

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001156-MR

DARRELL PALLADINO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 10-CI-03717

THOMAS SHROPSHIRE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT AND MOORE, JUDGES.

MOORE, JUDGE: Darrell Palladino appeals from an opinion and order of the Fayette Circuit Court awarding damages in the amount of \$17,890.58 to Palladino's former landlord, Thomas Shropshire, in this breach of lease action.

In October 2007, Palladino signed a lease agreement with Shropshire to rent a residence in Lexington, Kentucky. On June 23, 2010, Shropshire filed a complaint in Fayette Circuit Court against Palladino, alleging that he had breached

the lease by vacating the residence and failing to pay rent for the months of September and October 2009, and by damaging the structure of the home, its landscaping and its contents. The complaint sought compensatory damages and attorney's fees.

On April 12, 2011, Shropshire filed a motion for summary judgment solely on the issue of nonpayment of rent. On May 23, 2011, the trial court granted the motion, holding that Palladino owed rent in the amount of \$5,000. The trial court denied Palladino's subsequent motion to alter, amend or vacate the judgment.

On September 23, 2011, the trial court ordered a bench trial for December 1, 2011, to determine what amount was owed to Shropshire for various damages to the house and its contents. On November 14, 2011, Palladino filed a motion to continue the trial because he had recently been scheduled to work out-of-state on the trial date. The court granted the continuance and, with Palladino's work schedule in mind, rescheduled the trial for May 16, 2012. On the morning of trial, Palladino's counsel asked for another continuance, citing his client's work conflicts. The trial court refused to grant the continuance and held the trial in Palladino's absence. The trial court entered an opinion and order awarding damages for the cost of repairing the furniture, the interior of the residence, the landscaping, the plumbing, the stove, and for attorney's fees and costs, plus post-judgment interest. This appeal by Palladino followed.

### **The summary judgment**

The standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc.* 807 S.W.2d 476, 480 (Ky. 1991).

It is undisputed that under the terms of the lease agreement, Palladino was to pay \$2,500 per month in rent. In his deposition, Palladino admitted that he did not pay rent for September or October 2009, the two final months that he and his family occupied the house. Palladino argues that he should have been allowed to invoke Kentucky Revised Statutes (KRS) 383.700 as a defense to the nonpayment of rent because Shropshire had unlawfully entered the rental premises during his tenancy. The statute provides the following remedy for abuse of access by a landlord:

If the landlord makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant, the tenant may obtain injunctive relief to prevent the reoccurrence of the conduct or terminate the rental agreement. In either case the tenant may recover actual damages and reasonable attorney’s fees.

KRS 383.700(2).

According to the notarized statements attached to Palladino's motion to alter, amend or vacate the summary judgment, Shropshire unlawfully entered the property on four occasions. According to Palladino's son, Shropshire entered the house without permission in October 2008 to retrieve some clothes from the attic. Palladino's wife's statement alleged that in November 2008, after returning from a trip to New York, they noticed some property had been moved in the attic. Then in September 2009, they found a leather notebook, receipts and documents belonging to Shropshire in the attic while they were packing to move. A week later, Shropshire knocked at the back door, which can only be accessed via the garage door or the back garden gate.

KRS 383.700(2) permits a tenant to obtain an injunction against a landlord to prevent future improper entries onto the property, or the tenant may terminate the rental agreement and recover damages. There is no indication that Palladino availed himself of these statutory remedies in a timely manner following the alleged infractions by Shropshire. The two earliest unlawful entries allegedly occurred in September and October 2008, yet Palladino raised the statutory defense for the first time a year later, in an email to Shropshire dated September 29, 2009, when the rent for that month was already twenty-eight days overdue. Under these circumstances, the trial court did not err in granting partial summary judgment on the issue of the unpaid rent.

#### **The motion to dismiss**

Next, Palladino argues that the trial court erred in denying his motion to dismiss the claims regarding damage to the property. The motion, which was filed on May 9, 2012, seven days prior to the second trial date, argued that Shropshire was not entitled to claim such damages because there was no listing of the condition of the property before and after Palladino's tenancy, as required under KRS 383.580(2), which states:

Prior to tendering any consideration deemed to be a security deposit, the prospective tenant shall be presented with a comprehensive listing of any then-existing damage to the unit which would be the basis for a charge against the security deposit and the estimated dollar cost of repairing such damage. The tenant shall have the right to inspect the premises to ascertain the accuracy of such listing prior to taking occupancy. The landlord and the tenant shall sign the listing, which signatures shall be conclusive evidence of the accuracy of such listing, but shall not be construed to be conclusive to latent defects. If the tenant shall refuse to sign such listing, he shall state specifically in writing the items on the list to which he dissents, and shall sign such statement of dissent.

KRS 383.580(2).

