IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

HENRY MCCONE,

Appellant,

v.

CASE NO.: CVA1 07-53
Lower Court Case No.: 06-CC-18798-O

THE GROVE AT ORLANDO HOLDINGS, INC.,

Appellee.
_____/

Appeal from the County Court,
for Orange County,
Wilfredo Martinez, Judge.

Henry McCone, Pro Se,
for Appellant.

Kenneth J. Lowenhaupt, Esquire,
for Appellee.

Before GRINCEWICZ, DAWSON, M. SMITH, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Henry McCone (McCone) timely appeals the lower court's final judgment for removal of tenant in favor of Appellee The Grove at Orlando Holdings, LLC (The Grove). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

The Grove filed a tenant eviction action against McCone on December 6, 2006, for nonpayment of rent for the months of September, October, and November. The complaint stated that a three-day notice was served upon McCone on November 17, 2006, but McCone refused to

pay rent or deliver the premises. On December 18, 2006, McCone filed an answer and affirmative defenses denying each of The Grove's allegations and asserting that The Grove failed to state a cause of action, that the three-day notice was defective, and that The Grove failed to maintain the premises. McCone also filed a three-count counterclaim alleging breach of contract, violation of the Florida Deceptive and Unfair Trade Practices Act, and violation of the implied covenant of good faith. Additionally, McCone filed a motion to dismiss asserting that there was a material defect in the three-day notice and a motion to determine rent stating that the amount to be posted in the court registry was unclear. In response, The Grove filed a motion to dismiss McCone's counterclaim stating that it would impossible to answer and there was no legal basis for it.

The parties appeared before the trial court on January 9, 2007, for a hearing on McCone's motion to determine rent. The trial court ordered McCone to pay back rent into the court registry in the amount of $3,264.00 by January 10, 2007. The trial court also dismissed McCone's counterclaim but granted leave to file an amended counterclaim. McCone timely filed an amended three-count counterclaim on January 22, 2007. The Grove promptly filed an answer denying each allegation and a motion to dismiss Counts II and III of the amended counterclaim regarding a violation of the Florida Deceptive and Unfair Trade Practices Act and a violation of implied covenant of good faith.

On May 17, 2007, the parties appeared before the trial court for a non-jury trial on The Grove's complaint for possession and McCone's three-count counterclaim. With regards to the complaint for possession and The Grove's motion to dismiss, the trial court entered a Final Judgment for Removal of Tenant in favor of The Grove holding that McCone failed to present evidence as to uninhabitability and granted the motion to dismiss as to Count II of the

counterclaim. The trial court also found in favor of The Grove as to Counts I and III of McCone's counterclaim holding that McCone failed to provide evidence as to uninhabitability or diminution of rent. At the conclusion of trial, The Grove submitted a motion to disburse funds from court registry and the trial court entered an order granting the motion.

On March 19, 2007, McCone filed a motion for rehearing, motion to dismiss, motion to stay final judgment, motion to stay writ of possession, and motion to stay release of funds in court registry. The trial court promptly entered an order denying all of McCone's motions. This appeal followed.

Where a trial court's decision rests on a pure matter of law that can be evaluated equally as well by the appellate and trial courts, the standard of review is de novo. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 (Fla. 5th DCA 1998)(judicial interpretation of state statutes is a purely legal matter and therefore subject to de novo review). It should also be noted that a trial court's factual findings are presumed correct and will not be reversed unless the court's decision is unsupported by competent substantial evidence. City of Cocoa v. Leffler, 803 So. 2d 869, 872 (Fla. 5th DCA 2002).

This appeal pertains to a residential eviction governed by Florida's Residential Landlord and Tenant Act, Florida Statutes, Chapter 83, Part II. McCone asserts that The Grove's three-day notice is fatally defective and that the trial court erred in rejecting his defense of uninhabitability. McCone also asserts that the trial court erred in denying entry of the city's code violation report and in awarding damages without subject matter jurisdiction and personal jurisdiction. Lastly, McCone argues that the trial court erred in dismissing Count II of the counterclaim and in finding in favor of The Grove on Counts I and III of his counterclaim.

