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

STEVEN J. WOLK,

Appellant,

v.

AARON MICHAEL GOODMAN,

Appellee.
_____/

CASE NO.: 2014-CV-000022-A-O
Lower Case No.: 2013-SC-009018-O

Appeal from the County Court, for Orange County, Florida, Faye L. Allen, County Judge.

Steven J. Wolk, Esquire, In Propria Personam, Appellant.

Michelle Ku, Esquire, for Appellee.

Before J. KEST, MYERS, and WHITEHEAD, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Steven J. Wolk ("Wolk"), timely files this appeal of the trial court's Final Judgment entered on February 28, 2014. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

As gathered from the court record, including the stipulated Statement of Evidence and Proceedings[1], the facts and procedural history are summarized as follows: On September 04, 2012, Aaron Michael Goodman ("Goodman") entered into a lease to rent an apartment from Wolk for a term expiring on August 31, 2013 at a monthly rental rate of $450.00. Goodman also paid Wolk a security deposit of $450.00. Upon Goodman moving in, both parties agreed that the apartment had not been cleaned to normal rental standards; thus, Wolk agreed to pay Goodman a cleaning allowance.

During the term of the lease, Goodman made late several rent payments and kept unauthorized animals in the apartment. On August 05, 2013, Wolk sent Goodman by regular mail a Notice of Non-Renewal of Lease notifying him that his lease would not be renewed upon its expiration on August 31, 2013 and if he failed to timely vacate the apartment he would be liable for rent at double the monthly rate then in effect pursuant to section 83.58, Florida Statutes. Shortly after Goodman received the Notice of Non-Renewal, both parties had discussions concerning the possibility of extending the lease if Goodman paid the entire rent for the renewal term in advance prior to someone else renting the apartment as of September 01, 2013. However, that arrangement did not occur and on or about August 24, 2013, Wolk approved the application of a replacement tenant for the apartment beginning on September 01, 2013 and telephoned Goodman notifying him of this information and that he would have to vacate the apartment by August 31, 2013. Goodman informed Wolk that he would vacate the apartment accordingly. On or about August 28, 2013, Goodman telephoned Wolk requesting an

[1] There was no court reporter at the trial. Thus, in place of a transcript, the parties submitted a stipulated Statement of Evidence and Proceedings per rule 9.200(a)(4) Fla. R. App. P. On July 8, 2014, this Court granted the motion for leave to file the stipulated Statement of Evidence and Proceedings and directed the Clerk to supplement the record on appeal with same.

extension of a few days before he had to vacate the apartment. Wolk told him he could not grant the extension because per the lease with the new tenant he had to move the new tenant into the apartment on September 01, 2013. Thereafter, on September 01, 2013, Goodman and Wolk had another telephone conversation wherein they agreed that Goodman could have until 12:00 p.m. on that same day to vacate the apartment. Goodman vacated the apartment between 12:00 p.m. and 1:00 p.m. on that date.

After Goodman vacated the apartment, Wolk was unable to move the new tenant into the apartment as planned on September 01, 2013 because: 1) Goodman's personal property, including a double bed and a desk, was still in the apartment; 2) The apartment's door had been broken in and the lock broken; 3) The carpet in the apartment was infused with animal odor and urine; and 4) Goodman had not cleaned the apartment. Therefore, the move-in of the new tenant had to be postponed until Goodman's personal property was removed from the apartment and the damaged or unfit items in the apartment had been repaired or otherwise made rent-ready.

Subsequently, Wolk made telephone calls to Goodman leaving messages requesting him to remove his furniture and other personal property from the apartment. Wolk did not receive any response from Goodman. Thus on September 04, 2013, Wolk removed Goodman's personal property to the roadside in front of the building. In the same period, the apartment door and frame were repaired, the carpet and pad were removed and replaced with vinyl flooring, and the apartment was professionally cleaned. When the apartment had been made ready for reoccupation, the new tenant moved in on September 04, 2013 and paid a prorated rent of $445.50 for the month of September that excluded payment for the first three days of the month. On September 30, 2013, Wolk sent to Goodman's new address via certified mail a notice of his intention to impose a claim on the security deposit per section 83.49(3)(a), Florida Statutes,

claiming a balance due of $815.39 exceeding the amount of the security deposit. Goodman did not pay Wolk's claim.

On September 27, 2013, Wolk filed suit against Goodman alleging breach of the lease agreement and seeking $815.39 in damages plus attorney's fees and court costs. In response, Goodman filed an answer, affirmative defenses, and counter claim alleging: 1) Per section 83.575(1), Florida Statutes, Wolk failed to comply with the 30 day notice provision in the lease as to his intent not to renew the lease; 2) Wolk breached his duty of good faith per section 83.44, Florida Statutes; and 3) Wolk violated section 559.72(9), Florida Statutes, of the Florida Consumer Collection Practices Act ("FCCPA") by knowingly and willfully attempting to collect monetary damages to which he was not entitled to i.e. double rent.

