200 CARONDELET	*	**NO. 2017-CA-0328**
VERSUS	*	
		COURT OF APPEAL
TYRONE BICKHAM	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2016-09243-F, SECTION "D"
Ernestine L Anderson-Trahan,
* * * * * *
Judge Terrel J. Broussard, Pro Tempore
* * * * * *
(Court composed of Judge Terri F. Love, Judge Terrel J. Broussard, Pro Tempore, Judge Marion F. Edwards, Pro Tempore

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REVERSED

OCTOBER 25, 2017

Appellant, Tyrone Bickham, appeals the judgment of the First City Court of New Orleans signed February 2, 2017, in favor of Appellee, 200 Carondelet resulting in the eviction of Appellant. On appeal, Appellant asserts three (3) assignments of error:

1. There was insufficient proof presented by Appellee to support an eviction based upon the alleged violation of the "Drug Free/Zero Tolerance Policy" of the lease agreement;

2. The other incidents raised at the February 2 hearing were improperly admitted over the objection of counsel because only hearsay testimony was offered and Appellant was not given due process notice of the events that would be at issue; and

3. Because Appellant suffered a mental disability, First City Court erred in granting the Rule for Possession over Appellant's affirmative defense and exception for failure to accommodate his disability in violation of federal civil rights law, which were never ruled upon.[1]

For reasons set forth below, we reverse the city court's judgment. We find the city court was clearly wrong in finding that there was a violation of the lease. Appellee failed to provide sufficient evidence that there was a breach of the lease agreement by Appellant. Further, we find that the process implemented by Appellee was flawed and violated Appellant's right to due process. Although

Appellant's mental disability raises questions of Appellee's failure to accommodate the Appellant's incapacitating condition pursuant to state and federal statutes, that issue is rendered moot since we find the other two assigned errors have merit; thus, the discussion of assigned error three is pretermitted.

FACTUAL AND PROCEDURAL BACKGROUND:

Appellant suffered a mental disability. He lived at 200 Carondelet St., Apt. 501, located in New Orleans, Louisiana. 200 Carondelet was an apartment complex that housed low income tenants; the complex was considered as a low-income tax credit property. Although the Appellant was the signator on the lease in question, the lease was subject to addenda, which included compliance with the low income federal tax credit program under Section 42 of the Internal Revenue Code of 1886 as amended. Such leases are subject to the provisions of the Fair Housing Act, 26 USC section 42 *et. seq*.

Although Appellant suffered from a mental disability, he entered a lease agreement with Appellee on his own. The lease agreement had a termination date of January 31, 2017, and was renewed on a month to month basis thereafter. An addendum to the lease agreement was a "Drug Free/Zero Tolerance Policy" signed by Appellant in February 2014. The first paragraph of the addendum provided a resident shall not engage in drug related criminal activity on or near the premises. Drug related criminal activity was defined as the "illegal manufacture, sale, distribution, use or possession with intent to distribute or use of controlled substance on or near premises. (As defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."

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[1]Denise Jenkins, Appellant's mother testified he suffered from a bipolar and schizophrenic condition. Appellee did not contest Appellant suffered from a disability.

On November 22, 2016, Appellee issued to Appellant a "Thirty Day Notice" demanding repossession of the premises on the ground Appellant contravened his lease by violating the drug free policy. Following, Appellee filed in the trial court a "Rule for Possession of Premises" and alleged Appellant was in violation of his lease because he was using and selling drugs on multiple occasions on the property.[2]