Alternatively, The Grove maintains that the three-day notice substantially complied with

the statute and McCone failed to present evidence concerning his defense of uninhabitability. The Grove also maintains that the trial court did not err by excluding the city's code violation report or awarding damages and reserving on fees and costs. Lastly, The Grove asserts that the trial court was correct in dismissing Count II of McCone's counterclaim and in finding in favor of The Grove on Counts I and III of the counterclaim.

Three-day Notice

McCone first asserts that the trial court erred by not dismissing The Grove's three-day notice for payment of rent or delivery of the premises. He argues that the notice was defective on its face because it failed to state the landlord's name, address, and phone number, as well as the correct amount of outstanding rent. The Grove contends that the three-day notice substantially complied with section 83.56, Florida Statutes, and McCone failed to support his argument with applicable case law.

The law is clear that a statutory cause of action cannot be maintained in court until the plaintiff complies with all the conditions precedent. Ferry-Morse Seed Co. v. Hitchcock, 426 So. 2d 958, 961 (Fla. 1983). An action for removal of a tenant from a residential unit is controlled under Chapter 83, Florida Statutes, which prescribes that certain conditions must be met before a landlord may bring an action for possession. See §83.56, Fla. Stat. In addition, existing case law establishes that delivery of a nondefective notice of termination of tenancy is a statutory prerequisite to maintain an action for possession under the Florida Residential Landlord and Tenant Act. See Inv. and Income Realty, Inc. V. Bentley, 480 So. 2d 219 (Fla. 5th DCA 1985).

In the instant case, a three-day notice was posted on McCone's door on November 17, 2006. (R. at 1A.) The notice stated that $1,732 was due on or before November 22, 2006, and it was signed by the property manager, Andrew Rodriguez. (R. at 1A.) It is undisputed that

McCone received the posted notice. It is also undisputed that the amount of outstanding rent listed on the notice was not the correct amount; however, it was lower, not higher, than the outstanding amount.

Section 83.56(3), Florida Statutes, specifically states that a three-day notice must contain a statement in substantially the same format as that provided in the statute. This Court finds that the trial court did not err by proceeding with the action for possession against McCone because the three-day notice substantially complied with the statutory requirements of section 83.56, Florida Statutes.

Section 83.60, Florida Statutes

McCone next argues that the trial court erred in finding in favor of The Grove because he had a complete statutory defense to the action for possession pursuant to section 83.60(1), Florida Statutes. The Grove asserts that McCone was given ample opportunity to present evidence as to uninhabitability or noncompliance, but he failed to do so.

Section 83.60(1), states that "[a] material noncompliance with s. 83.51(1) by the landlord is a complete defense to an action for possession based upon nonpayment of rent." Pursuant to section 83.51(1), a landlord shall comply with the requirements of applicable building, housing, and health codes; or in the absence of such codes, the landlord shall maintain the roofs, windows, doors, floors, and all other structural components in good repair. If the landlord's failure to comply renders the unit untenantable and the tenant vacates, the tenant is not liable for rent during the period the unit is uninhabitable. §83.56(1)(a), Fla. Stat. However, if the landlord's failure to comply does not render the unit untenantable and the tenant remains in possession of the unit, then the rent for the period of noncompliance shall be reduced in proportion to the loss of rental value caused by the noncompliance. §83.56(1)(b), Fla. Stat.

In the instant case, the trial court found that McCone failed to present evidence establishing that the premises was uninhabitable. Based on this finding, the trial court ruled that no reduction in rent was required and McCone should be responsible for the entire contracted rent amount. Upon review of the record and trial transcript, this Court finds that the trial court did not err in ruling in favor of The Grove on Count I of the counterclaim because McCone failed to present sufficient evidence to support his defense.

Evidence

McCone also asserts that the trial court erred in denying entry of the city's code violation report into evidence because the report is admissible under section 92.40, Florida Statutes. The Grove counters that the trial court was correct in refusing to allow the report into evidence because it was not certified.

