TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00668-CV

Rafael Montez Da Oca, Appellant

v.

Eduardo Gutierrez, Appellee

FROM THE COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-12-000782, HONORABLE ERIC SHEPPERD, JUDGE PRESIDING

MEMORANDUM OPINION

Rafael Montez Da Oca appeals the trial court's final judgment against him for damages resulting from his alleged wrongful conduct as the landlord under a commercial-lease agreement with appellee Eduardo Gutierrez. Da Oca challenges the sufficiency of the evidence supporting various jury findings. For the following reasons, we will affirm the trial court's final judgment.

BACKGROUND

The parties' legal dispute originated in the form of a forcible-detainer action filed in the justice court by Da Oca against Gutierrez after Da Oca locked Gutierrez out of the leased premises where Gutierrez was operating a restaurant. Da Oca's sworn petition filed in the forcible-detainer action alleged that Gutierrez was delinquent in paying the monthly rent of $4,200 and had a history of late payments and that Gutierrez owed rent in the total amount of $4,410 (one month's rent plus late fees). The justice court's judgment is not in the appellate record, but the parties'

briefing and other documents in the record indicate that the justice court entered a judgment granting possession of the property to Da Oca and terminating the lease.

After the conclusion of the forcible-detainer proceeding, Da Oca's attorney sent Gutierrez a letter stating that Gutierrez's security deposit would "be reduced by the deductions for damages, charges for which you are legally liable under the unexpired terms of the lease (utilities and sales taxes), and damages and charges that resulted from a breach of the lease." The letter also asserted that, pursuant to section 93.006 of the Property Code, Gutierrez was "not entitled to a description and itemized list of deductions since rent was owed when [Da Oca] recovered the property vis a vis [the justice court's judgment]" and that "prior to the rendition of [the justice court's] judgment rents were in arrearage since March, 2011."

Gutierrez then sent a response letter to Da Oca's attorney seeking the return of his $21,000 security deposit and admittance into the leased premises to retrieve his personal property left behind as a result of the lockout. His letter quoted the justice court's judgment accordingly: "IT IS ORDERED, ADJUDGED AND DECREED . . . [that] the Tenant is entitled to recover a month's rent less the cost of delinquent rents. Since a month's rent was delinquent, then tenant would not receive these damages." About a year and a half later, Gutierrez's newly appointed attorney sent a letter to Da Oca's attorney, again requesting the return of Gutierrez's security deposit. When Da Oca failed to return the deposit or provide an itemized list of deductions, Gutierrez filed the present lawsuit now on appeal.

In this lawsuit, Gutierrez alleged that he and Da Oca entered into a five-year commercial lease of premises owned by Da Oca; that he paid Da Oca a security deposit of $21,000;

and that Da Oca locked him out of the leased premises without any notice when he fell behind on his rent. He made claims for damages from Da Oca's alleged wrongful lockout and unlawful retention of his security deposit. The trial court rendered a default judgment in favor of Gutierrez upon Da Oca's failure to appear for trial, heard and admitted Gutierrez's evidence, and awarded him total damages in the amount of $104,001.11, including amounts for attorney's fees and damages for Da Oca's bad-faith retention of the security deposit. Da Oca filed a motion for new trial supported by the affidavit of his attorney, in which he asserted that he failed to appear for the trial because he had not been notified of the trial setting. The trial court granted Da Oca's motion for new trial, and the cause was then tried to a jury.

The jury found that Da Oca: (1) wrongfully failed to refund $19,570.65 of a $21,000 security deposit; (2) retained the security deposit in bad faith; (3) constructively evicted Gutierrez, thereby causing damages to him in the amount of $18,424.30; (4) caused $8,000 in damages to Gutierrez by locking him out of the leased premises; and (5) should pay $50,000 in attorney's fees, plus additional specified amounts in the event of an unsuccessful appeal. The trial court rendered judgment for Gutierrez in accordance with these jury findings. In this appeal, Da Oca complains of several of the findings.

