

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-877
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

REMI as Agent for ANTONIO
IZQUIERDO,
Plaintiff,

v.

Mecklenburg County
No. 10CVD22726

SHALONDA TYRONE,
Defendant.

Appeal by plaintiff from order entered 19 January 2011 by Judge Becky T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 29 November 2011.

The Duggan Law Firm, by Christopher M. Duggan, for plaintiff appellant.

McGuireWoods LLP, by Bradley R. Kutrow and J. Curtis Griner, for defendant appellee.

McCULLOUGH, Judge.

REMI as Agent for Antonio Izquierdo ("plaintiff") appeals from an order of the district court awarding rent abatement and damages to Shalonda Tyrone ("defendant"). Plaintiff contends the trial court's order was not based on competent evidence and that

the trial court lacked jurisdiction to hear defendant's counterclaims. We agree in part and disagree in part.

I. Background

On 25 May 2010, defendant entered a lease agreement with plaintiff to rent an apartment in Charlotte, North Carolina, for \$600.00 a month until 24 May 2011. She was shown a model apartment and told that hers would look almost identical. At the signing of the lease, defendant paid her first month's rent and put \$400.00 towards her last month's rent, in lieu of a security deposit. The lease called for a five percent late fee along with court costs and filing fees should summary ejectment become necessary. Defendant experienced a multitude of problems from the day she moved in.

When defendant initially entered her unit with a property representative, she complained of a strong odor emanating from the carpets. The property representative told her that the carpets had just been cleaned and that the odor would dissipate. The following day after moving in, defendant complained of black mold present throughout the apartment. A property manager told defendant to simply clean the mold with water and bleach. Defendant subsequently reported leaks in the roof, a faulty stove, and a faulty refrigerator that would not keep food cold.

She first complained about the stove and refrigerator on 1 June 2010. Plaintiff claimed that it replaced both appliances on 23 June 2010. On 2 August 2010, defendant reported that the replacement refrigerator no longer worked. Plaintiff delivered another replacement refrigerator on 24 August 2010, which defendant ended up complaining about on 4 September 2010. Plaintiff claims that it attempted to replace this final refrigerator, but could not because defendant was never around to provide entry for the maintenance crew.

Following the complaints regarding the leaks in the roof, defendant began to experience leaks from the kitchen faucet and bathroom sinks. She also complained of an unstable toilet, as well as additional leaks in the roof. Defendant reported the sink and toilet leaks on 4 June 2010 and plaintiff supposedly repaired these problems the next day. She reported the subsequent roof leaks on 28 June 2010. The roof leaks were allegedly repaired the next day, but defendant had to complain about them again on 4 September 2010. Plaintiff made final repairs on 29 September 2010. Defendant gave thirty days' notice, through a handwritten letter, of her intent to vacate the apartment by 1 November 2010. She did not pay October rent and vacated the apartment on or about 28 October 2010.

Plaintiff initiated a summary ejectment action against defendant for past due rent and fees even though defendant had already vacated the unit. Prior to the summary ejectment hearing, defendant filed handwritten counterclaims against plaintiff. Defendant claimed she suffered numerous damages due to all the issues with the apartment. The leaky faucet, sinks, and toilet caused defendant's water bill to spike, leading to excessive charges in the amount of \$444.00. The replacement refrigerator caused a bad odor and maggot infestation due to the spoiling of her food. Defendant's losses in food amounted to \$271.00. Defendant claimed the leaky ceiling and subsequent mold ruined her mattresses, couch, and recliner, with a replacement cost of approximately \$1500.00. Defendant also alleged that she and her children began to experience health issues, including skin rashes, respiratory problems, headaches, and vomiting, as a result of the black mold. Defendant presented medical bills for herself and children totaling \$903.39.

