

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00255-CV

JOHN KLEKOTKA AND PRISCILLA KLEKOTKA, Appellants

V.

PAMELA DENEVE AND ROBERT DENEVE, Appellees

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Cause No. 09-23847

MEMORANDUM OPINION

On appellant's motion for rehearing, we withdraw our opinion of January 13, 2011, and substitute this opinion.

John and Priscilla Klekotka (the tenants), appeal from a judgment entered in favor of Pamela and Robert DeNeve (the landlords). We affirm the trial court's judgment.

Background

The landlords and the tenants entered a residential lease which commenced on September 16, 2009, and expired on December 16, 2009. The initial dispute between the

parties arose when the tenants failed to timely pay their October rent. When the tenants refused the landlords' demand for payment, which included late fees, the landlords filed a petition for eviction in the justice of the peace court. The landlords' petition asserts the tenants had not paid rent and late fees as required by the terms of the lease. The landlords obtained a judgment from the justice of the peace, awarding them possession of the leased property, back rent in the amount of \$2,600, and court costs.

The tenants appealed to the county court, exercising their right to obtain a trial de novo, and they posted a cash appeal bond in the amount of \$7,800. *See* Tex. R. Civ. P. 749; *see also* Tex. R. Civ. P. 752. Following a bench trial, the trial court found the tenants breached the lease by failing to timely pay their October rent. The trial court, in its judgment, awarded the landlords damages of \$14,223 based on the damages recoverable under the lease. On March 8, the Klekotkas filed a motion for new trial, which was denied.

Issues One and Two

In their first two issues, the tenants argue the trial court never acquired jurisdiction to hear the landlords' claims. According to the tenants, neither the justice court nor the trial court acquired jurisdiction because the landlords did not properly serve them with a notice to vacate that strictly complied with the provisions of section 24.005(f) of the Texas Property Code. *See* Tex. Prop. Code Ann. § 24.005(f) (West Supp. 2010) (providing methods to serve the notice to vacate).

However, the judgment from which the tenants appeal in this case was entered by the county court at law. The tenants perfected an appeal from the judgment of the justice court by filing an appeal bond, and they also filed an answer in the county court at law to the landlords' petition for eviction. The tenants' answer filed in the county court at law constitutes an appearance. *See Whitmire v. Greenridge Place Apts.*, No. 01-06-00963-CV, 2007 Tex. App. LEXIS 7893, at *8 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd w.o.j.). Generally, an answer is “an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him.” Tex. R. Civ. P. 121; *see Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999).

We further note that the county court at law had jurisdiction over the amount in controversy between the parties to this dispute. *See* Tex. Gov't Code Ann. §§ 25.0003(c)(1), 25.1721 (West Supp. 2010); Tex. Gov't Code Ann. § 26.042(a) (West Supp. 2010). An alleged failure to comply with section 24.005(f) of the Texas Property Code did not deprive the court of jurisdiction to consider the disputed issue. *See* Tex. Prop. Code Ann. § 24.004 (West 2000). We overrule issues one and two.

Issue Three

In issue three, the tenants contend the trial court did not have jurisdiction to award rent and late fees for the period after they moved from the landlords' property. As we have noted, the county court at law had jurisdiction over the amount in controversy in this dispute. *See* Tex. Gov't Code Ann. §§ 25.0003(c)(1), 25.1721; Tex. Gov't Code Ann. §

26.042(a). During the trial, the trial court admitted into evidence a copy of the written lease agreement, and it contains a provision that obligates the tenants upon breaching the lease to pay accelerated rent. The lease also requires the tenants, upon failing to timely pay rent, to pay late fees. The lease was admitted during the trial without objection. The landlords' evidence at the trial also addressed the damages they suffered based on the tenants' breach of the lease. Thus, the issues tried to the court included the landlords' claims for damages based on the tenants' breach of the lease.

The issues before the court also included a counterclaim filed by the tenants that is based on a statute the tenants contend required the landlords to install keyless bolting devices.¹ Nevertheless, none of the parties moved to sever the forcible entry and detainer claims from the landlords' contract claims or from the tenants' statutory damage claims.

Now, for the first time, the tenants complain the judgment allows the landlords greater relief than that available for forcible entry and detainer claims. However, the tenants never objected to the landlords' contract claims when the case was prosecuted in the county court at law.

To preserve an issue for appeal, the Rules of Appellate Procedure require a party to bring complaints that are to be later raised on appeal to the trial court's attention by filing a timely request, objection or motion and by obtaining the trial court's ruling. Tex.

¹A keyless bolting device is commonly known as a keyless dead bolt. Tex. Prop. Code Ann. § 92.151(6) (West 2007).

R. App. P. 33.1.² Whether the landlords' contract claims were properly joined with their forcible entry and detainer case is raised by the tenants for the first time on appeal, and the matter was not brought to the trial court's attention by a timely request, objection, or motion. Because the tenants did not comply with Rule 33.1 of the Texas Rules of Appellate Procedure, their complaints that relate to the joinder of these claims were not preserved for appellate review.