DISCUSSION

In his first issue, Da Oca contends that the evidence is factually insufficient to support the jury's finding that he wrongfully failed to refund a portion of Gutierrez's security deposit. *See* Tex. Prop. Code § 93.005(a) ("The landlord shall refund the security deposit to the tenant not later than the 60th day after the date the tenant surrenders the premises and provides notice to the landlord

or the landlord's agent of the tenant's forwarding address under Section 93.009."); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (outlining factual-sufficiency standard of review). Specifically, Da Oca contends that the $21,000 that Gutierrez paid him did not constitute a security deposit and, therefore, Da Oca did not violate the Property Code and Gutierrez is not entitled to a refund of that money. *See id.* § 93.004 ("A security deposit is any advance of money, other than a rental application deposit or an advance payment of rent, that is intended primarily to secure performance under a lease of commercial rental property.").

The lease between the parties, which was admitted into evidence, indicated that Gutierrez paid Da Oca a $21,000 security deposit. The evidence showed that the lease was prepared by Da Oca or his agent. Gutierrez testified that he paid Da Oca $16,000 by check (a copy of the check was admitted as an exhibit)[1] as part of the total security deposit and that the remainder of the $21,000 deposit was provided to Da Oca in the form an agreement whereby either Gutierrez assumed the remaining debt owed on a promissory note to an associate of Gutierrez or the debt was entirely forgiven.[2] Gutierrez's associate, Arlene Martinez, similarly testified that Da Oca was given $16,000

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[1] Gutierrez testified that he had obtained the $16,000 through a loan from his sister to help him operate a restaurant in the leased premises. Da Oca himself had been operating a restaurant in the premises but was seeking to sell the business because his finances had become tight. Gutierrez attempted to help broker a sale but, after no success in finding a buyer, Gutierrez agreed to take over the operation of the restaurant, changing the cuisine and the restaurant's name.

[2] The testimony is not entirely clear whether Gutierrez's associate, Arlene Martinez, actually forgave the remaining $9,200 owed on the debt or whether Gutierrez assumed the obligation. In any case, Gutierrez's testimony indicates that Da Oca was no longer obligated on the debt; that Da Oca's automobile titles, which had been securing the loan, were returned to him; and that Da Oca, Martinez, and Gutierrez considered the $9,200 for which Da Oca was no longer indebted as part of the security deposit on the leased premises. Martinez testified that Da Oca was having trouble repaying the loan about the same time that Gutierrez was preparing to open his restaurant in the leased premises, and the parties negotiated that the remaining $9,200 that Da Oca owed on the debt

by Gutierrez, and that the three parties agreed that the total of Gutierrez's check plus debt forgiveness ($16,000 plus $9,200) would be applied thus: $21,000 as a security deposit and $4,200 towards the first month's rent when the restaurant started operating.

While other evidence at trial was inconsistent with the finding that the parties intended to use the $21,000 as a security deposit, we cannot say that the jury's verdict in favor of Gutierrez on this issue[3] was so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust. *See Ortiz*, 917 S.W.2d at 772; *see also Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) (noting that in factual-sufficiency review, appellate court is not required to detail all evidence supporting judgment when affirming trial court's damages). The evidence was factually sufficient to support the jury's implied finding that the $21,000 did, indeed, constitute a security deposit. Accordingly, we overrule Da Oca's first issue.

In his second issue, Da Oca contends that the evidence is factually insufficient to support the jury's finding that he withheld the security deposit in bad faith. A landlord who fails to return a security deposit or to provide a written description and itemized list of deductions on or before the 60th day after the date the tenant surrenders possession is presumed to have acted in bad faith. *See* Tex. Prop. Code § 92.109(d). Once the presumption of bad faith arises, the burden shifts to the landlord to rebut the presumption and prove that his retention of the security deposit was reasonable. *See id.* § 92.109(c); *Johnson v. Waters at Elm Creek, L.L.C.*, 416 S.W.3d 42, 47 (Tex.

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would be transferred over as a security deposit on the leased premises on Gutierrez's behalf and that Martinez thereby "invested" in the restaurant and obtained an ownership interest in it.