Defendant failed to appear at the hearing before the magistrate, so the magistrate entered summary ejectment and damages for October rent in favor of plaintiff and denied defendant's counterclaims based on a lack of merit. Defendant timely appealed to the district court. The district court held a

hearing on 3 January 2011 where it heard testimony and received evidence. The district court reversed the magistrate's granting of summary ejectment in favor of plaintiff and awarded defendant rent abatement for five months and other damages amounting to \$5,368.39. Plaintiff appeals.

II. Analysis

Plaintiff raises several issues on appeal, but mainly argues the trial court's findings of fact are not based on competent evidence and that the trial court's conclusions of law are not based on valid findings of fact. Plaintiff also contends the trial court did not have personal jurisdiction to address defendant's counterclaims. Based on the following we agree in part and disagree in part.

"Where the trial judge sits as the trier of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence." *L&S Water, Inc. v. Piedmont Water Authority*, ___ N.C. App. ___, ___, 712 S.E.2d 146, 152 (2011) (internal quotation marks and citation omitted). "Even if there is evidence to the contrary, it is the ultimate decision of the court to determine the weight and credibility of conflicting evidence when different inferences may be drawn from the evidence." *Id.* However, the conclusions of law are reviewed *de*

nov. Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

A. Past Due Rent and Fees

Plaintiff first contends the trial court erred in denying its request for past due rent and fees as a result of defendant's early termination of the lease. We disagree.

Plaintiff argues it submitted a tenant ledger at trial with no objection from defendant showing various monies owed by defendant for late rent payments and insufficient funds charges. Plaintiff also claims it was owed, pursuant to the lease, the filing fees and court costs associated with the summary ejectment proceeding. Finally, plaintiff contends it never received defendant's letter allegedly giving plaintiff thirty days' notice of defendant's intention to vacate the premises.

On the other hand, defendant argues the trial court did not err in denying plaintiff's claim for past due rent because she had already vacated the apartment and therefore did not owe rent for the month of November. Also, defendant contends that she did not owe rent for October because the evidence presented established that the property was uninhabitable and in violation of the Residential Rental Agreement Act ("RRAA") as provided in N.C. Gen. Stat. §§ 42-38 *et seq.* (2009). Finally, she claims she

properly gave notice of her intent to vacate the property through the letter she mailed to plaintiff. As noted above, it is up to the trial court to determine the weight and credibility to be given various pieces of contradictory evidence. *L&S Water*, ___ N.C. App. at ___, 712 S.E.2d at 152. At trial, defendant presented a copy of the letter provided to plaintiff and the trial court accepted this as thirty days' notice of defendant's intent to vacate the premises over plaintiff's objections. Thus, we cannot hold that the trial court erred in ruling in favor of defendant and denying plaintiff's claim for past due rents and fees.

B. Personal Jurisdiction

Plaintiff's second issue on appeal is that the trial court erred in finding that it had personal jurisdiction to hear defendant's counterclaims. Specifically, plaintiff contends defendant never had a summons issued and never properly served plaintiff with her counterclaims in a manner to establish personal jurisdiction. We disagree.

Plaintiff filed its summary ejectment action against defendant on 18 October 2010 with a hearing before the magistrate set for 9 November 2010. Defendant supposedly filed her handwritten counterclaims on 8 November 2010, one day before

the hearing. Defendant never had the clerk issue a summons for the counterclaims. The magistrate dismissed defendant's counterclaims for lack of merit and defendant appealed to the district court. Plaintiff subsequently objected to the counterclaims at the district court level due to lack of proper service. Plaintiff claimed it did not receive a copy of defendant's counterclaims until 3 January 2010, after retaining counsel for the appeal to district court who located them in the court file.

The trial court noted plaintiff had a right to notice of what is pending prior to entering court, but after questioning plaintiff, the trial court determined that plaintiff had known about the counterclaims for at least a week prior to trial. Defendant argues plaintiff voluntarily submitted to the jurisdiction of the district court when it initially filed its complaint. Moreover, defendant notes:

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

. . . .