Shropshire admitted in his deposition that no such listing exists and that he had no knowledge of Palladino ever reviewing or signing such a listing. The trial court denied the motion, stating that it was not timely filed.

Palladino argues that discovery was not completed until May 8, 2012, and until that time he could not file the motion because he could not in good faith state that such a listing did not exist. Presumably, however, Palladino himself

would be in the best position to know whether he had signed a listing that complied with the statutory requirements.

Moreover, the lease agreement which he signed stated as follows:

Tenant hereby acknowledges that Tenant has examined the leased premises prior to the signing of this Lease, or knowingly waived said examination. Tenant acknowledges that Tenant has not relied on any representations made by Landlord or Landlord's agents regarding the condition of the leased premises and that Tenant takes the premises in its AS-IS condition ...

Shropshire's real estate agent Laura Schu testified that Palladino inspected the premises during a walk-through before signing the lease and that Palladino seemed to like the house and did not express any concerns about its condition. Furthermore, evidence in the record in the form of emails shows that Shropshire and Schu attempted numerous times to contact Palladino about attending a final walk through and inspection of the house prior to the repairs, but he never responded. Under these circumstances, we agree with the trial court that Palladino had been given every opportunity to object to the condition of the home, both before he moved in and after he moved out. He was therefore precluded from raising a defense under KRS 383.580(2) so close in time to the trial date.

### **Sufficiency of the evidence**

Palladino argues that there was insufficient evidence to support the trial court's findings of causation and the amount of damages assessed for (1) the furniture; (2) the interior, including the master bathroom and the crossbars; (3) the landscaping; (4) the plumbing; and (5) the stove.

When we review a judgment following a bench trial, the trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence, which is defined as evidence which has sufficient probative value to induce conviction in the mind of a reasonable person. *Gosney v. Glenn*, 163 S.W.3d 894, 898-99 (Ky. App. 2005). The trial court's conclusions of law, however, are reviewed de novo. *Id.*

### **The furniture**

The first item of damages concerns a couch and some chairs that Shropshire alleged were damaged by Palladino's cat. At trial, Shropshire testified that, before Palladino moved in, the attic of the rental home was subdivided to create a room where Shropshire could store some personal items. The room was equipped with a lockable door, but there was a gap between the top of the wall and the ceiling, as well as various holes for piping and duct work. Shropshire began storing furniture and other items in the attic room around 2002, including two leather chairs and a couch. He testified that when he stored them in the attic room, they were in excellent condition and had never been in contact with any pets. At trial, Shropshire testified that Palladino told him that they had a pet cat living on the premises. Palladino never denied owning a cat, although it was a condition of the lease that no pets were to be allowed on the premises.

After Palladino moved out in October 2009, Shropshire discovered that the furniture had been destroyed by cat scratches and cat urine stains. Shropshire introduced authenticated photos of the damaged furniture, and the video deposition of David Hicks, who repaired the furniture. Hicks testified that he has been in the furniture repair business since 1973; that the damage to the furniture was caused by a cat; that he was forced to reconstruct the furniture due to the damage; that the furniture was expensive and antique; and that the total cost to reupholster the three pieces in leather and to replace the brass cost \$7,689.80. An authenticated invoice for that amount was introduced into evidence.

Palladino argues that it was undisputed that he did not have a key to the attic where the couch was stored; that no evidence was offered that a cat was ever present in the attic; that Shropshire could not remember whether the couch was 35 or 40 years old; and that he had no proof of the condition of the couch prior to the damage occurring. Nonetheless, Hicks's testimony, the invoice, and Shropshire's own testimony constituted substantial evidence supporting the amount of damages for the furniture repair, and the trial court did not err in awarding damages in the amount specified in the invoice.

### **The interior**

Next, Palladino argues that the damages to the interior of the home were insufficiently itemized. Russ Milburn, of Milburn Home Repairs, testified that his company had performed work on the home for a number of years, including before and after Palladino moved out. He verified that the damage was done to the house



while Palladino resided there. Milburn described the damage as more than ordinary wear-and-tear. It included the front door lock being slammed shut with the deadbolt out; bathroom paint and plaster peeling due to steam damage; television mounts and outlets installed in the walls without permission; and window muntin bars being smashed and broken. Milburn submitted an invoice for \$1,687.00 for the cost of repairing these items. It included labor and materials. Palladino argues that an itemized statement was necessary to ascertain the damages with reasonable certainty. The invoice and testimony constituted evidence of sufficient probative value to induce conviction in the mind of a reasonable person regarding the cost of the repairs. Furthermore, Palladino chose not to participate in the trial, to present any contradictory evidence, or to contest Shropshire's evidence in any meaningful manner. As to his argument that Shropshire failed to show any evidence of diminution of value, we note that both Millburn and Laura Schu testified that the property was in excellent condition before Palladino rented it.

