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**IN THE
COURT OF APPEALS OF INDIANA**

AHEPA 100 APARTMENTS, INC.,)

Appellant-Plaintiff,)

vs.)

JOSEPH SCHUBERT,)

Appellee-Defendant.)

No. 71A03-0605-CV-191

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts Manier, Judge
Cause No. 71D05-0506-SC-5957

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

AHEPA 100 Apartments (“AHEPA”) appeals a judgment in favor of Joseph Schubert. AHEPA terminated Schubert’s tenancy in a federally subsidized housing complex for “material noncompliance with the lease.” In the subsequent eviction action, the trial court construed the lease to require proof of criminal activity as noncompliance. Because criminal activity is not the only manner in which a tenant could fail to comply with the lease, the trial court erred in construing the lease agreement. Accordingly, we reverse and remand.¹

FACTS AND PROCEDURAL HISTORY

AHEPA provides housing for the elderly through a program with the Secretary of Housing and Urban Development (“HUD”). AHEPA leased a unit to Schubert on June 22, 2004. The lease specified the initial term would end on May 31, 2005.

On April 29, 2005, AHEPA sent Schubert a thirty-day notice of termination of tenancy. The notice indicated the reason for termination was material noncompliance with the lease and provided in part:

(1) Material noncompliance with your lease includes disrupting the livability of the project or adversely affecting the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related projects. AHEPA 100 Management has agreed you have committed these types of acts against other tenants.

(A) On the evening of April 5, 2005 you made it apparent to Ms. Doris Hughes that you have a master key for the building, which Ms. Hughes feels, was done to intimidate and scare her, because with that key you would be able to enter her apartment at any time. Immediately upon notification to the management office Ms. Hughes’s front door apartment lock was changed along with [that of] Ms. Elizabeth Dunkleberger. Ms. Dunkleberger was also concerned

¹ Because we reverse, we need not address AHEPA’s argument that the trial court erroneously disregarded substantial evidence.

for her safety because she was with Ms. Hughes many times that you had allegedly encountered her with this type of behavior. Some of these encounters have also been witnessed by several other residents of AHEPA 100. Your behavior has been so severe and detrimental towards Doris, she has called the South Bend Police on several different occasions to report your behavior toward her as “stalking”. Ms. Hughes has also filed a “Formal Complaint” with the management office of AHEPA 100. Additionally, over the time I have been the Property Manager for AHEPA 100, several other residents had spoke [sic] to me about their own, unrelated concerns about your behavior, and they also feel worried and frightened for their own safety.

This behavior is a direct violation of the 202 PRAC Lease, which you had agreed to following [sic] its guidelines when you signed it on June 22, 2004. Please refer to Par. 8, section (2)(d),(1)(2).

(App. at 35-36.)²

In June of 2005, AHEPA began eviction proceedings against Schubert in small claims court. The notice of claim listed “Harrasment [sic], no rent payment, refusal to vacate” as the basis of the claim. (*Id.* at 12.) A copy of the thirty-day notice was attached to the claim.

After hearing evidence, the trial court found for Schubert. The order provided:

The April 29, 2005 Thirty Day Notice misstates the provisions of the lease concerning termination for material noncompliance with the Lease. A tenancy may be terminated for *criminal activity* that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents. The evidence that was adduced at trial does not show that Defendant has engaged in any criminal activity. Although Ms. Hughes described Defendant’s conduct as “stalking,” the Court does not find this allegation proven by a preponderance of the evidence.

* * * * *

The evidence does not convince the Court that Defendant is intentionally following or pursuing Ms. Hughes. They reside in the same apartment complex and their encounters generally have taken place in the

² The notice letter also detailed a second violation, alleging Schubert’s installation of an alarm system in his apartment interfered with AHEPA’s right to enter the apartment.

common areas. The Defendant is accused of staring at Ms. Hughes, shaking his keys at her, pointing to his radio. Ms. Hughes testified that she “did not know what he (the Defendant) would do,” but there is no evidence that suggests Defendant is anything but perhaps annoying. No reasonable person would be terrorized, frightened, intimidated, or threatened by Defendant, although a reasonable person may indeed be annoyed by him.

