STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0574

Highland Management Group Inc.,
Appellant,

vs.

Joyce Moeller,
Respondent.

Filed January 21, 2020
Reversed and remanded; motion denied
Rodenberg, Judge
Concurring specially, Ross, Judge

Hennepin County District Court
File No. 27-CV-HC-19-994

Christopher T. Kalla, Douglass E. Turner, Hanbery & Turner, P.A., Minneapolis, Minnesota (for appellant)

Rebecca Stillman, Mary Kaczorek, Mid-Minnesota Legal Aid, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

In this eviction action based on holdover after expiration of a lease, appellant-landlord Highland Management Group, Inc., challenges the district court's determination that landlord violated the Fair Housing Act (FHA) and Minnesota Human Rights Act

(MHRA) and is thereby precluded from evicting respondent-tenant Joyce Moeller because it refused to accommodate tenant's disability. Landlord argues that (1) denial of a reasonable accommodation is not an affirmative defense in a holdover-eviction action; (2) tenant failed to request an accommodation; and, (3) if tenant did request an accommodation, tenant's request was not reasonable. Because the record contains no evidence to support the finding that tenant requested a reasonable accommodation during the lease term, we reverse.

FACTS

Landlord owns the Edina Highland Village apartment complex in Edina. Tenant is 83 years old and has rented a market-rate Highland Village apartment from landlord since 2006 under a series of one-year leases, the last of which was for the period ending February 28, 2019.

In October 2018, landlord received several complaints from other tenants in the complex regarding a horrible odor in the common hallway near tenant's apartment. After noticing that the smell was particularly strong around tenant's door, landlord's community manager and maintenance technician entered tenant's apartment on October 15, 2018.[1] Upon entering, they discovered extreme clutter, decaying and rotting food in the refrigerator, dirty water and unwashed dishes in the clogged kitchen sink, and mold on the kitchen floor. Tenant's refrigerator was turned off, and its rotting contents were determined to be the source of the smell.

[1] Appellant makes no claim that the entry violated Minn. Stat. § 504B.211, subd. 2 (2018), or was otherwise unauthorized or illegal.

Landlord's community manager promptly wrote tenant a letter informing her that she needed to clean her apartment immediately, and suggested that tenant enlist the help of a family member or other individual to assist with the cleaning. Tenant orally responded by stating that she "[wi]ll have it cleaned up." She did not request an accommodation.

On October 17, 2018, landlord wrote tenant a second letter captioned "lease violation." The letter indicated that tenant was in direct violation of the terms and conditions of her lease and that the current state of tenant's apartment was a fire hazard. On October 23, 2018, landlord sent tenant a notice of lease nonrenewal and notice to vacate the apartment upon the expiration of her lease on February 28, 2019. Tenant did not respond.

In mid-January 2019, landlord again received complaints about a foul smell coming from tenant's apartment. Landlord provided tenant with a letter dated January 25, 2019, warning that landlord would commence an eviction action against her if she did not immediately clean her apartment.

On February 27, 2019, the day before her one-year lease was to end, tenant requested that her tenancy be extended "until . . . August 31, 2019, because that's when [tenant] receives her rental rebate and [will] be able to afford movers." Landlord denied tenant's request and commenced an eviction action against her on March 1, 2019, based on a failure to vacate after expiration of the lease term.

Tenant appeared in the eviction action and argued to the housing court referee that she is disabled and entitled to protections under the FHA and MHRA, that landlord's decision not to renew tenant's lease was related to tenant's disability, and that tenant

therefore has the right to request and receive a reasonable accommodation. Landlord argued that there is no denial-of-a-reasonable-accommodation affirmative defense in a holdover-eviction action, and that, even if such an affirmative defense is available, tenant failed to inform landlord that she was disabled and failed to request a reasonable accommodation.

Following a two-day eviction hearing, the housing court referee determined that tenant is disabled and entitled to protections under the FHA and MHRA, that tenant is entitled to a reasonable accommodation, and that landlord failed to provide tenant with a reasonable accommodation. The referee recommended that tenant remain in possession of the apartment "provided she maintains her apartment in accordance with [landlord's] housekeeping standards." It also recommended that "[t]enant must provide to [l]andlord . . . a detailed written proposal . . . requesting a reasonable accommodation" within 15 days. The written proposal was required to include, among other things, "[a] description of [t]enant's physical limitations and what services [t]enant will need to have to ensure her apartment is kept clean and sanitary." The referee's recommended findings and order were adopted by a district court judge.