- (2) With respect to any counterclaim asserted against that person in an action which he has commenced in the State.

N.C. Gen. Stat. § 1-75.7(2) (2009); *see Leasing, Inc. v. Brown*, 14 N.C. App. 383, 386, 188 S.E.2d 574, 576 (1972), *rev'd on other grounds*, 285 N.C. 689, 208 S.E.2d 649 (1974). Here, plaintiff commenced the action in Mecklenburg County, North Carolina, and consequently, according to the statute, the district court had personal jurisdiction over plaintiff. This argument is without merit.

C. Defendant's Medical Bills

Plaintiff next argues the trial court erred in awarding defendant damages for medical bills allegedly incurred by defendant and her children due to the mold throughout the apartment. Plaintiff contends the trial court erred in accepting into evidence and considering defendant's medical bills without first providing expert testimony as to the causal link between defendant's medical problems and the black mold. We agree.

Plaintiff claims the trial court erred in awarding defendant \$903.39 in medical bills without first laying a proper foundation. Plaintiff notes that medical bills are only admissible where there is expert testimony regarding the causal relationship between the negligent act and the injury that is at the heart of the bills. *See Smith v. Pass*, 95 N.C. App. 243, 253, 382 S.E.2d 781, 787-88 (1989). Even further, plaintiff

contends medical bills are "admissible where lay and medical testimony of causation is [sic] provided." *Id.* at 253, 382 S.E.2d at 788. Here, defendant was the only person to testify regarding the alleged injuries and correlating medical bills. Defendant did not present a medical expert to testify regarding the underlying causes of the bills.

On the other hand, defendant argues lay witness testimony regarding an injury is admissible where the lay witness has personal observations of the injury. *See Worthy v. Ivy Cmty. Ctr., Inc.*, 198 N.C. App. 513, 519, 679 S.E.2d 885, 889 (2009). However, *Worthy* pertains to situations where an eyewitness testifies to his personal observations regarding the cause of a fire or the cause of injuries in an automobile accident. *Id.* Defendant also contends that in North Carolina an injured party is competent to give evidence regarding the amount of medical expenses incurred provided that records of the expenses accompany the testimony. *See* N.C. Gen. Stat. § 8-58.1 (2009). While defendant's arguments are generally correct in that this testimony is admissible, in certain instances, it appears that she fails to address the necessity of expert testimony regarding the causal link between the negligent act and the injury. *See Smith*, 95 N.C. App. at 253, 382 S.E.2d at 787-88. In the case at

hand, plaintiff objected at trial to defendant's submission of mere medical bills without any accompanying medical reports or testimony from a medical expert. Defendant needed to present more than just the medical bills to satisfy the need for expert testimony. Defendant incorrectly tries to rely on *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991), for her argument that even if the trial court's admission of defendant's medical bills was improper, it was not prejudicial to plaintiff. This argument is completely misplaced as the admission of the medical bills was not improper, but the awarding of damages relating to the medical bills was inappropriate due to a lack of expert testimony. Consequently, the trial court erred in awarding defendant damages in regard to the medical bills without accompanying expert testimony and we must reverse on this issue.

D. Competency and Admissibility of the Evidence

Plaintiff makes an overarching argument that the trial court erred in awarding various damages to defendant because the trial court's determinations were based on incompetent, inadmissible evidence. Plaintiff specifically takes issue with the trial court's awarding of damages for defendant's water bill, spoiled food, and personal property. We agree in part and

disagree in part with plaintiff's argument that the trial court erred in awarding damages based on incompetent evidence.

