IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRANDYWINE REALTY MANAGEMENT, INC.,	)	
Appellant,	)	
v.	)	**C.A. No. 00A-12-005-JEB**
JACK HOROWITZ and TRUDY LOGE,	)	
Appellees.	)	

Submitted: April 16, 2001
Decided: September 17, 2001

Appeal from Decision of Court of Common Pleas.
Affirmed in Part. Reversed in Part.

OPINION

Appearances:

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Attorneys for Appellant Brandywine Realty Management, Inc.

Jack Horowitz, Pro Se.

JOHN E. BABIARZ, JR., JUDGE.

Brandywine Realty Management, Inc., a residential landlord corporation, appeals a decision of the Court of Common Pleas finding in favor of Appellees Jack Horowitz and Trudy Loge, who had leased a house from Brandywine. Because of an error of law, the decision is ***Affirmed*** in part and ***Reversed*** in part.

FACTS

The essential facts in this case are uncontested. In June 1994, Appellees entered into a lease agreement with Brandywine Realty, whereby they rented a house at 2089 Creek Road, Yorklyn, Delaware. For four years, Appellees lived in the house without incident. In September 1999, the home was badly damaged when Hurricane Floyd hit Delaware. Brandywine provided Appellees with substitute housing and offered them the option to terminate the lease, although they did not accept this offer. After some minimal cleaning, Brandywine requested that Appellees move back in. For reasons which the record does not make clear, Appellees did not return to the home at that time.

On October 12, 1999, Brandywine personnel moved Appellees back into the house without their permission. Although Appellees eventually acquiesced in the move, they were not satisfied with the condition of the house and complained repeatedly to Brandywine about water in the basement, a clogged bathroom drain, wet carpets and other problems.

On October 12, Officer James G. Unger was dispatched to Appellees' home to help resolve a landlord/tenant dispute. Unger found the house to be unsanitary, with a soaked basement and an unsound floor in the bathroom. He finished his report outside because of the foul odor in the home, which he did not believe to be caused by Appellees' pets.

On October 13, Brandywine sent a plumber to the home. Trudy Loge, who was home alone, turned him away because she had had no notice of the appointment and the time was inconvenient for her. The appointment was not rescheduled.

On October 18, 1999, the home was inspected by William McIntyre, a New Castle County building inspector. Because of the wet basement, the foul odor, a damp bathroom floor and numerous external defects, he issued a code violation notice to Brandywine. When he discussed the situation with Robert Brumbaugh, president of Brandywine Realty, Brumbaugh agreed to let Appellees out of their lease.

In a letter dated November 28, 1999, Appellees informed Brandywine that they intended to vacate the premises by December 1, 1999, because of the home's "unliveable" condition. Appellees moved out on November 30, 1999. On December 10, 1999, Brandywine wrote to Appellees accepting Horowitz's letter as a 60-day termination notice and billing Appellees for $2603. This amount included damages and fees, as well as rent for November and December 1999, as well as January 2000.

Brandywine filed suit in Justice of the Peace Court, and Appellees counterclaimed for reimbursement of their security deposit. The magistrate entered judgment for Appellees, and Brandywine sought a trial *de novo* in CCP. After hearing the evidence, the trial judge found that Brandywine was entitled to rent for November but not for December and January. On Appellees' counterclaim, the trial judge found that the $900 security deposit had been wrongfully withheld and ruled that Appellees were entitled to recover twice the amount, or $1800. Judgment was entered for Appellees in the amount of $1103 plus interest and court

costs. On cross motions for reargument, the trial judge reduced the award to $930 without explanation. Brandywine filed a timely appeal to this Court. Briefing is complete, and the issues are ripe for decision.

ISSUES

Brandywine argues that the trial court erred as a matter of law in its claim for rent for December 1999 and January 2000. Brandywine also argues that the trial court erred in awarding Appellees a double security deposit. Appellees assert that the trial court's decision should be upheld.

STANDARD OF REVIEW

On appeal from a civil decision of the Court of Common Pleas, this Court is limited to correcting errors of law and determining whether substantial evidence exists to support the lower court's factual findings.[1] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[2] Questions of law are reviewed *de novo*.[3]

DISCUSSION

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[1] *Shahan v. Landing*, Del. Supr., 643 A.2d 1357 (1994).

[2] *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994).

[3] *Lincoln v. Eddis*, Del. Super., 1999 WL 1240883.

A. Recovery of unpaid rent for December 1999 and January 2000. On July 17, 1996, the Landlord-Tenant Code was repealed and reanacted with substantial revisions. The revisor's note to the reenactment provides that, with a few specific exceptions, the new provisions do not apply retroactively.[4] In the case at bar, the lease was executed in 1994, and the case is therefore governed by the provisions of the prior Landlord-Tenant Code. Because the trial judge applied the new laws, the statutes and the statutory section numbers discussed in this opinion are different from those in the lower court's Final Order and Decision.[5]

Pursuant to 25 *Del. C.* § 5308, when a "rental unit. . . [is] rendered partially or wholly unusable by fire or other casualty. . . the tenant may. . . immediately quit the premises and promptly notify the landlord, in writing, of his election to quit within 1 week after vacating, in which case the rental agreement shall terminate as of the date of notice." The provisions of § 5308's counterpart in the new Code are substantially similar, and the trial judge ruled that the statute entitled Appellees to vacate the property and terminate their lease. In so finding, the trial judge emphasized the uncontested facts that Brandywine was well aware of the damage to the house and did not remedy the damage until after Appellees had vacated.