Landlord's appeal from the judgment followed.

D E C I S I O N

At the outset, we reject landlord's argument on appeal that we should consider this case as one involving lease nonrenewal resulting from tenant's material breach of the lease. Landlord's notices to tenant were all premised on nonrenewal. The record contains no indication that landlord alleged or argued that tenant committed a material breach of the

lease as a ground for eviction, and nothing in the district court's order indicates that it addressed this issue in dismissing landlord's eviction action. We "must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). The case as presented below was limited to landlord's contention that tenant failed to vacate the apartment at the end of her lease.

Similarly, we do not consider the argument advanced by amicus curiae Minnesota Elder Justice Center that requiring tenant to move may cause tenant "transfer trauma," or that the lease nonrenewal was discriminatory and void as a matter of law. The record does not indicate that these arguments were made by tenant to the housing court. We therefore decline to further address this argument. *Id.*

We also disregard landlord's contention at oral argument that we should ascribe significance to the fact that landlord has prevailed in a second eviction action that followed after this action was dismissed. Landlord now contends that the district court's decision in that second case has some bearing on the issues in this appeal. We decline to consider the later action and we instead review the record as it existed when the district court made its findings and order in this case. The later factual and legal developments cannot logically show error during the earlier case. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (establishing principle that appellate courts will not base decisions on matters outside the record submitted on appeal). And an eviction appeal is not moot when the tenant vacates the property involuntarily. *Real Estate Equity Strategies, LLC v. Jones*, 720 N.W.2d 352, 355 (Minn. App. 2006).

The district court did not err in allowing tenant to assert denial of a reasonable accommodation as a defense under the circumstances of this case.

Tenant argued to the district court, and the district court held, that a landlord's failure to reasonably accommodate a tenant's disability is an available defense in a holdover eviction. Landlord argues on appeal that reversal is required because a tenant may not assert entitlement to a reasonable accommodation as an affirmative defense to a holdover eviction.

"We review a district court's application of the law de novo." *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

There is no published authority in Minnesota that directly addresses whether a failure to reasonably accommodate a tenant's disability is available as a defense to an eviction action where the tenant holds over at the end of the lease. Although not binding on this court, caselaw in other jurisdictions is instructive. *See Hunt v. Almco Properties, L.P.*, 814 F.3d 1213, 1223 (11th Cir. 2016) (determining that "the FHA protects renters . . . from eviction"); *United States v. California Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) (holding that the FHA "imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons"); *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996) (providing that the FHA affords handicapped tenants accommodation to their disabilities in rules, practices, policies, and services).

In *Schuett Inv. Co. v. Anderson*, this court held that a tenant may raise the defense of a landlord's failure to reasonably accommodate a tenant's disability if the reason for the lease violation on which the unlawful detainer action was based is causally related to the tenant's disability. 386 N.W.2d 249, 253 (Minn. App. 1986). However, the facts in *Schuett*

differ from this case in that the landlord in *Schuett* received federal funds under the Housing and Community Development Act housing program. *Id.* Here, landlord is a private management group and receives no federal funding. Additionally, *Schuett* did not involve a holdover situation, and instead involved the landlord's claim of a material lease violation. *Id.* at 250-51. As discussed above, this case involves landlord's claim that it is entitled to evict tenant because tenant failed to vacate the leased premises at the end of the lease period. This is not a material-breach eviction.

Landlord argues that "[e]viction actions have limited statutory defenses available," citing *Kleinman Realty Co. v. Talbot*, No. A10-1132 2011 WL 1938184 (Minn. App. May 23, 2011), *review denied* (Minn. Aug. 16, 2011). Similar to the facts in this case, the tenant in *Kleinman* argued—in the context of a holdover-eviction action—that the denial of a reasonable accommodation was an available defense. 2011 WL 1938184, at *3. The landlord appealed, asserting that the district court erred in accepting the tenant's reasonable-accommodation argument as an affirmative defense to the eviction action. *Id.* at *5. Ruling for the landlord, this court reversed the district court, observing that the tenant offered no authority to support the argument that a failure to reasonably accommodate is an available defense in the context of a holdover eviction action. *Id.* at *7.