[3] The jury answered "yes" to a question asking whether Da Oca wrongfully failed to refund any portion of Gutierrez's security deposit and found the amount unreturned was $19,570.65.

App.—San Antonio 2013, pet. denied). Da Oca concedes that the presumption applied to him but argues that the evidence of his good faith and reasonableness in retaining the deposit was sufficient to rebut the presumption. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (noting that when reviewing factual-sufficiency challenge to jury finding on issue on which appellant had burden of proof, appellate court will determine whether adverse finding is "against the great weight and preponderance of the evidence.").

The jury heard Da Oca's testimony explaining why he did not timely provide an itemized list to Gutierrez or return the security deposit (stating that he believed that Gutierrez owed unpaid amounts for utilities, sales taxes, and delinquent rent and that he feared Martinez would later sue him for the forgiven debt). The documentary evidence that Da Oca attempted to offer to support his testimony about unpaid utility amounts was not admitted into evidence. The jury also heard Gutierrez's conflicting testimony (including his averment that he made all of the contested utility, tax, and rent payments)[4] and the testimony of other witnesses on the same issues. The jury viewed various exhibits, including records from the State Comptroller showing sales-tax returns and accompanying checks indicating payment thereof by Gutierrez. The Comptroller's records did not support Da Oca's testimony that he had paid over $3,500 in unpaid sales taxes for the restaurant.

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[4] For instance, Gutierrez testified that the utility services were not separately metered to the leased premises (other commercial enterprises occupied different areas of the common building in which the restaurant was located) and that each month Da Oca would inform Gutierrez of his portion of the utility bill. Gutierrez testified that he "wholeheartedly trust[ed]" Da Oca about the amounts due, paid them each month in cash or by check, and that he could not access his records to prove that he had paid them because his records were still in the restaurant and inaccessible since the sudden lockout. Gutierrez also testified that he and Da Oca had orally agreed to a rent reduction for several of the initial months of the lease because the restaurant would take some time to generate cash flow.

The evidence also showed that (1) Da Oca eventually provided an itemized list of the deductions for which he claimed that Gutierrez was liable, but not until his deposition over a year and a half after the lockout, and (2) over the three years until trial he had not refunded Gutierrez any amount of the security deposit, despite his sworn statement when filing his eviction action in the justice court that Gutierrez owed overdue rent and late fees in the amount of only $4,410. After hearing all of the evidence, the jury made specific findings that Gutierrez paid all utilities, rent, and taxes required of him under the lease and was free to weigh or disregard Da Oca's testimony in making its determination of whether, under the circumstances, his retention of the deposit and failure to timely provide an itemized list of deductions were reasonable, and we cannot say that its bad-faith finding was against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 242. We overrule Da Oca's second issue.

In his third and fourth issues, Da Oca contends that the evidence is legally and factually insufficient to support the jury's finding that he constructively evicted Gutierrez. Specifically, he posits that a lockout authorized by the Property Code does not constitute constructive eviction, and that his lockout of Gutierrez was authorized by Gutierrez's failure to pay August rent. *See* Tex. Prop. Code § 93.002(c)(3), (f) (providing procedures by which landlord is permitted to lockout tenant who is delinquent in rent); *Ashford.Com, Inc. v. Crescent Real Estate Funding III, L.P.*, No. 14-04-00605-CV, 2005 WL 2787014, at *7 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.) (mem. op.) (holding that where lockout was lawful, tenant's claim for violation of covenant of quiet enjoyment failed). However, the jury found both that Da Oca's lockout of Gutierrez was

in violation of the Property Code and that Gutierrez paid all rent required by the parties' agreement,[5] and Da Oca does not challenge those findings. Additionally, our review of the evidence leads us to conclude that it is legally and factually sufficient to support each of the elements of the jury's constructive-eviction finding.[6] *See Lazell v. Stone*, 123 S.W.3d 6, 11–12 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (listing elements of constructive eviction); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) (noting legal-sufficiency standard of review); *Ortiz*, 917 S.W.2d at 772 (noting factual-sufficiency standard of review). Da Oca's intention that Gutierrez no longer enjoy the premises can be inferred from the combination of his changing the locks, failure to post the required notice about how Gutierrez could regain entry, and sending an eviction notice five days after the lockout. These acts also constitute a material act by Da Oca substantially and permanently interfering with and depriving Gutierrez of his intended use and enjoyment of the premises. Gutierrez testified that, after sending a letter to Da Oca seeking resolution of the issue