In response, Appellant, through his attorney, filed "Exceptions, Answer and Affirmative Defenses to Rule for Possession of Premises." Appellant alleged an exception of vagueness or ambiguity pursuant to La.Code Civ.P. art. 926(A)(5) based on the general allegations that he used and sold drugs on multiple occasions. Additionally, Appellant alleged the rule for possession was premature as Appellant failed to issue a cease and desist notice, and allow for an adjustment or abatement of the conduct pursuant to the lease agreement and its addenda. As an affirmative defense, Appellant denied using or selling drugs on the premises. Furthermore, he asserted, under the Federal Fair Housing Act, the lessor was required to make an adjustment to a normal rule or policy for a person with a disability to ensure equal access to housing citing 28 U.S.C. §3604(f) (2012). Appellant requested his landlord contact his mother, Denise Jenkins, when any issues arose with his tenancy as a reasonable accommodation for his mental disability. Following, on January 2, 2017, Appellant submitted a letter to Appellee requesting a stay of the eviction and to consult with Ms. Jenkins who was represented as attorney in fact for her son pursuant to a power of attorney.

[2]At the hearing, the Rule for Possession along with the attached documents, such as the lease, were introduced into evidence by Appellee. No objection was stated for the record.

A hearing was held on January 12, 2017. The trial court granted Appellant's exception of vagueness and ambiguity, and the matter was continued. Another hearing was held on February 2, 2017. At the conclusion of that hearing, the city court ruled: "In light of Mr. Bickham's disability and his request, whether that be in writing or just a habit that had formed over four years of time, . . . I'm going to evict, but I'm going to give him until February 16th at 3 p.m."

STANDARD OF REVIEW/BURDEN OF PROOF:

A trial court's ruling on an eviction proceeding is subject to a clearly "wrong/manifestly erroneous" standard of review on appeal. *Bridges v. Anderson*, 16-0432, pp. 3-4 (La.App. 4 Cir. 12/7/16), 204 So.3d 1079, 1081, *writ denied*, 17-0194 (La. 3/24/17), 216 So.3d 817 (quoting *Housing Authority of New Orleans v. Haynes*, 14–1349, p. 16 (La.App. 4 Cir. 5/13/15), 172 So.3d 91, 99.) However, if the trial court makes one or more prejudicial legal errors that poisoned the fact-finding process which produced an erroneous result, then, a manifestly erroneous judgment must be reviewed under the *de novo* standard. *Housing Authority of New Orleans v. King*, 12-1372, p. 5 (La.App. 4 Cir. 6/12/13), 119 So.3d 839, 842. "[W]here there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are reasonable." *Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989) (citations omitted).

If there are two permissible views of the evidence, "the factfinder's choice between them cannot be manifestly wrong." *Id*. at 844 (citations omitted).

The lessor has the burden of proving, by a preponderance of the evidence, a valid lease and that the violation of the lease provides sufficient grounds for an

eviction. *Guste Homes Resident Mgmt. Corp. v. Thomas,* 12-0386, p. 8 (La.App. 4 Cir. 5/29/13), 116 So.3d 987, 991.

ASSIGNMENT OF ERROR NO. 1:

We find no violation of the drug free/zero tolerance policy.

Appellant does not challenge the validity of the lease, and he does not contest the credibility of witnesses or evidentiary determinations regarding the violations of the drug free provisions of the lease agreement. He argues that Appellee presented insufficient legal proof that he violated the lease by using or selling illegal drugs on the premises. Since Appellant does contest the credibility findings of the city court, a *de novo* review of this assigned error is appropriate.

We find Appellee failed to prove by a preponderance of the evidence that Appellant used or sold illegal drugs in violation of the lease agreement.

Ceon Rob'ert, a manager for 200 Carondelet from 2014 to 2016 testified that Appellant admitted to her that he smoked marijuana, but Appellant stated he never used drugs on the property.

Angelina Reed a tenant at 200 Carondelet, testified she knew Appellant, as they resided on the same floor. She recalled that on May 24, 2016, she was walking her dogs from Carondelet Street to Common Street and she saw Appellant exchanging money for "large, white, round pills" in a Ziploc bag with "some kind of guy, a random guy." On cross-examination, Ms. Reed admitted she was not certain if the drugs were illegal.[3] She did not give a background of drug use or experience identifying illegal drugs.

[3]Over the objection of Appellant's attorney, Ms. Reed expressed she was afraid of Appellant because he talked to an imaginary friend.