Issue Four

In issue four, the tenants assert the evidence is insufficient to support the trial court's judgment. The tenants specifically complain of the trial court's awards of attorney fees, court costs, and fees associated with the landlords' trips to check on the rented property. The tenants also complain that the trial court erred by refusing to reimburse them for their security deposit.

When analyzing a challenge to the legal sufficiency of the evidence, we view the evidence in the light most favorable to the prevailing party, crediting favorable evidence if the factfinders could, and disregarding contrary evidence unless the factfinders could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Since the

²Rule 33.1 provides, in pertinent part:

(a) *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context[.]

landlords prevailed at trial, we view the evidence in the light most favorable to their verdict. *See id.* The evidence is legally sufficient if it enables “reasonable and fair-minded people to reach the verdict under review.” *Id.* at 827. In determining factual sufficiency of the evidence, courts of appeals must weigh all the evidence, both for and against the finding. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

While the tenants argue, in part, that no evidence supports the trial court’s judgment, our review reveals that the record contains evidence supporting the trial court’s awards of attorneys’ fees, trip charges, and court costs. We overrule the tenants’ fourth issue to the extent it contends that the record contains no evidence to support the trial court’s judgment.

We also conclude the evidence is factually sufficient to support the trial court’s judgment. With respect to the trial court’s award of attorney’s fees, the attorney representing the landlords testified during the trial that he charged two hundred dollars per hour and that his fees were reasonable. Additionally, Pamela Deneve, one of the landlords, testified that she had paid an attorney the sum of two thousand dollars for legal fees for work he performed representing the landlords before the justice court. Deneve stated that those fees were fair and reasonable. No objections were lodged to her testimony. The lease, which was admitted into evidence without objection, provided for the landlords’ recovery of “all Landlord’s costs associated with eviction of Tenant, including but not limited to attorney’s fees, court costs, costs of service, witness fees, and

prejudgment interest[.]” Finally, we note that the principal issue in dispute in both the justice court and the county court at law concerned which of the parties had the superior right to possession of the property, and that there is no testimony in the record that attorney fees Deneve testified the landlords incurred were not reasonable. Based on the record before us, we conclude the evidence is legally and factually sufficient to support the trial court’s award of attorney’s fees and its award of costs associated with the tenants’ eviction.

The tenant’s fourth issue challenges the trial court’s awards of damages incurred by the landlords as trip charges and as court costs. The tenants’ fourth issue also includes a complaint concerning the sufficiency of the evidence to support the trial court’s ruling as it relates to the tenants’ security deposit. These complaints are not separately briefed, and the tenants cite no authorities that directly support their argument about these specific complaints. Nonetheless, the record reflects the trial court admitted, without objection, an exhibit that summarized the landlords’ damages. Deneve briefly addressed the items in the detailed summary, and the detailed summary includes line items for trip charges and court costs. One of the provisions in the parties’ lease allows the landlords to recover trip charges. Another of the provisions allows the landlords to deduct reasonable charges, including unpaid rent and late fees, from the tenants’ security deposit.

When it rendered its final judgment, the trial court reduced the judgment by the amount the tenants had posted as their security deposit. The final judgment also credits

the tenants as having paid \$7,800, the amount of the appeal bond, toward satisfying the judgment. We conclude that the evidence is legally and factually sufficient to support the trial court's award of trip fees, court costs, costs associated with the tenants' eviction, and attorneys' fees, and we conclude that the evidence is sufficient to support the credit the trial court allowed the tenants based on their security deposit. Because the awards challenged by the tenants in issue four are supported by legally and factually sufficient evidence, we overrule issue four.

Issue Five

In issue five, the tenants argue the trial court erred by refusing to find the landlords liable for their failure to install keyless bolting devices on the exterior doors of the home. *See* Tex. Prop. Code Ann. § 92.157 (West 2007). In their counterclaim, the tenants assert they demanded in writing that the landlords install keyless bolting devices. *See* Tex. Prop. Code Ann. §§ 92.153, 92.164 (West 2007).

However, before the date the tenants requested the installation of keyless bolting devices, they had breached the lease by failing to fully pay their rent. The Texas Property Code allows the antecedent breach of the lease to serve as a defense to the demand for the installation of security devices. *See* Tex. Prop. Code Ann. § 92.1641 (West 2007). The tenants made their request to install the keyless bolting devices on October 13. The evidence also shows the tenants had not paid their October's rent, which under the lease was "due and payable not later than October 1, 2009." In its Findings of Fact, the trial

court found the tenants were in default for failing to pay rental amounts in full as required by the lease at the time they requested the landlords to install keyless bolting devices. This finding is not specifically challenged by the tenants in the appeal.

We conclude the evidence sufficiently supports the trial court's decision denying the tenants any recovery on their statutory claim related to the installation of keyless bolting devices. We overrule issue five.

Conclusion

Having considered each of the tenants' issues, and finding them without merit, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on October 7, 2010
Opinion Delivered February 17, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.