As noted by the district court here, *Kleinman* "is unpublished and has no precedential value." *See* Minn. Stat. § 480A.08, subd. 3(c) (2018) ("Unpublished opinions of the court of appeals are not precedential."). The district court therefore declined to apply the *Kleinman* holding here. The cited cases with precedential value all state that the issue

of reasonable accommodation can be addressed in an eviction action. The district court concluded that, had *Kleinman* been a published opinion, it likely would have found in favor of landlord.

We acknowledge the possible conflict between our holdings in *Schuett* and *Kleinman* and between our holding in *Kleinman* and the authorities in other jurisdictions, as discussed above. We are also mindful of the recent decision of the Minnesota Supreme Court in *Cent. Hous. Assoc. v. Olson*, 929 N.W.2d 398 (Minn. 2019), recognizing a new common-law defense to breach-of-lease evictions.

Moreover, we agree with the district court that *Kleinman* is at odds with the apparent purpose of the FHA and MHRA to require reasonable accommodation for disabled persons. At least in the factual circumstances here, the housing court did not err in concluding that a tenant may assert the denial of a reasonable accommodation as a defense to a holdover-eviction action. But this case does not present the occasion for establishing a rule of law concerning the parameters of that defense because, even assuming the availability of a failure-to-reasonably-accommodate affirmative defense to a holdover eviction, the record here is insufficient to support the defense. *See* Lawrence R. McDonough, *To Be or Not to Be Unpublished: Housing Law and the Lost Precedent of the Minnesota Court of Appeals*, 35 Hamline L. Rev. 1, 2-16 (2012) (expressing the author's opinions both that *Kleinman* should have been published and was erroneously decided).

The record does not support the district court's determination that tenant proved the four required elements to support a finding of a failure to reasonably accommodate a disability for purposes of the FHA and MHRA.

Landlord argues that, even if a failure-to-reasonably-accommodate defense is available to tenant, the district court clearly erred when it found that tenant proved that landlord failed to reasonably accommodate tenant's disability. We agree.

When reviewing a district court's findings in an eviction proceeding, appellate courts defer to a district court's findings of fact and credibility determinations, and review the factual findings for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). Appellate courts will not determine that a district court's finding is clearly erroneous "absent a clear demonstration that it is without substantial evidentiary support or that it was induced by an erroneous view of the law." *Schuett*, 386 N.W.2d at 252 (quotation omitted).

The FHA was enacted by Congress to promote "fair housing throughout the United States." 42 U.S.C § 3601 (2012).[2] It prohibits discrimination in the rental of housing, and makes it unlawful "to otherwise make unavailable or deny[] a dwelling to any . . . renter because of a handicap of that . . . renter." 42 U.S.C. § 3604 (f)(1)(A) (2012). There are three ways to prove actionable discrimination under the FHA: refusal to reasonably accommodate, disparate impact, and disparate treatment. *Hinneberg v. Big Stone Cty. Hous. & Redevelopment Auth.*, 706 N.W.2d 220, 225 (Minn. 2005). Tenant here argues only that landlord refused to reasonably accommodate her disability.

[2] We cite to the 2012 version of the statute because the statute has not been amended since the 2012 printing of the United States Code which, for the sections of Title 42 cited herein, is the most-recent printing.

A tenant must plead and prove four elements to succeed on a failure-to-reasonably-accommodate claim: (1) she must be a person with a disability recognized under the FHA; (2) she must have requested a reasonable accommodation for the disability; (3) the landlord must have refused to make the accommodation; and (4) the requested accommodation must be shown to have been necessary to afford tenant an opportunity to use and enjoy the dwelling. 42 U.S.C. § 3604 (f)(3) (2012); *see Hunt*, 814 F.3d at 1225; *see also Hinneberg*, 706 N.W.2d at 226 (holding that a tenant must explicitly request a reasonable accommodation in a failure-to-reasonably-accommodate claim).

The record supports the district court's findings that tenant is a person with a disability and that landlord knew or reasonably should have known of that disability.

Landlord does not appear to dispute that tenant is disabled and physically impaired, but asserts that it was unaware of tenant's disability before it commenced this action. The record supports the district court's finding that tenant is disabled and that landlord knew or reasonably should have known of the disability.