(*Id.* at 8-9) (emphasis original).

DISCUSSION AND DECISION

A party appealing from a negative judgment must establish the evidence is without conflict and leads to but one conclusion, and the trial court did not reach that conclusion. *Truck City of Gary, Inc. v. Schneider Nat’l. Leasing*, 814 N.E.2d 273, 278 (Ind. Ct. App. 2004). The appellant may attack the trial court’s judgment only as contrary to law. *Id.*

We will affirm the trial court’s judgment unless all evidence leads to the conclusion that the trial court’s findings are clearly erroneous and against the logic and effects of the facts. *Id.* We neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* We consider only the evidence most favorable to the judgment together with all reasonable inferences that may be drawn therefrom. *Id.* This deferential standard of review is particularly appropriate in small claims actions, where trials are informal, with the sole objective of dispensing speedy justice according to the rules of substantive law. *Id.* at 277.

However, the construction of the terms of a written contract, such as a lease, is a pure question of law. *Allstate Ins. Co. v. Bradtmueller*, 715 N.E.2d 993, 996 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 288 (Ind. 2000). We review *de novo* such questions of law. *Id.*

AHEPA argues the trial court misconstrued the termination provisions of the lease.

The lease agreement provided in relevant part:

8. Unless terminated or modified as provided herein, this Agreement shall be automatically renewed for successive terms of one month each at the aforesaid rental, subject to adjustments as herein provided.

* * * * *

(b) The LANDLORD's right to terminate this Agreement is governed by the regulation of the [HUD] Secretary at 24 CFR 891.430 and 24 CFR Part 247 (herein referred to as the HUD Regulation). The HUD Regulation provides that the LANDLORD may terminate this Agreement only under the following circumstances:

(1) The LANDLORD may terminate, effective at the end of the initial term or any successive term, by giving the TENANT notification in the manner prescribed in paragraph (a) below that the terms of this Agreement is not renewed and this Agreement is accordingly terminated. This termination must be based upon either *material noncompliance* with this Agreement, *material failure to carry out obligations* under any State landlord or tenant act, or *criminal activity* that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises-, [sic] *any criminal activity* that threatens the health or safety of any on-site property management staff responsible for managing the premises; or *any drug-related criminal activity* on or near such premises, engaged in by a resident, any member of the resident's household or other person under the resident's control; or *other good cause*. When the termination of the tenancy is based on other good cause, the termination notice shall so state, and the tenancy shall terminate at the end of a term and in accordance with the termination provisions of this Agreement, but in no case earlier than 30 days after receipt by the TENANT of the notice. Where the termination notice is based on material noncompliance with this Agreement or material failure to carry out obligations under a State landlord and tenant act, the time of service shall be in accordance with the previous sentence or State law, whichever is later.

* * * * *

(d) The term "material noncompliance with this Agreement" shall, in the case of the TENANT, include (1) one or more substantial violations of this Agreement, (2) repeated minor

violations of this Agreement which disrupt the livability of the project, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related project facilities, interfere with the management of the project or have an adverse financial effect on the project, (3) failure of the TENANT to timely supply all required information on the income and composition, or eligibility factors of the TENANT household (including failure to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR Part 5, or knowingly providing incomplete or inaccurate information).

* * * * *

(e) The conduct of the TENANT cannot be deemed other good cause unless the LANDLORD has given the TENANT prior notice that said conduct shall henceforth constitute a basis for termination of this Agreement.

