal was not successful as to Bienski and, moreover, Bienski is not represented by an attorney on appeal. Thus, there is no basis upon which to award attorney's fees on appeal to Bienski.

I believe the above awards are supported by the law and the record. To the extent that the trial court disregarded a finding necessary in support of the above awards, I would hold that there is some evidence to support the jury finding, reverse the trial

[2] Alexis contends this amount is $100, plus 3 times the security deposit wrongfully withheld. The evidence shows that Alexis had a security deposit of $1095 and the prior tenant's $500 animal deposit had been assigned for her benefit. Because Bienski did not establish any lawful deduction from the security deposit, having proven no breach of either lease, Alexis contends the entire amount was unlawfully withheld. These are statutory damages. Alexis is also entitled to the return of the actual deposits in addition to the statutory damages.

court's ruling to the contrary, and render the judgment the trial court should have rendered. Additionally, to the extent that the trial court purported to "find" answers in response to the questions in the charge, rather than "unfind" the jury's answers, I would determine such was error. Finally, I would award Alexis and Terrisa judgment against Bienski for all appellate cost paid by them and assess any unpaid cost against Bienski. To the extent the Court's judgment is different from the judgment described, I respectfully dissent.[3]

TOM GRAY
Chief Justice

Dissenting opinion delivered and filed September 19, 2018

[3] This was not an easy trial court case and is not an easy appeal. There is clearly a lot of conflicting evidence. I have endeavored to disregard what I would have done as a juror, trial attorney, trial court judge, or appellate attorney, and look only to a disposition of the issues properly before us as an appellate court. To the extent there is a differing point of view on what the evidence establishes directly or by reasonable inference, I am endeavoring to look at the evidence though the lens of the charge actually given. The law given in the charge may be different from the general state of the law discussed in the abstract. This is particularly problematic when we have been deprived the benefit of briefing by the appellee. Oral argument might have been useful. But I have not requested it because we would still have no help from the appellee. Finally, this is a case that, although sent to mediation while in the trial court, may benefit from mediation on appeal; but that would add still more cost and time prior to a disposition.