Appellant testified he showed the white pills, in the plastic bag, to James who lived on the 8th floor.[4] Appellant stated the pills were his medication given to him by the hospital. Appellant's mother confirmed Appellant took prescription medicine which included Tylenol 3 - an oval-shaped white pill, folic acid - a white small pill, and penicillin - a yellow pill. James was not called to testify, and no testimony was given to rebut that the pills in the plastic bag were Appellant's medication from the hospital.

Another incident alleged by Appellee involved a letter where Appellant supposedly admitted giving a pill to a security guard in exchange for money. Appellee lost the letter so it could not be admitted into evidence. The city court held that any testimony regarding the contents of the letter was inadmissible, but it allowed testimony surrounding the circumstances of the letter.

Brittney Freeman, the leasing agent for Appellee, testified she was given a letter by April Recurt, assistant leasing agent for Appellee. The letter was retrieved from a lockbox kept in the lobby of the complex for tenants to drop off their rent payments. Ms. Freeman read the letter and recalled it stated Appellant gave pills to the security guard, the security guard did not pay, and Appellant wanted his money. Both Ms. Freeman and Ms. Recurt testified Appellant admitted, in their presence, writing a letter stating he wanted money from the security guard for giving him some pills. However, neither Ms. Freeman nor Ms. Recurt could verify the event actually happened or if it did happen, whether or not the pills were an illegal substance. Ms. Recurt admitted, to her knowledge, management did not

[4]The city court requested that Appellant testify, but Appellant's attorney objected asserting his client suffered with a mental disability. The city court sustained the objection on the grounds Appellant was not interdicted, he did not have a social worker assigned to him, he lived alone, and only recently, he gave power of attorney to his mother to handle his affairs.

investigate the alleged selling of the pill to the security guard, and the security guard was not questioned. At the time of the hearing, the security guard was not working at the complex, and he was not called to testify at the hearing.

Ivy Alexander, a housekeeper at the apartment complex, testified she was a friend of Appellant's mother, and Ms. Jenkins would contact her and ask how Appellee was doing.[5] Ms. Alexander stated she was present during a meeting between the management staff of the apartment complex, Ms. Jenkins, and Appellant which occurred in December 2016. She recalled Appellant admitted he gave the security guard a pill or drugs, but she did not state if Appellant indicated the pill or drugs was an illegal substance.

At the hearing, Appellant denied writing the letter and denied selling drugs to the security guard. Appellant explained that the security guard had a headache, and he went to buy the security guard an Advil.

Christopher Johnson, the property manager for 200 Carondelet at the time of the January hearing, became manager in September 2016. Mr. Johnson recalled a female, while at the apartment complex, overdosed on heroine. An official from the Drug Enforcement Agency (DEA) informed Mr. Johnson that in connection with the overdose, they were watching a tenant named "Daniel" and Appellant was his friend. Mr. Johnson stated Daniel's vehicle matched the description of the vehicle a white male was driving when he witnessed Appellant making a suspicious transaction in front of the apartment complex in November 2016.[6] Mr. Johnson explained he observed a white male give Appellant a white tissue paper in

[5]Ms. Alexander testified she was the only one with Ms. Jenkins' number, and it was not in the Appellant's file kept by the apartment complex.

[6]Mr. Johnson's testimony was unclear if the white male was inside the vehicle or outside the parked vehicle.

a ball, and Appellant give the man money. Mr. Johnson did not refer to the man as Daniel, but described the man as a "well-known drug dealer who has since vacated our property and not returned. He was a guest." Mr. Johnson admitted he was not certain what was in the tissue paper and the incident was not reported to the police.[7]

Mr. Johnson stated he documented both incidents in the file he kept as manager for the complex. The file was presented to the court and Appellant's attorney, and the letter and notes were admitted into evidence without objection; however, neither the letter nor the note is contained in the appellate record. In court, Appellant's attorney indicated the note stated "Tyrone Bickham is friends with somebody named Daniel."