Palladino also argues that there was insufficient evidence that he deliberately removed part of the landscaping. The lease agreement provided that no alterations could be made to the landscaping without written permission of the landlord. Laura Schu testified that when she showed the home to Palladino, the outdoor landscaping was fine. Shropshire testified that the back porch patio had a flowerbed containing rose bushes. After Palladino moved out, Shropshire noticed that the roses had been uprooted and replaced with tomato plants. Shropshire hired Sun N'Shade Landscaping to clean out the flowerbed, trim everything and

remulch. The total amount billed by the company was \$185.00. The trial court awarded this amount in damages.

Palladino argues that the evidence supporting the award was insufficient, particularly the evidence of the condition of the landscaping before he took possession of the property. He contends that Schu's testimony lacked specificity and that when she was asked the length of time between when she last viewed the residence and when Palladino received the keys, she replied, "I couldn't tell you." It seems highly unlikely, however, that Shropshire himself would have replaced the rose bushes with tomato plants during the period between the showing by Schu and Palladino's taking possession of the residence, or indeed at any time. Schu's testimony and the bill from Sun N'Shade constituted substantial evidence to support the trial court's award of damages.

### **The plumbing**

Next, Palladino disputes the award of \$275 for damages to the plumbing. Shropshire testified that he received notice in early 2008 from Mullins Plumbing that they had been called to the residence to clear a stopped drain or sewer line. Mark Borchers of Mullins Plumbing testified that paper towels had caused the clogging. Palladino challenges the trial court's finding that he caused unnecessary damage to the plumbing "by clogging the sewer line with a roll of paper towels." He points out that the plumber did not testify how many towels clogged the line and that his actual testimony was that the clog was not caused by an entire roll. Nonetheless, the trial court's findings were not clearly erroneous; although an

entire roll of paper towels was not found in the line, the line was clogged by paper towels. It was a reasonable inference on the trial court's part that they had been put there during Palladino's tenancy.

### **The stove**

The final item of damages concerns the stove, which Shropshire testified was installed in 2002. At some time in early 2008, the fire alarm went off in the house. Shropshire learned that Palladino's son was cooking something on the stove and it "flamed up." The stove had to be repaired due to the fire damage. Shropshire testified that the repairs cost \$463; however, because he had made the payment online, he did not have an invoice. Palladino argues that the evidence was insufficient to support an award of damages. Palladino did not, however, dispute that the stove was damaged during his tenancy. He was free to present evidence to refute Shropshire's testimony regarding the cost of repairing the stove, but he chose not to do so. The trial court did not err in awarding damages in accordance with Shropshire's testimony.

Palladino argues that, as a general principle, the amount of damages to personalty must be based on evidence of the condition or the fair market value of the item prior to the alleged injury and that the evidence was purely speculative as it was based only on Shropshire's allegations of what he paid for repairs. Palladino signed a lease stating that everything in the home was in good repair when he

began renting it. Shropshire presented invoices for the cost of repairing the furniture, the interior, including the master bathroom and the crossbars, the patio flowerbed; and the plumbing, and he also presented the testimony of the furniture repairman, the home repairman, and the plumber. Although Shropshire did not present an invoice for the stove repairs, he personally testified to the amount he paid, and Palladino himself admitted to causing the damage. As the trial court observed, Palladino did not contradict any of the evidence presented by Shropshire, and his counsel simply raised objections to the introduction of the evidence and the weight that should be given to the testimony.

### **The attorney's fees**

Finally, Palladino argues that the trial court's award of attorney's fees was in contravention of KRS 383.570(1)(c), which states that a rental agreement may not provide that the tenant agrees to pay the landlord's attorney's fees. But the trial court's judgment does not specify that the fees are awarded in reliance on a provision of the lease agreement. Under KRS 383.660(3), "[e]xcept as provided in KRS 383.505 to 383.715, the landlord may recover damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or KRS 383.605 or 383.610. If the tenant's noncompliance is willful the landlord may recover actual damages and reasonable attorney's fees." "Willful" is defined as "with deliberate intention, not accidentally or inadvertently, and done according to a purpose." KRS 383.545(17). In *O'Rourke v. Lexington Real Estate Co. L.L.C.*, 365 S.W.3d 584, 586-87 (Ky. App. 2011), this Court held that a tenant's failure to

pay rent and his tasteless decoration of the rental property were not sufficient to support a finding of willfulness. By contrast, in addition to withholding rental payments, Palladino caused damage in a deliberate manner that went far beyond ordinary wear and tear, such as making holes in the wall in order to mount television sets, uprooting rose bushes in order to plant tomatoes, keeping a pet cat in contravention of the lease, ruining the paint and plaster in the bathroom, and breaking the window bars. These acts of intentional destructiveness, considered as a whole, demonstrate the level of willfulness contemplated by the statute, and the trial court did not err in awarding attorney's fees to Shropshire.

The summary judgment, and the opinion and order of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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