When an individual's disability is not open or obvious, the initial burden is on the individual seeking a reasonable accommodation to make known the disability. *Taylor v. Principal Fin. Grp., Inc*., 93 F.3d 155, 165 (5th Cir. 1996). The FHA defines "handicap"[3] as a person with "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602 (h)(1) (2012).

[3] Because tenant refers to herself as "disabled," we use "handicap" and "disability" synonymously under the FHA for purposes of this opinion.

Tenant asserts that her disability was "readily apparent" to landlord. The district court so found, reasoning that landlord should have known tenant was disabled because of her frail appearance in court. The district court also accepted as accurate tenant's testimony that "her hip hurts, her hands shake, she can't bend, and has trouble walking."

At the eviction hearing, landlord's community manager testified that she "noticed [tenant is] slower with walking." She testified that, after she discovered the condition of tenant's apartment, she called the Edina Senior Center to "try to find resources for [tenant]," and to find someone "that could help [tenant] with the condition of her apartment." Landlord's awareness of tenant's disability is further evidenced by an October 15, 2018 letter to tenant from landlord that states "I am concerned about you living in the apartment in [its] current condition." The record also shows that tenant is 83 years old, walks with the assistance of a cart, and that landlord's employees have witnessed her walking with the cart.

We defer to the housing court's superior position to determine whether tenant is a person with a physical or mental impairment that substantially limits a major life activity and whether landlord knew or should have known of that disability.

The record does not support the district court's finding that tenant requested a reasonable accommodation during the term of the lease.

Landlord next argues that tenant failed to request an accommodation. Alternatively, landlord argues that, if tenant did make any request for accommodation, her request was not reasonable.

Tenant argues that she sufficiently requested an accommodation from landlord. The record is unclear concerning when, or if, an accommodation of tenant's disability was

requested. In the fact section of her brief to this court, tenant asserts only that "[i]n her Answer as well as at the first appearance [in housing court, tenant] asserted that she is disabled and entitled to protections under the FHA and MHRA, including the right to a reasonable accommodation." Of course, the answer and first hearing occurred after the lease period had ended and tenant was already holding over. At her eviction hearing, tenant testified to the following:

> Q: Have you ever asked your property manager for more time to clean your apartment?
> A: Yes, I sure did . . .
> Q: And how many times have you asked for more time?
> A: Several times. Several times, and it's a week or two and then I can't get it done in that.

Tenant's testimony relates not to accommodating her disability but to extending her tenancy. The only written request for an accommodation in the record is contained in tenant's answer to landlord's eviction complaint, which was after the end of the lease.

Landlord's community manager testified that tenant made no contact with landlord regarding an accommodation after she was notified of the nonrenewal of the lease in October 2018 and before the end of the lease. We see no contrary evidence in the record. And, as discussed, landlord did not seek to evict tenant because of the condition of her apartment being a material breach of the lease. It appears that the housing court, too, was confused about whether tenant requested an accommodation. It found as a fact that tenant "*is* seeking a reasonable accommodation." (Emphasis added.) It ordered (when the referee's recommendation was adopted by the district court) that "Tenant must provide to Landlord on or before 15 days from the date of this order a detailed written proposal to Landlord *requesting a reasonable accommodation*." (Emphasis added.)

Even if tenant did in some manner request an accommodation before the end of the lease period, any such request was insufficiently specific on this record to be interpreted as a request for reasonable accommodation of tenant's disability.

Tenant had leased the apartment under a series of one-year leases. On February 27, 2019, one day before her lease expired, tenant requested to remain in her apartment for an additional six months. Nothing in the record shows that tenant requested to sign a new lease, and tenant made no claim at trial that she communicated a desire to enter into a new lease agreement. The record contains no evidence of a request by tenant during the lease term that she needed assistance to clean her apartment. In fact, at the eviction hearing, tenant testified at length about assistance she had available to her—and of which she had availed herself in the past. Her testimony was consistent with landlord's position that tenant did not request any accommodation to assist with cleaning her apartment. Tenant's unequivocal testimony was that she had adequate help with basic household chores without assistance from landlord and that her friends and others in the building and community had been an "absolutely wonderful" help to her.

Tenant asked landlord to stay past the end of the lease "until . . . August 31, 2019, because that's when she receives her rental rebate and [will] be able to afford movers." Tenant explained at the eviction hearing that she needed movers to move her piano from the apartment and testified as follows:

> Q: And are [cleaners] going to help you move things out of your apartment?
> A: They can help me—They could help me move some things: I have a piano that's old, the movers—and I have to say, oh, here, the movers, it's so heavy.