Ultimately, a non-jury trial was held on December 18, 2013 and the trial court reserved ruling. On February 28, 2014, the trial court entered the Final Judgment first finding that Wolk was entitled to damages for the door repair, lock replacement, and interior cleaning totaling $495.54 minus Goodman's cleaning allowance of $106.00 and $450.00 security deposit leaving a refund due to Goodman of $60.46. The trial court also found Wolk in violation of section 559.72(9), Florida Statutes, finding that he was not entitled to double rent and accordingly ordered that Goodman recover $500 from Wolk for the violation. Wolk now appeals this Final Judgment.

Arguments on Appeal

Wolk argues: 1) The trial court erred by finding him liable for damages under section 559.72(9), Florida Statutes, of the FCCPA, because all his claims were exclusively in the context of the instant legal action and per the required legal process; thus, to hold him liable under the FCCPA violated his Florida litigation privilege; 2) The trial court erred by failing to award him

damages for rental loss incurred and for the value of the destroyed carpet and pad in the apartment; and 3) The trial court erred by failing to award him his costs incurred in bringing suit. Lastly, Wolk filed a motion seeking an award of appellate attorney's fees per the lease agreement and Florida Rule of Appellate Procedure 9.400(b).

Conversely, Goodman argues: 1) Wolk did not raise the litigation privilege argument in the lower court and therefore did not preserve the issue for appeal; 2) The litigation privilege does not extend to the pre-suit communications by Wolk to him; 3) Even if the FCCPA is held inapplicable to Wolk's attempts to collect, the trial court found that Wolk was seeking money not owed; and 4) The trial court did not err in denying Wolk's costs because Wolk was not the prevailing party in the case. Lastly, Goodman also seeks an award of appellate attorney's fees per Florida Rule of Appellate Procedure 9.400(b) and sections 83.48 and 559.77(2), Florida Statutes. However, Goodman did not file/serve a separate motion as required under rule 9.400(b).

Standard of Review

A trial court's interpretation of a statute involves a question of law and thus, is subject to de novo review. *In re Guardianship of J.D.S. v. Dep't of Children & Families*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004). Also, when the sufficiency of evidence is challenged on appeal, the appellate function is to determine if there is competent substantial evidence in the record to support the trial court's ruling. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (defining competent substantial evidence as relevant evidence as a reasonable mind would accept as adequate to support a conclusion); *Wekiva Springs Reserve Homeowners v. Binns*, 61 So. 3d 1190, 1191 (Fla. 5th DCA 2011) (explaining that a lower court's ultimate factual determinations

during a non-jury trial may not be disturbed on appeal unless shown to be unsupported by competent and substantial evidence).

Analysis

Wolk's Argument addressing Liability under FCCPA

This Court first addresses Wolk's argument that the trial court erred by finding him liable for damages under section 559.72(9), Florida Statutes, of the FCCPA that states: "In collecting consumer debts, no person shall claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." Also, under section 559.77(2), Florida Statutes, violators under FCCPA are liable for actual damages and additional statutory damages up to $1,000 and in determining liability for any additional statutory damages, the court shall consider the nature of the noncompliance, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional. Lastly, section 559.77(3), Florida Statutes, states: "A person may not be held liable in any action brought under this section if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error."

As gathered from the stipulated Statement of Evidence and Proceedings, at the trial Wolk testified that he sought from Goodman rent in the amount of $900.00, calculated at double the monthly rent of $450.00, or due as of September 01, 2013 for Goodman's failure to have completely vacated the apartment by the end of his lease on August 31, 2013, less the amount of $445.50 that he had realized by re-rental of the apartment for the month of September, 2013.

In response, Goodman testified that he did not actually receive the notice of the non-renewal of the lease until a few days later and contended that Wolk failed to give the required thirty day notice of his intent not to renew the lease per section 83.575(1), Florida Statutes[2], and he contended that Wolk was not entitled to collect any additional rent because of his failure to provide the thirty day notice. Further, Goodman contended that Wolk was not entitled to double rent of $900.00, since Wolk knew that Goodman vacated the premises and did not hold over, fail to vacate, or remain in possession after the lease expired.[3] Specifically, Goodman testified that on September 01, 2013, the parties had a further telephone conversation wherein they agreed that he could have until 12:00 p.m., on September 01, 2013 to complete vacating the apartment, and that he did vacate the apartment between 12:00 p.m. and 1:00 p.m. on September 01, 2013.

Whether Wolk violated the statute was a factual issue and the trial court was in the best position to determine whether a violation occurred based on the testimony and other evidence presented. This Court stresses that as there was no trial transcript, the record on appeal is limited. Accordingly, from review of the limited record including the trial testimony as discussed in the stipulated Statement of Evidence and Proceedings, particularly Goodman's testimony, provided competent substantial evidence for the trial court find that Wolk knowingly and willfully

[2] Section 83.575(1), Florida Statutes, states: "A rental agreement with a specific duration may contain a provision requiring the tenant to notify the landlord within a specified period before vacating the premises at the end of the rental agreement, if such provision requires the landlord to notify the tenant within such notice period if the rental agreement will not be renewed; however, a rental agreement may not require more than 60 days' notice from either the tenant or the landlord." The lease in the instant case, include a 30 day notice provision.