The evidence and testimony of Mr. Johnson is not competent since the substance that would violate the lease agreement was never determined to be a controlled substance prohibited by the lease agreement. Neither the DEA agents nor Daniel were called to testify at the hearing. Additionally, the DEA's report was not introduced and admitted into evidence. Furthermore, Appellant denied any knowledge of exchanging money for the tissue paper.

Appellant correctly points out that Appellee failed to present any physical evidence, expert testimony, or competent lay testimony to prove he used or sold illegal drugs on the premises. Moreover, Appellee has demonstrated a propensity to fail to include essential evidence to support his case into the court record. Appellee failed to prove by a preponderance of the evidence that the lease

[7]After the November incident, Mr. Johnson reported the occurrence to his corporate office, which instructed him to evict Appellant. Following, Mr. Johnson delivered the Thirty Day Notice to Appellant's apartment door.

agreement was violated. Our review of the jurisprudence involving public housing lease agreements, which contain a provision similar to the one at issue in this case, illustrates that Appellee failed to sustain his burden of proof. A public housing lease generally provides that a lessee, anyone in lessee's household, or guests will not engage in criminal activity that was either drug related, or threatened the health, safety, or right to peaceful enjoyment of the premises. In *River Garden Apartments v. Robinson,* 12–0938, p. 10 (La.App. 4 Cir. 1/23/13), 108 So.3d 352, this court held the lessor proved, by preponderance of the evidence, a lease violation. A police officer who lived next door to appellant testified he witnessed appellant's brother, her son, and her son's guest smoke marijuana in front of her residence on more than one occasion, and a person hired to patrol the complex for criminal activities testified he arrested a man, who was a guest of the lessee's, for possession with the intent to distribute pharmaceutical pills. *Id.* at 359. Additionally, in *River Garden Apartments-Peggi Edwards v. Horton*, 06-541, p.4 (La.App. 4 Cir. 1/24/07), 948 So.2d 399, 402, *writ denied*, 07-572 (La. 5/4/07), 957 So.2d 618, this court found the lessor met its burden of proof to prevail on the rule for possession when the merchandise looted from a nearby Wal-Mart was found in the lessee's apartment. The apartment was secure at the time it was inspected, and the evidence indicated no forced entry. *Id.* at 401. However, in *Haynes,* 172 So.3d 91, and *Estates of New Orleans v. McCoy*, 14-0933 (La.App. 4 Cir. 3/18/15), 162 So.3d 1179, this court found the lessor failed to meet its burden of proof. In *Haynes*, 172 So.3d 91, this court held the management company failed to prove the tenant should be evicted due to the criminal activity of her daughter who visited the premises. There was no evidence the mother knew her daughter was wanted for an outstanding warrant or that the lessee attempted to aid the

daughter in avoiding arrest. *Id*. at 103. In *Estates of New Orleans,* 162 So.3d 1179*,* this court reversed the trial court's granting of the lessor's Rule for Possession. The lessor failed to prove the lessee committed criminal acts in violation of the one strike policy. Although a police officer testified the lessee was intoxicated and involved in an altercation, the officer admitted he did not perform any sobriety test and could not determine who was the aggressor in the fight. *Id*. at 482-83.

Reviewing the record *de novo* and the previous cases from this Court, we find the city court was clearly wrong in granting the rule for possession. While the city court found Appellee's witnesses' testimony credible, these witnesses provided mere speculation that Appellant used or sold illegal drugs on the premises in violation of the lease. Accordingly, we find assignment of error one has merit.

ASSIGNMENT OF ERROR NO. 2:

We find that the other alleged incidents presented by Appellee violated Appellant's right to due process.