* * * * *

(i) The LANDLORD may terminate this Agreement for the following reasons:

1. drug related criminal activity engaged in on or near the premises, by any TENANT, household member, or guest, and any such activity engaged in on the premises by any other person under the tenant's control;

2. determination made by the LANDLORD that a household member is illegally using a drug;

3. determination made by the LANDLORD that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents;

4. criminal activity by a tenant, any member of the TENANT's household, a guest or another person under the TENANT's control:

(a) that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or

(b) that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises;

5. if the TENANT is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that in the case of the State of New Jersey, is a high misdemeanor; or

6. if the TENANT is violating a condition of probation or parole under Federal or State law;

7. determination made by the LANDLORD that a household member's abuse or pattern of abuse of alcohol threatens the health, safety, or right to peaceful enjoyment of the premises by other residents;

8. if the LANDLORD determines that the tenant, any member of the TENANT'S household, a guest or another person under the TENANT'S control has engaged in criminal activity, regardless of whether the tenant, any member of the tenant's household, a guest or another person under the tenant's control has been arrested or convicted for such activity.

(App. at 25-28) (emphases supplied, capitalization in original).

As indicated, termination of the lease may be based on 1) material noncompliance with the agreement, 2) material failure to carry out obligations under state landlord/tenant laws, 3) criminal activity that threatens others or is drug-related, or 4) other good cause.³

The notice indicated AHEPA was terminating Schubert's lease due to material noncompliance with the lease. Paragraph 8(d) of the lease defines material noncompliance as (1) one or more substantial violations of the lease, (2) repeated minor violations of the lease affecting others, or (3) failure to provide certain information.⁴

³ These termination procedures are based on the following HUD regulation:

(a) General. The landlord may not terminate any tenancy in a subsidized project except upon the following grounds:

- (1) Material noncompliance with the rental agreement,
- (2) Material failure to carry out obligations under any state landlord and tenant act,
- (3) Criminal activity by a covered person . . . or alcohol abuse by a covered person
- (4) Other good cause.

No termination by a landlord under paragraph (a)(1) or (2) of this section shall be valid to the extent it is based upon a rental agreement or a provision of state law permitting termination of a tenancy without good cause.

24 C.F.R. 247.3. The structure of this regulation makes clear material noncompliance with the rental agreement is a separate basis for termination of the lease.

⁴ The corresponding HUD regulation, 24 C.F.R. 247.3(c) is substantially similar.

Although criminal activity would violate the lease, criminal activity is not the only lease violation contemplated. Failing to pay rent after the grace period has expired is a substantial violation, and paying rent late but within the grace period is a minor violation.

In construing the lease, however, the trial court determined:

The April 29, 2005 Thirty Day Notice misstates the provisions of the lease concerning termination for material noncompliance with the Lease. A tenancy may be terminated for *criminal activity* that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents. The evidence that was adduced at trial does not show that Defendant has engaged in any criminal activity. Although Ms. Hughes described Defendant's conduct as "stalking," the Court does not find this allegation proven by a preponderance of the evidence.

(*Id.* at 8-9) (emphasis original). Although the trial court is correct in stating criminal activity may be a basis for termination, material noncompliance with the lease does not require proof of criminal activity. Rather, material noncompliance includes "[r]epeated minor violations of this Agreement which disrupt the livability of the project, [or] adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises[.]" (*Id.* at 26.) Schubert's behavior toward Ms. Hughes might not be criminal but may be a violation of the agreement that constitutes a disruption or might adversely affect another tenant's right to quiet enjoyment of the premises.⁵

⁵ AHEPA is required to provide a copy of the "Resident Rights & Responsibilities" brochure to residents each year. Among the "Responsibilities to the Project and to Your Fellow Residents," listed in the brochure is "conducting yourself in a manner that will not disturb your neighbors." (App. at 83.) *See also* Paragraph 8(e) of the lease (tenant must be given notice his conduct may constitute a basis for termination before his conduct can be deemed other good cause).

Because the trial court erred in requiring AHEPA to prove Schubert had engaged in criminal activity before it could terminate its agreement, we reverse and remand.

Reversed and remanded.

RILEY, J., and BAILEY, J., concur.