[3] Section 83.58, Florida Statutes, states: "If the tenant holds over and continues in possession of the dwelling unit or any part thereof after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit in the manner provided for in s. 83.59. The landlord may also recover double the amount of rent due on the dwelling unit, or any part thereof, for the period during which the tenant refuses to surrender possession."

attempted to collect double rent that he was not entitled to. Thus, the trial court did not err in finding Wolk liable for $500.00 in statutory damages per 559.72(9), Florida Statutes.

Wolk's Argument addressing Litigation Privilege

Next, Wolk argues that because all his claims were exclusively in the context of the instant legal action and per the required legal process, to hold him liable under the FCCPA violated his Florida litigation privilege. From review of the record, Wolk did not file a response to Goodman's counter-claim nor is as there anything in the lower court record showing that the litigation privilege was argued. Therefore, this Court concurs with Goodman that Wolk failed to preserve this issue for appeal.

Wolk's Argument addressing Damages for Loss of Rent and Value of Carpet and Pad

Goodman admitted in his testimony at trial to having kept an unauthorized dog and cat in the apartment during the term of the lease and that the animals had occasionally urinated in the carpet and that he had attempted to clean the carpet with no success. However, Goodman's friend, Chelsea Jordan, also testified that she had seen the apartment when Goodman first moved in and the carpet was worn and frayed, but did not smell of urine. Thus, it appears that the urine in the carpet and pad was at least partially due to Goodman's pets. Wolk testified that he replaced the apartment's carpet and pad with vinyl flooring. He did not provide the trial court with evidence as to the cost of the vinyl flooring, but instead, provided a cost estimate $304.28 for a new carpet and pad and taking into account depreciation of the old carpet and pad.

There is nothing in the stipulated Statement of Evidence and Proceedings that reveals the trial court's analysis in deciding not to award damages to Wolk for the value of the destroyed carpet and pad. Perhaps the trial court had concerns with awarding such damages because Wolk replaced the damaged carpet and pad with vinyl flooring and did not provide an invoice for

same. Also, there is nothing in the record as to the trial court's analysis in deciding not to award Wolk damages for loss of rent ($49.50) due to the time taken to clean and make repairs to the apartment. This Court can only speculate and as discussed above, the trial court as the finder of fact was in the best position to determine if Wolk was entitled to such damages. Therefore, this Court's review as to this issue can go no further. Lastly, it is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983).

Wolk's Argument addressing the Award of Court Costs

Wolk argues that he was the prevailing party thus, the trial court erred by failing to award him court costs per section 57.041(1), Florida Statutes, that provides: "The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment…" This Court concurs with Goodman that the trial court did not err in denying Wolk an award of court costs because Wolk was not the prevailing party in the case. The prevailing party is the party that prevails on the significant issues in the litigation. *Granoff v. Seidle*, 915 So. 2d 674, 677 (Fla. 5th DCA 2005).

As Goodman points out, Wolk's claim in the instant litigation was primarily for money in excess of the security deposit. The parties agreed that Goodman had paid the security deposit and that Goodman was entitled to a cleaning credit for having to clean the apartment when he first moved in. Based on the evidence presented, the trial court determined that after certain deductions for damages were taken from the security deposit and after the cleaning credit was applied, Wolk owed Goodman a net refund of $60.46. The trial court also rejected Wolk's remaining claims of alleged monetary damages and costs. Further, Goodman prevailed on his

counterclaim as to Wolk's violation under section 559.72(9), Florida Statutes, of the FCCPA. Accordingly, the trial court did not err by not awarding Wolk court costs in this case.

Therefore, based on the foregoing it is hereby **ORDERED AND ADJUDGED:**

1. The trial court's Final Judgment entered on February 28, 2014 is **AFFIRMED.**

2. Goodman's request for an award of appellate attorney's fees is **DENIED** as he failed to properly file and serve a separate motion in this Court for such fees as required by rule 9.400(b), Fla. R. App. P. *Melweb Signs, Inc. v. Wright*, 394 So. 2d 475, 477 (Fla. 1st DCA 1981); *McCreary v. Florida Residential Property & Casualty Joint Underwriting Assoc.*, 758 So. 2d 692, 696 (Fla. 4th DCA 1999).

3. Wolk's Motion for Attorneys' Fees filed September 3, 2014 is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 5th day of November, 2014.

/S/
JOHN MARSHALL KEST
Presiding Circuit Judge

MYERS and WHITEHEAD, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Steven J. Wolk, Esquire**, 857 Dover Road, Maitland, Florida 32751-3121 and **Michelle Ku, Esquire**, Student Legal Services FC Rm. 142, University of Central Florida, P.O. Box 163650, Orlando, Florida 32816-3650, on this 5th day of November, 2014.

/S/
Judicial Assistant