Appellant asserts the other incidents raised at the February 2nd hearing were improperly admitted. Appellant argues only hearsay testimony was presented and was allowed over his timely objection. Further, Appellant urges he was denied his fundamental rights to due process by the city court allowing testimony of other incidents without the proper notice given by Appellee as required by Louisiana courts and by the terms of the lease agreement. Appellant's attorney objected on the grounds it would be improper for the trial court to render a ruling based on alleged incidents Appellant learned of the morning of the hearing, and the new incidents were hearsay. Additionally, according to Appellant, only one of

incidents, pushing the eight-year-old girl, was alleged in the supplemental rule for possession.

Other alleged incidents

The other incidents offered by Appellant at the hearing did not involve criminal drug activity. *Only* Mr. Johnson was called to testify, over counsel's objection as hearsay evidence, as to these alleged other incidents. The city court stated for the record he would allow testimony of what Mr. Johnson witnessed or a complaint to the management, but not specific details. Despite the city court's instructions, Mr. Johnson gave detailed testimony of the alleged incidents. Mr. Johnson testified, a tenant complained, the day before the (February) hearing, that Appellant pushed an eight-year-old girl in the elevator, and Appellant was hostile toward the girl and her father. Appellant denied pushing the eight-year-old child in the elevator.

Other complaints Mr. Johnson received, since the January hearing, involved two tenants who accused Appellant of knocking on their doors and asking for money. A nearby hotel alleged Appellant asked their patrons for money. A second hotel faulted Appellant with coming to the lobby late one night and eating their cookies and getting angry and throwing cookies when asked to leave. Appellant admitted going to the hotel and asking for money. Although he admitted eating cookies from the lobby of hotel, he testified when he was told not to go into the hotel, he stopped going. He denied causing a disturbance at the hotels.

Mr. Johnson admitted he did not question Appellant, call the police, or talk to Appellant's mom regarding any of the incidents. We find this testimony is incompetent for its intended purpose.

Notice and Due Process

Appellee failed to give Appellant proper notice of the other alleged incidents and improperly enlarged the pleadings. The city court stated on the record Appellee filed an amended petition or supplemental rule for possession alleging these additional incidents. However, the supplemental rule for possession is not in the appellate record.[8]

In *Robinson,* 108 So.3d at 358 (citing *Flores v. Gondolier, Ltd.,* 375 So.2d 400, 403 (La.App. 3 Cir. 1979) and *Louisiana State Museum v. Mayberry,* 348 So.2d 1274, 1276 (La.App. 4 Cir. 1977), this court explained, in an eviction proceeding, proper notice is an essential requirement for a lessee to have due process. In *Mayberry*, 348 So.2d at 1276-77, this court held that the minimum requirement of due process is to be notified of the reason for the eviction to allow preparation of a defense, and if a written lease with a definite term is to be terminated for a reason other than the mere passage of time, the tenant must be appraised of the substantive reasons for his desired eviction. *Id.* at 1276. The remedy for failing to give notice of reasons for eviction before the hearing is to amend the notice and rule or to dismiss the action. *Id*. at 1277. Additionally, in *Davis v. Nola Home Constr., L.L.C.*, 16-1274, pp.10-11 (La. App. 4 Cir. 6/14/17), 222 So.3d 833, 842, (quoting *Barham & Arceneaux v. Kozak*, 02-2325, pp. 16-17 (La.App. 1 Cir. 3/12/04), 874 So.2d 228, 241–42, *writ denied*, 04-930 (La. 6/4/04), 876 So.2d 87), the court addressed the issue of enlargement of the pleadings at a hearing or trial, writing**:**

[8]In *Houston v. Chargois,* 98-1979, p. 4 (La.App. 4 Cir 2/24/99), 732 So.2d 71, 73, this court held, "We are a court of record. We are powerless to act on representations . . . not supported by the record."

> [I]f evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended. LSA–C.C.P. art. 1154. However, according to the editor's notes to Article 1154, this sentence does not contemplate the adding of an issue not pleaded . . . A timely objection to an attempt to enlarge the pleadings, coupled with the failure to move for an amendment to the pleadings, is fatal to an issue not raised by the pleadings. *Barker v. Loxco, Inc.*, 432 So.2d 975 (La.App. 1st Cir.1983); *Gar Real Estate & Ins. Agency v. Mitchell*, 380 So.2d 108, 109 (La.App. 1st Cir.1979).