Section 92.40, Florida Statutes, states that "[a] copy of a report, notice, or citation of a violation of any building, housing, or health code by a governmental agency charged with the enforcement of such codes, certified by the agency, if otherwise material shall be admissible as evidence." The standard of review of a trial court's evidentiary rulings is abuse of discretion. See McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007). "[D]iscretion is abused only where no reasonable person would take the view adopted by the trial court." Spann v. State, 857 So. 2d 845, 854 (Fla. 2003). The trial court's evidentiary ruling is affirmed because McCone has failed to demonstrate abuse of discretion by the trial court

Release of Funds in Court Registry

McCone next argues that the trial court erred in awarding damages to The Grove because the trial court did not have subject matter jurisdiction or personal jurisdiction. Specifically, McCone argues that subject matter jurisdiction was not invoked because The Grove failed to file

a separate count for damages with its complaint. He further asserts that he was never personally served in any manner prescribed by law; therefore, the trial court never obtained personal jurisdiction to award damages, court costs, or attorney's fees.

Subject matter jurisdiction is the power of a court to adjudicate the type of case before it. Bell v. Kornblatt, 705 So. 2d 113, 114 (Fla. 4th DCA 1998). Section 34.011(2), Florida Statutes, gives county courts "jurisdiction of proceedings relating to the right of possession of real property and to the forcible or unlawful detention of lands and tenements." Further, section 83.48, Florida Statutes, provides that in civil actions brought to enforce the provisions of a rental agreement, "the party in whose favor a judgment or decree has been rendered may recover reasonable court costs, including attorney's fees, from the nonprevailing party." Based on this authority, this Court finds that McCone's argument regarding lack of subject matter jurisdiction lacks merit. This Court further finds that McCone's argument regarding lack of personal jurisdiction fails because his participation in the proceedings amounted to a general appearance, thereby constituting a waiver of any alleged defects in service or in jurisdiction. See Leipuner v. Federal Deposit Ins. Corp., 860 So. 2d 1027, 1028 (Fla. 5th DCA 2003).

Counts I, II, and III of McCone's Counterclaim

Lastly, McCone argues that the trial court erred in dismissing Counts I and III of his counterclaim for breach of contract and violation of implied covenant of good faith. McCone further argues that the trial court erred in finding in favor of The Grove on Count II of his counterclaim for violation of Florida Deceptive and Unfair Trade Act. It should be noted that McCone's understanding of the trial court's rulings are mistaken. The trial court dismissed Count II of the counterclaim and ruled in favor of The Grove on Counts I and II of the counterclaim.

"It is an elemental principle of appellate procedure that every judgment, order or decree of a trial court brought up for review is clothed with the presumption of correctness and that the burden is upon the appellant in all of such proceedings to make error clearly appear." State v. Town of Sweetwater, 112 So. 2d 852, 854 (Fla. 1959); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980); Wright v. Wright, 431 So. 2d 177, 178 (Fla. 5th DCA 1983). "An appellant does not discharge this duty by merely posing a question with an accompanying assertion that it was improperly answered in the court below and then dumping the matter into the lap of the appellate court for decision." Lynn v. City of Ft. Lauderdale, 81 So. 2d 511, 513 (Fla. 1955.) Moreover, this burden must be met notwithstanding the fact that a party is a non-lawyer acting pro se. McCone's Amended Initial Brief merely states that the trial erred in its decision relating to the outcome of Counts I, II, and III of the counterclaim. McCone fails to cite any statutes or case law in support of these arguments. Accordingly, this Court finds that McCone failed to meet his burden of demonstrating error by the trial court.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Final Judgment for Removal of Tenant entered on May 17, 2007, is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the __24_ day of ____April_____, 2009.

_/S/_____
DONALD E. GRINCEWICZ
Circuit Judge

__/S/_____
DANIEL P. DAWSON
Circuit Judge

___/S/_____
MAURA T. SMITH
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Henry McCone,** Post Office Box 551908, Orlando, Florida 32855 and **Kenneth J. Lowenhaupt, Esquire**, 7765 SW 87th Avenue, Suite 201, Maimi, Florida 33173 on the _24_____ day of ____April_____, 2009.

_____/S/_____
Judicial Assistant