COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1444

MICHELLE HOLDINGS, LLC

vs.

KIM JOHNSTON & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Michelle Holdings, LLC (landlord), appeals from a judgment entered in the Housing Court that awarded damages, attorney's fees, and costs to the defendants, Kim Johnston (tenant) and Sara Ostrofsky (guarantor) (collectively, defendants).[2] We affirm.

Background. In 2013, the landlord filed a summary process action against the tenant for nonpayment of rent.[3] Days before the court date, the parties settled the case and reduced their

[1] Sara Ostrofsky.

[2] All claims with the exception of the G. L. c. 93A claim were tried before a jury. The 93A claim was reserved and decided by the judge who presided over the jury trial.

[3] Pursuant to a lease agreement and addendum, rent was $3,700 per month from December 19, 2012, to August 31, 2013. Prior to taking possession of the apartment, the tenant paid $1,551.55 prorated for the month of December 2012, $7,400 for rent for January and February 2013, $3,700 for last month's rent, and $3,700 as a security deposit.

agreement to writing. The tenant agreed to pay $11,100 in rent to the landlord. In turn, the landlord agreed to make certain repairs, return the security deposit, and dismiss the case. The tenant tendered payment and did not attend the scheduled court date in reliance on the settlement. Instead of dismissing the case as the parties agreed, the landlord proceeded with the summary process action and obtained a default judgment against the tenant. When the tenant learned of the default, she stopped payment on the check. Thereafter she was subjected to harassment by the landlord's manager. The tenant filed a motion to vacate the default and moved out of the apartment.

The case was transferred from the summary process docket to the civil docket. The landlord filed an amended complaint alleging breach of contract, breach of guaranty, and fraud. The defendants filed an answer and counterclaims alleging retaliation, breach of the warranty of habitability, interference with quiet enjoyment, breach of the security deposit law, breach of the last month's rent law, reckless or intentional infliction of emotional distress, failure to post owner and management information, and breach of the consumer protection act (93A claim).

At the close of the landlord's case, the judge allowed the defendants' motion for a directed verdict on the fraud claim. Thereafter, the jury found against the landlord on its breach of

contract claim and its breach of guaranty claim, and in favor of the defendants on their claims. The judge denied the landlord's motion for judgment notwithstanding the verdict (judgment n.o.v.). The judge found against the landlord on the defendants' 93A claim. She awarded statutory attorney's fees and costs to the defendants.

On appeal, the landlord raises numerous claims including that the judge (1) erred in excluding and admitting evidence, (2) abused her discretion in ruling that the landlord waived the attorney-client privilege, (3) ended the trial before the landlord rested, (4) precluded the landlord from completing its rebuttal case, (5) ordered the landlord to pay excessive attorney's fees, (6) erred in allowing the defendants' motion for a directed verdict, and (7) erred in entering judgment for the defendants on the landlord's breach of contract claim.

Discussion. a. Exclusion of evidence. The landlord's primary argument concerns the judge's exclusion from evidence of an alleged security deposit receipt. The purpose of the security deposit law is to ensure that "tenant monies are protected from potential diversion to the personal use of the landlord, earn interest for the tenant, and are kept from the reach of the landlord's creditors." Neihaus v. Maxwell, 54 Mass. App. Ct. 558, 561 (2002). The failure to establish a separate, interest-bearing account or to provide a tenant with

an appropriate receipt represents a failure to comply with G. L. c. 186, § 15B (3) (a).

Here, the tenant alleged and the jury verdict form set forth two independent grounds for violation of the security deposit law: (1) whether the landlord placed the deposit in a statutorily compliant account, and (2) whether the landlord provided the tenant with the bank name, address, and number of that account. A violation of either entitled the tenant to damages. See G. L. c. 186, § 15B (7). Because the jury found the landlord did not place the deposit into a compliant account and made no finding as to whether the proper receipt was provided to the tenant, the excluded evidence has no bearing on the outcome of the case. The landlord's claim that the jury verdict was based on the failure to provide this receipt finds no support in the record. However, even if we were to assume for the sake of argument that the judge erred in excluding this evidence,[4] the landlord's failure to deposit the funds in a

[4] The judge's ruling was based on the landlord's attempt to introduce testimony concerning the receipt that was in direct contradiction to the deposition testimony given by the landlord's designee pursuant to Mass. R. Civ. P. 30 (b) (6), 365 Mass. 780 (1974). At the deposition, the designee testified that he had no knowledge of any fact related to the security deposit. The deficiency in this testimony was raised throughout the proceedings, as early as June 2015. And, in 2016, the tenant filed a motion in limine to exclude testimony that contradicted the designee's deposition testimony. Moreover, two judges warned the landlord that it would be precluded from introducing this evidence. Finally, the landlord's argument

proper account was a sufficient, independent basis for the verdict and thus the excluded evidence was immaterial to the jury's ultimate determination.[5]