Plaintiff first contends the evidence does not warrant an awarding of damages for excessive water bills. Plaintiff further argues defendant's testimony regarding the leaks was not reliable and was also contradictory to the evidence presented by plaintiff. Defendant presented evidence in the form of her water bills showing that her bills exponentially increased from around \$35.00 the first month to a couple of hundred dollars a month for the following months. Defendant testified that the water bills increased due to leaks in the faucets, sinks, and toilets. Alternatively, plaintiff claims the increased water bills could not be due to the leaks because, as the maintenance log showed, the leaks were all fixed very soon after being reported. However, as stated above, issues regarding the weight and credibility to be given evidence are left to the discretion of the trial court. *L&S Water*, ___ N.C. App. at ___, 712 S.E.2d at 152. Because the parties presented conflicting testimony regarding the cause of the increased water bills, the trial court was better situated to determine the weight to be given each argument. *See id.* Thus, the trial court did not err in awarding defendant damages for the increased water bills.

Plaintiff next argues the trial court erred in awarding defendant \$271.00 for spoiled food due to the inoperative refrigerators. Plaintiff notes that the rent receipt from September 2010 shows a \$100.00 deduction to that month's rent due to spoiled food. The trial court determined that defendant lost \$271.00 in spoiled food, but plaintiff argues the trial court failed to include the \$100.00 deducted from the September rent. Defendant, on the other hand, contends that the \$100.00 deducted from the September rent was for rent abatement for the month. The rent receipt clearly indicates that the property manager deducted the \$100.00 for defendant's lost food. Consequently, the trial court erred in awarding \$271.00 for spoiled food when plaintiff had already deducted \$100.00. The trial court should have awarded \$171.00 for spoiled food after considering the \$100.00 previously deducted.

Plaintiff's final argument under this issue is that the trial court erred in awarding damages to defendant for the replacement costs of furniture damaged by the black mold. Plaintiff claims the replacement costs provided by defendant were not supported by competent evidence. We disagree.

At trial, defendant testified that certain pieces of her furniture were destroyed due to the black mold caused by the

apartment's leaking roof. Defendant testified that plaintiff failed to sufficiently fix the leaking roof and thus caused the apartment to become besieged by black mold which destroyed defendant's furniture. The trial court asked defendant for reasonable estimates as to the value of the damaged property and defendant estimated her damaged mattresses had a depreciated replacement value of \$1,000.00, while her ruined couch and recliner, together, had a depreciated replacement value of \$500.00. Again, as stated above, the trier of fact is left to determine the weight and credibility to be given conflicting evidence. *L&S Water*, ___ N.C. App. at ___, 712 S.E.2d at 152. Even further, the trier of fact may weigh the evidence to determine the fair market value of damaged property. See *Huff v. Thornton*, 287 N.C. 1, 12-13, 213 S.E.2d 198, 207 (1975). Accordingly, the trial court did not err in awarding defendant damages for her ruined personal property.

In reviewing the damages awarded defendant by the trial court, the only amount not supported by competent evidence was the extra \$100.00 awarded for the spoiled food. Thus, we must reverse the trial court's awarding of \$271.00 for spoiled food and in turn award only \$171.00 to defendant for lost food.

Otherwise, we affirm the trial court's awarding of other damages under this issue.

E. Judgment Supported by Findings of Fact and Conclusions of Law

Plaintiff's final argument is that the trial court's judgment in awarding defendant rent abatement in the amount of \$1,750.00 was error due to it not being supported by the findings of fact and conclusions of law. We believe the trial court did not err in awarding rent abatement, but erred in its calculation of the amount awarded.

Plaintiff contends the trial court erred in awarding rent abatement based on defendant's contention that the apartment was uninhabitable due to mold, leaks, and appliance problems. A tenant may bring an action for breach of implied warranty of habitability against its landlord and seek rent abatement where the landlord has failed to comply with the RRAA. *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987); see N.C. Gen. Stat. §§ 42-38 *et seq.* Plaintiff presented evidence at trial, in the form of maintenance and telephone logs, showing that plaintiff repaired any problems with the apartment reported by defendant in a reasonable time. However, defendant presented pictures, documents, and testimony regarding the various damages suffered due to the uninhabitable apartment. The trial court was

justified in awarding rent abatement to defendant because defendant presented abundant evidence of plaintiff's violation of various sections of the RRAA in failing to maintain defendant's apartment in an habitable manner. See *Cotton*, 86 N.C. App. at 537, 358 S.E.2d at 695. The issue was properly left to the trial court to determine whether defendant's evidence warranted the awarding of rent abatement. See *L&S Water*, ____ N.C. App. at ____, 712 S.E.2d at 152.