Tenant's request, in short, was not to continue to lease the apartment with a reasonable accommodation. Instead, tenant asked that she be allowed to stay in the apartment until August without renewing the lease.

The housing court concluded that "landlord should have . . . at least allowed Tenant an opportunity to seek help to clean her apartment." But it is undisputed that tenant had approximately four months before the expiration of her lease to clean her apartment after the problem with the foul smell coming from her apartment was discovered. Tenant received notice of her lease nonrenewal on October 23, 2018, and was not required to vacate her apartment until February 28, 2019. Tenant produced no evidence that she requested accommodation during that four-month period. We see no evidence in the record that tenant requested any assistance before her lease expired. Her only oral request of landlord was to continue to hold over. This is not a request for reasonable accommodation of a handicap or disability.

Tenant's request to remain in the apartment for an additional six months and her not having requested any accommodation during the more-than-four-month notice period between October 2018 and the end of February 2019 defeats any claim that tenant either requested accommodation for a disability or that any accommodation request would reasonably have been understood by landlord. Even the housing court was unable to discern from the record any reasonable-accommodation request. It ordered that tenant *make* such a request within 15 days.

Because tenant failed to request a reasonable accommodation during the lease term, we need not address whether tenant successfully proved the remaining required elements

to support a finding that landlord failed to reasonably accommodate tenant's disability for purposes of the FHA and MHRA. We reverse the district court's judgment granting tenant continued possession of the premises and remand for further proceedings consistent with this opinion as may appear appropriate.[4]

Reversed and remanded; motion denied.

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[4] After this appeal was submitted for decision, tenant moved to dismiss the appeal as moot. Tenant argues that, in subsequent eviction proceedings in district court while this appeal proceeded, landlord pursued eviction based only on breach of lease and nonpayment of rent. Tenant argues that, because these grounds for eviction are inconsistent with holdover, landlord waived its holdover position and there is no relief that this court can grant. Landlord timely responded to tenant's motion to dismiss, arguing that the appeal is not moot and that the arguments now made by tenant ought properly to have been made by way of a notice of related appeal or an earlier motion.

The mootness doctrine "requires that [courts] decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). When a decision on the merits is no longer necessary or an award of effective relief is no longer possible, an appellate court should dismiss an appeal as moot. *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015) (citing *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997)). But the mootness doctrine is not a mechanical rule that courts invoke automatically; rather, it is a "flexible discretionary doctrine." *Id.* at 4 (citing *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984)). Generally, an eviction appeal becomes moot when possession of the premises is relinquished voluntarily. *See Real Estate Equity Strategies, LLC*, 720 N.W.2d at 355 (concluding that tenant's move from property was not voluntary when precipitated by eviction judgment, issuance of writ of recovery, and tenant's inability to meet the conditions of a stay); *Lanthier v. Michaelson*, 394 N.W.2d 245, 246 (Minn. App. 1986) (concluding that because the appellant left the property voluntarily, an unlawful detainer appeal was moot), *review denied* (Minn. Nov. 26, 1986).

We decline to address tenant's mootness argument for reasons similar to those underlying our disregard of landlord's arguments concerning the eviction action(s) that followed after this one. Tenant's motion to dismiss relies on information not part of the record in this appeal, which appears to us to have been known well before this matter was submitted. The motion to dismiss is denied. The district court may consider arguments concerning mootness in addition to any other legal issues the parties raise on remand.

ROSS, Judge (concurring specially)

I write separately to express my complete agreement with the majority's well-supported conclusion that, "even assuming the availability of failure-to-reasonably-accommodate affirmative defense to a holdover eviction, the record here is insufficient to support the defense." I therefore likewise also agree with the majority that "this case does not present the occasion for establishing a rule of law concerning the parameters of that defense." For those reasons, I concur in the result, reversing the district court's decision. But I do not believe we have any cause to go any further so as to render additional holdings unnecessary to decide this appeal. So I decline to join the majority's reflections about the availability of the defense generally or to offer my view about the majority's application of those reflections so as to conclude that "[t]he district court did not err in allowing tenant to assert denial of a reasonable accommodation as a defense."