The landlord also tried to admit in evidence the tenant's neighbor's security deposit receipt. This receipt was attached to a verified complaint, sworn to by the landlord's manager, in an unrelated matter that detailed an attack on the tenant by her downstairs neighbor. The tenant offered the complaint as part of her claim that the landlord failed to address safety issues in the building. The judge ruled that the neighbor's receipt was not relevant as to whether the landlord provided the tenant with a statutorily compliant receipt. She also ruled that the prejudice resulting from introducing the receipt outweighed its probative value. The landlord makes no argument that the receipt was relevant. Nor does the landlord argue that the receipt was needed to clarify the context of the admitted statement related to the assault. See Commonwealth v. Crayton, 470 Mass. 228, 246 (2014) (judicial discretion to admit relevant portions of statement which clarify context of admitted

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that it was not afforded a hearing on this issue is belied by the record.

[5] We note that the judge precluded the landlord from marking the contested exhibit for identification. Better practice would have been for the judge to have had the exhibit marked for identification so that there could be a complete record on appeal; however, the failure to do so in this case does not alter the outcome.

portion). Instead, the landlord contends that the verified complaint, without the tenant's receipt, is misleading, but it fails to explain how the receipt clarifies the context of the assault. At best, the receipt is an attempt to circumvent the exclusion of the security deposit receipt that had previously been excluded. The judge did not abuse her discretion in excluding this evidence. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion occurs where judge makes clear error of judgment in weighing factors relevant to decision such that decision falls outside range of reasonable alternatives).

b. Fraud claim. The landlord argues that the judge erred in entering a directed verdict in favor of the defendants on its fraud claim. A party cannot survive a motion for a directed verdict "if any essential element of his case rests upon a 'mere scintilla' of evidence" (citation omitted). Stapleton v. Macchi, 401 Mass. 725, 728 (1988). Here, the landlord must prove that the defendants made a promise with the intention to defraud the landlord, and it relied on that promise directly resulting in damages. See Alpine v. Friend Bros., 244 Mass. 164, 167 (1923). This claim is based on the stop payment order that the tenant placed on the settlement check once she learned the landlord had obtained a default judgment against her in violation of the settlement agreement. Here, the landlord

failed to put forth any evidence of the tenant's intent at the time that she tendered the check. Mere evidence that a promise was not performed is insufficient to prove intent. Galotti v. United States Trust Co., 335 Mass. 496, 501 (1957). See McCartin v. Westlake, 36 Mass. App. Ct. 221, 230 n.11 (1994) ("intention not to carry out the promise, existing when the promise was made . . . could not be inferred merely from the nonperformance of the promise"). Nor did the landlord offer evidence that it relied upon the check. As such, there was no error in the judge's entry of a directed verdict.

c. Remaining claims. The remaining claims set forth in the landlord's brief were not preserved in the Housing Court and therefore are waived. See Lydon v. Coulter, 85 Mass. App. Ct. 914, 915 n.4 (2014) (court need not address arguments to which there was no timely objection). As to the first such claim -- that the judge permitted questions and answers that violated the attorney-client privilege -- the landlord misrepresents the record. Despite an initial objection, the landlord agreed to allow cross-examination on the issue and did not renew its objection to the subsequent cross-examination.[6]

Next, the landlord challenges the admission of what it describes as character evidence about its manager.

[6] We note that the landlord was represented in the Housing Court by the same law firm that represents it on appeal.

Notwithstanding the landlord's claim that its objection was overruled, the record reflects that the landlord withdrew its objection to this evidence. It also withdrew any objection to testimony concerning the manager's behavior in the court room, and the judge's subsequent order that required a court officer to stand next to the manager as he testified. On appeal, a party cannot change or add to the grounds for an objection in the trial court. See Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 416 (2001). The landlord's effort to do so here is unsustainable.

The landlord also claims that the judge precluded it from calling a witness, prevented it from completing its rebuttal case, and ended the trial before the landlord rested. The record belies each of these claims. After waiting hours for a witness to arrive, the judge, without objection, proceeded with closing arguments.[7] And, prior to the case being sent to the jury, the tenant argued a motion during which the judge stated that "the testimony is closed." The landlord did not object. Nor did the landlord object when the judge stated that the evidence was closed an additional two times. These claims are therefore waived.