Furthermore, Appellee failed to issue Appellant a cease and desist notice for the non-criminal activity as required by the lease. In the lease agreement, the paragraph entitled "Other Violations and Nuisance", provided:

> Tenant . . . fail to maintain a standard of behavior consistent with the consideration necessary to provide reasonable safety, peace and quiet to the other tenants in the apartment complex or neighborhood, such as being boisterous or disorderly, creating undue noise disturbance or nuisance of any nature or kind, engaging in any unlawful or immoral activities, and should such violation occur again after written notice to cease and desist from such activity or disturbance . . .

In this case, Appellant was given the Supplemental Rule for Possession, which contained one alleged other incident, the morning of the second hearing. At the hearing, Appellee improperly enlarged the pleadings. Furthermore, Appellee failed to follow the provision in the lease agreement that required a cease and desist notice to Appellant as to the other incidents. These due process violations resulted in prejudice to Appellant - his inability to properly defend against and prepare for the eviction proceeding.[9] Appellant is in a similar position as the lessee in *Hayes,* 172 So.3d 91, in which the lessor attempted to argue for the first time on appeal that the lessee was in violation of the one strike policy on a ground *not* asserted in the trial court. This court held, *"[N]otice of the basis for eviction from*

[9]See *Robinson,* 108 So.3d at 357 (citing *Boutte v. Winn–Dixie Louisiana, Inc.,* 95–1123, p. 9 (La.App. 3 Cir. 4/17/96), 674 So.2d 299, 305) where this court held reversal was warranted if the error harmed or prejudiced the complaining party's cause.

public housing, is the most basic of due process protections. Public housing was designed and implemented to aid the most vulnerable members of our society." Id. at 104 (emphasis added). The *Hayes* court noted that procedural requirements in an expedited eviction process must be strictly adhered to, in order to protect the rights of a tenant. *Id*. In the concurrence, Judge Tobias added, "No 'relaxed' or simplified rules of evidence apply to eviction proceedings." *Id.*

Termination of the Lease

We find Appellee's assertion, for the first time on appeal, that the city court's ruling should be upheld since the lease terminated on January 31 and good cause was shown for eviction is not properly before this court and is denied. The thirty day notice contained in the record indicates a demand for repossession of the premises for violating the drug free policy of the lease, and it did not mention non-renewal of the lease. At the January hearing, Appellee stated for the record, the lease expired January 31, 2017, and "[w]e have given them Notice of Non-Renewal to vacate that is sufficient." However, this Notice of Non-Renewal was not filed in the appellate record. Additionally, the basis of the action before the city court was not for non-renewal of the lease, but a rule for re-possession of the premises because of violations of the lease. As this Court has noted "[i]t is well established that as a general matter, appellate courts will not consider issues raised for the first time, which were not pleaded in the trial court below and which the trial court has not addressed." *Billieson v. City of New Orleans,* 09–0410, p. 8 (La.App. 4 Cir. 11/12/09), 26 So.3d 796, 801–02, *writ denied*, 10-64 (La. 6/4/10), 38 So.3d 301. As the city court did not rule on this issue directly, it is not properly before this Court for appellate review and is denied. *See Haynes*, 172 So.3d 91.

Accordingly, we find assignment of error two has merit.

ASSIGNMENT OF ERROR 3:

Because assignments of error one and two have merit and results in reversal of the city court's judgment, we find review of assigned error three is moot, and we pretermit discussion of the issue.

CONCLUSION:

Based upon a *de novo* review of the record before this court, we find the city court was clearly wrong in granting the rule for possession in favor of Appellee, 200 Carondelet, and against Appellant, Tyrone Bickham. Consequently, we reverse the judgment of the city court and render judgment in favor of Appellant, Tyrone Bickham.

REVERSED