The more significant issue though is whether the trial court awarded the proper amount in calculating rent abatement. "The rent abatement is calculated as the difference between the fair rental value of the premises if as warranted (*i.e.*, in full compliance with N.C.G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition ('as is') plus any special and consequential damages alleged and proved." *Cotton*, 86 N.C. App. at 537, 358 S.E.2d at 694 (citations omitted).

The fair rental value of property may be determined "by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined." *Brewington v. Loughran*, 183 N.C. 559, 565, 112 S.E. 257, 260 (1922) (emphasis added); *Sloan v. Hart*, 150 N.C. 269, 275, 63 S.E. 1037, 1039 (1909). The "other facts" of which *Brewington* and *Sloan* speak include the dilapidated condition of the premises - indirect evidence of fair

rental value. *Huff v. Thornton*, 287 N.C. 1, 213 S.E.2d 198 (1975); *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985). The rent agreed upon by the parties when entering into the lease is some evidence of the property's "as warranted" fair rental value, but it is not binding. See *Martin v. Clegg*, 163 N.C. 528, 530, 79 S.E. 1105, 1106 (1913).

Id. at 539, 358 S.E.2d at 695. The trier of fact may determine the "as is" fair rental value of the property in question by applying their own experience with living conditions to the testimony presented by both the plaintiff and the defendant. *Id.* Furthermore, "[a] party is not required to put on direct evidence to show fair rental value." *Id.* "Direct evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property." *Id.* at 538, 358 S.E.2d at 695. As a result, defendant's evidence was sufficient for the trial court to determine the "as warranted" fair rental value of \$600.00 and the "as is" fair rental value of \$250.00, resulting in a monthly rent abatement of \$350.00. However, we believe the trial court erred in how many months of rent abatement it awarded.

In its award of damages for defendant, the trial court granted defendant five months of rent abatement. Defendant moved

into the apartment at the end of May 2010 and paid rent for the months of June, July, August, and September before moving out at the end of October 2010. Plaintiff argues the trial court should have awarded rent abatement for only July, August, and September, because defendant did not report the leaky roof until July. Plaintiff also argues the trial court should have awarded rent abatement in the amount of \$250.00 instead of \$350.00 for September because of the \$100.00 deduction discussed above. Plaintiff attempts to argue the \$100.00 deduction was for both spoiled food and rent abatement. However, the deduction was clearly for the spoiled food and cannot now be considered in relation to rent abatement.

We believe the trial court properly considered the evidence in awarding rent abatement for June and the full amount for September. Nonetheless, we believe the trial court erred in awarding rent abatement for October because defendant never paid rent for this month and thus there cannot be rent abatement where rent was not paid. See *Surratt v. Newton*, 99 N.C. App. 396, 407, 393 S.E.2d 554, 560 (1990). Therefore, we reverse in part the trial court's decision by holding that the trial court erred in awarding rent abatement of \$1,750.00, but should have awarded it in the amount of \$1,400.00.

III. Conclusion

Based on the foregoing, we affirm in part and reverse in part the trial court's awarding of damages to defendant. The trial court erred in awarding defendant a \$100.00 deduction for both spoiled food and September rent abatement; \$903.39 for medical bills; and \$350.00 for rent abatement in the month of October. As a result of our calculations, the proper amount of damages to be awarded defendant is \$4,015.00. We therefore reverse for the trial court to enter an order consistent with this opinion.

Affirmed in part; reversed in part.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).