[7] This witness was present on the first day of trial, but the landlord chose not to call her at that time.

As to the landlord's claim that the judge erred in denying its motion for judgment n.o.v., we note that the landlord did not file a motion for a directed verdict on its breach of contract claim. Because such a motion is required by Mass. R. Civ. P. 50, as amended, 428 Mass. 1402 (1998), we need not reach the merits of this claim. See Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 299 (2016); Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 34 (1991) (motion for judgment n.o.v. can be brought only where moving party first moved for directed verdict on same issue at close of all evidence). But even if the landlord complied with rule 50, the issue was still waived. The jury declined to award damages on the landlord's contract claim finding that it failed to "fully perform the terms of the contract." And, because the landlord failed to object to the jury instructions or the verdict form, the issue was not preserved for appeal. See Scott v. Boston Hous. Auth., 56 Mass. App. Ct. 287, 297-298 (2002) (waiver if failure to object to special questions); Jarry v. Corsaro, 40 Mass. App. Ct. 601, 603 (1996) (must object to jury instructions to preserve issue for appeal). See also Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974).

The landlord next claims that the defendants were awarded duplicative damages because the jury did not award the landlord unpaid rent, but awarded damages to the tenant based on a breach

of the warranty of habitability. We again note that the landlord did not object to the special verdict form and therefore this claim is not preserved. Nonetheless, the claim is without merit. The jury found that the landlord failed to fully perform under the contract and therefore did not award it unpaid rent. The jury also found that the landlord breached the warranty of habitability.[8] A landlord's failure to perform under a contract is not limited to the same defects as a breach of the warranty of habitability claim. The latter includes "only the physical maintenance and repair of a dwelling unit." Doe v. New Bedford Hous. Auth., 417 Mass. 273, 281 (1994). Here, the tenant complained of issues regarding maintenance of the building, but she also complained about unaddressed safety concerns which included an attack on her. The warranty of habitability "is not breached solely by the presence . . . of persons engaged in unlawful activities or by the failure to provide security services." Id. at 282-283. These are independent claims upon which the jury answered separate special questions, neither of which resulted in duplicative damages.

[8] The jury awarded the tenant damages for defects in the apartment, not only for maintenance and repair issues, but for unlawful activities in the building and unaddressed safety issues.

d. Attorney's fees award. The landlord claims the judge's award of attorney's fees was clearly erroneous.[9] Specifically, it contends that the judge awarded fees on nonfee-shifting award claims, and that it was unreasonable to award fees for two attorneys. Here, the judge used the preferred "lodestar" method and calculated the fees by "multiplying the number of hours reasonably spent on the case by a reasonable hourly rate." Brady v. Citizens Union Sav. Bank, 91 Mass. App. Ct. 160, 161 n.7 (2017). "In determining the amount of a reasonable fee, we consider 'the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.'" Id. at 161, quoting Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). "No one factor is determinative." Berman v. Linnane, 434 Mass. 301, 303 (2001).

The landlord states generally that the fee award related to unspecified other claims, but fails to identify any particular award as improper. In the judge's thoughtful decision, she detailed which claims are fee shifting, including the 93A

[9] We note that fees were assessed for the landlord's repeated violations of the rules of civil procedure requiring unnecessary motion practice and additional depositions. The landlord does not address this aspect of the judge's reasoning on appeal.

claim,[10] and ordered fees accordingly. She did not award fees on nonfee-shifting claims. As an example, the judge found that the landlord's breach of the warranty of habitability was also a 93A violation, and properly doubled the damages as found by the jury and awarded attorney's fees on the 93A claim.

As to the claim of duplicative attorney billing, the judge carefully considered the fee request. She eliminated eighty-one hours of billable time for duplicative appearances at court hearings, depositions and the like, and nearly sixty-seven hours that she found to be otherwise duplicative. The award was more than $120,000 less than what was requested. Here, the fee order, which is largely left to the discretion of the trial judge, was not clearly erroneous. See Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 363-364 (1997).

We allow the defendants' request for an award of appellate attorney's fees and costs pursuant to G. L. c. 186, §§ 14, 15B, and 18, and G. L. c. 93A. They may submit a petition, together with supporting materials to the clerk of this court within fourteen days of the date of this decision. See Fabre v.

[10] The landlord did not challenge on appeal the judge's 93A findings and rulings.

Walton, 441 Mass. 9, 10-11 (2004). The landlord shall then have fourteen days thereafter to respond. See id.

Judgment affirmed.

By the Court (Wolohojian, Blake & Kinder, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: January 13, 2021.

[11] The panelists are listed in order of seniority.