[4]Section 20 of 70 *Del. Laws*, c. 513.

[5]*Brandywine Realty Mgmt, Inc. v. Horowitz*, Del. CCP, C. A. No. 2000-03-408, Welch, J. (Dec. 1, 2000)(Order and Decision).

Brandywine argues that the statute requires the tenant to quit the premises "immediately" and that because Appellees did not do so, they were not entitled to vacate without the 60 days' notice required by the lease. This argument loses its punch in light of the fact that Appellees were moved back into the house against their will and without their permission on October 12, 1999. Furthermore, when Appellees moved out on November 30, the flood damage had not yet been remedied. On these uncontested facts, the Court finds no error in the trial judge's conclusion that Appellees were entitled to vacate the property and terminate the rental agreement due to flood damage as of November 30, 1999.

Brandywine also argues that because Appellees did not terminate the lease on October 18, 1999, when Brumbaugh agreed to a termination, they lost the option to terminate at a later date. However, even assuming *arguendo* that Brumbaugh's offer was conditioned on immediate acceptance, Appellees' statutory remedy under § 5308 remained.

On the facts of this case, where Brandywine moved Appellees back into a damaged house without their permission on October 12, 1999, the Court finds that pursuant to 25 *Del. C.* § 5308, Appellees were entitled to vacate the property and terminate the lease agreement as of November 28, 1999. It follows that, as determined by the trial judge, Brandywine is not entitled to rent for December 1999 and January 2000.

B. Security deposit. The trial judge found that Appellees' $900 security deposit was wrongfully withheld and therefore awarded an amount equal to double the deposit pursuant to § 5514(g) of the revised Residential Landlord-Tenant Code. Brandywine argues that a good faith withholding of a security deposit cannot be the basis for punitive damages.

As previously noted, the Landlord-Tenant Code was substantially revised and renumbered in 1996. The previous statute governing security deposits was § 5511, which provided in part as follows:

> Failure by the landlord to provide a list of damages and tender the remaining of the tenant's deposit within 15 days shall constitute acknowledgment by the landlord that no damages are due and he shall immediately remit to the tenant the full amount of the security deposit. Failure to remit the deposit within 30 days from the expiration of termination of the rental agreement shall entitle the tenant to double the amount of the security deposit.

This statute establishes a clear procedure by which a landlord may retain the security deposit, or a portion of it, for recovery for actual damage to the rental property. However, the statute is silent as to the procedure for recovery of overdue rent,[6] even though one of the approved purposes of a security deposit is to "pay the landlord for all rental arrearage due under the rental agreement."[7]

[6] The amended statute, 25 *Del. C.* § 5514(f)(g), effective July 17, 1996, is also silent on this issue and sheds no light on the intent of the General Assembly.

[7] 25 *Del. C.* § 5511(c)(2).

In seeking to harmonize these sections of the Code, this Court has previously held that a landlord is protected from the double penalty provision if he provides a tenant with written notice of his intent to retain any portion of the deposit for rent arrearage.[8] In the case at bar, Brandywine sent Appellees an itemized list of fees, costs and damages (including rent) totaling $2603.[9] The notice was sent on December 10, 1999, well within the statutory 15-day time frame. Brandywine applied the $900 security deposit toward the total amount due and charged Appellees for the remaining $1703. Having provided the tenants with written notice of its intent to retain the security deposit, as required by statute and by case law, Brandywine cannot be subject to the penalty provision of § 5511(f). The Court concludes that the trial judge erred in awarding Appellees an amount equal to double their security deposit.

In sum, Brandywine is entitled to recover $697 for November 1999 rent, as determined by the trial judge, but is not entitled to recover rent for either December 1999 or January 2000. Appellees are not entitled to double the amount of their security deposit, but they are entitled to be reimbursed $203, the balance remaining from their $900 security deposit after deducting $697 for November's rent.

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[8] *Courts of Llangollen, Inc. v. Nero*, Del. Super., C.A. No. 98A-04-013, Herlihy, J., 1999 WL 1240847, *aff'd*, Del. Supr., No. 1, 2000 (May 24, 2000)(ORDER).

[9] In addition to rent and associated fees, Brandywine charged Appellees $465 for actual physical damages to the property. There were charges for replacing light bulbs, plunging the bathtub, removing plastic covers from the windows and other miscellanea. The trial judge made no findings on these charges, and Brandywine does not raise the issue on appeal. Therefore the Court need not address the question of these costs.

CONCLUSION

For the foregoing reasons, the decision of the **Court of Common Pleas is hereby** ***Affirmed*** in part and ***Reversed*** in part. The cause is ***Remanded*** to the Court of Common Pleas to enter judgment consistent with this opinion.

It Is So ORDERED.

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John E. Babiarz, Jr.

JEB,jr/RMP/BJW

Original to Prothonotary