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[5] While Gutierrez admitted that he was late on his August rental payment and had not paid it as of the lockout date, he explained that he and Da Oca had reached an agreement whereby Da Oca would simply deduct the August rent from the $7,500 refund of a liquor-license deposit that Da Oca would soon be receiving from the Texas Alcoholic Beverage Commission (TABC). Although the TABC deposit would be refunded directly to Da Oca (who had operated his own restaurant in the leased premises before leasing them to Gutierrez), Gutierrez testified that at the beginning of the lease period, he had paid Da Oca $7,500 for the liquor license because Da Oca needed the cash and Gutierrez needed the liquor license. The parties agreed that Gutierrez would file the appropriate documents with the Secretary of State to register the restaurant corporation in his name, but because he never did so, the TABC deposit remained in Da Oca's name even though, according to Gutierrez, the $7,500 rightfully belonged to him.

[6] The elements of constructive eviction are: (1) an intention on the part of the landlord that the tenant shall no longer enjoy the premises, (2) a material act by the landlord that substantially interferes with the tenant's intended use and enjoyment of the premises, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) abandonment of the premises by the tenant within a reasonable time after the commission of the act. *Lazell v. Stone*, 123 S.W.3d 6, 11–12 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

and receiving no response, Gutierrez effectively abandoned the premises and communicated to Da Oca his option to terminate the lease. We overrule Da Oca's third and fourth issues.

In his fifth issue, Da Oca contends that the jury's award of $8,000 in damages to Gutierrez proximately caused by Da Oca's lockout of Gutierrez is excessive. *See Maritime Overseas Corp.*, 971 S.W.2d at 406 ("The standard of review for an excessive damages complaint is factual sufficiency of the evidence."); *see also* Tex. Prop. Code § 93.002(c), (f), (g) (providing for recovery by tenant of actual damages, attorney's fees, and court costs for landlord's violation of section, which prohibits lockout of tenant except for non-payment of rent, among other non-applicable reasons, and requires specific posting on tenant's door upon lockout). The jury found both that Gutierrez paid any rent due to Da Oca under the lease and that Da Oca failed to provide the statutory written notice upon locking out Gutierrez. Gutierrez testified that several items of his personal property remained in the leased premises, such as various commercial kitchen appliances and restaurant furniture and equipment, and that he had not been provided an opportunity to retrieve them as of the trial date. He testified that the value of the unreturned property was between $6,000 and 8,000. A list of the specific items that Gutierrez had been unable to retrieve from the leased premises and remained in Da Oca's possession was admitted as an exhibit. We conclude that the evidence was factually sufficient to support the damage award, *see Maritime Overseas Corp.*, 971 S.W.2d at 407, and we overrule Da Oca's fifth issue.

In his sixth issue, Da Oca contends that the trial court erred by failing to instruct the jury on the factors that may be considered in assessing attorney's fees. *See Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). However, Da Oca did not preserve

this error because he did not make a timely objection in the trial court. *See Faust v. BNSF Ry. Co.*, 337 S.W.3d 325, 331 (Tex. App.—Fort Worth 2011, pet. denied) ("An objection to a jury instruction must timely and plainly make the trial court aware of the complaint, and the complaining party must obtain a ruling in order to preserve the error regarding the instruction for appeal.") (citing *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43–44 (Tex. 2007)); *Academy Corp. v. Interior Buildout & Turnkey Constr., Inc.*, 21 S.W.3d 732, 742–43 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that not objecting to jury charge before it was read to jury for charge's failure to instruct jury on *Andersen* factors waived error with regard to that complaint). Accordingly, we overrule Da Oca's sixth issue.

CONCLUSION

Having overruled all of Da Oca's issues, we affirm the trial court's final judgment.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: January 25, 2017