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NOTICE

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NO. 5-95-0898

FILED

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AT

LOUIS E. COSTA
CLERK, APPELLATE COURT, 5TH DIST.

FIFTH DISTRICT

THE ROSS GROUP, INC., d/b/a
THE FIELDS APARTMENTS,

Appeal from the
Circuit Court of
Jackson County.

Plaintiff-Appellant,

v.

No. 95-LM-310

TOMMY JOYCE NICHOLSON,

Honorable
Thomas Jones,
Judge, presiding.

Defendant-Appellee.

RECEIVED

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CLERK

R U L E 2 3 O R D E R

Plaintiff, The Ross Group, Inc., d/b/a The Fields Apartments, appeals from the trial court's order vacating a previous order in a forcible entry and detainer action granting plaintiff possession of defendant's, Tommy Joyce Nicholson's, apartment. On appeal, plaintiff contends that the trial court erred in considering defendant's motion to vacate and for rehearing and that the court erred in granting the motion to vacate since the motion contained issues outside of the scope of the forcible entry and detainer action, i.e., defendant's affirmative defenses were not germane to the issue of possession. We affirm for the reasons set forth below.

I. FACTS

A brief summary of the facts adduced at trial is as follows. Defendant, a low-income mother, is a tenant of plaintiff under a subsidized housing lease agreement pursuant to the section 8 housing program of the United States Department of Housing and

Urban Development (HUD). 24 C.F.R. §8 (1995). Under this lease, defendant is required to pay plaintiff \$37 per month on the first day of the month. The subsidy paid to plaintiff by the federal government is \$654 per month. Defendant has been a subsidized tenant of plaintiff since June 1987. In September 1995, defendant failed to pay her \$37 on the first day of the month. On September 14, 1995, plaintiff served defendant with a 10-day demand for rent and a notice of termination of tenancy. In this notice, plaintiff requested the \$37 in rent and a \$15 late-payment fee by September 25, 1995. Defendant failed to pay the September rent and the late-payment fee, so plaintiff filed a complaint in forcible entry and detainer on September 29, 1995. 735 ILCS 5/9-101 et seq. (West 1994).

On October 17, 1995, a hearing was held on plaintiff's complaint. At the hearing, plaintiff had the benefit of counsel, but defendant appeared pro se. The hearing was not transcribed, but plaintiff prepared and submitted on appeal a bystander's report summarizing the evidence presented at that hearing. The bystander's report states that Beth Comer, manager of plaintiff's apartments, and defendant testified at the hearing. Defendant admitted that her portion of the subsidized rent under her lease was \$37 per month and that the rent was due the first of the month. She also admitted that she did not pay the rent on September 1 and that she did not contact plaintiff after receiving the demand for rent and notice of termination. In her defense, defendant testified that she had problems with her refrigerator and that she had to purchase replacement food for food that had spoiled. She also testified that, after she received the complaint in this

matter, she attempted to pay the past-due rent but plaintiff refused to accept it.

Comer testified that defendant did not contact her regarding nonpayment of her rent. Comer admitted that she received a complaint about defendant's refrigerator, but she testified that the refrigerator was repaired the day the complaint was received.

Plaintiff advised the court that it was not seeking past-due rent, but that it simply desired to regain possession of defendant's apartment. Based upon this evidence, the trial court entered an order granting plaintiff possession of defendant's apartment but allowing defendant until October 30, 1995, to vacate the premises.

On October 26, 1995, counsel from Land of Lincoln Legal Assistance Foundation, Inc. filed his appearance and filed a motion to vacate and for rehearing on defendant's behalf. In her motion to vacate, defendant alleged that, because she appeared pro se, she was unable to present her defense to the complaint, i.e., that under the Federal HUD regulations, plaintiff is not entitled to terminate defendant's lease unless plaintiff shows "good cause" or "material noncompliance" with the lease. Further, defendant alleged, as an equitable defense, that she is a low-income housing tenant, that she has all amounts owed to plaintiff in her possession, that she is willing to pay plaintiff, and that the court should grant relief from the forfeiture and prevent the injustice of depriving defendant of her home. In addition, she argued that plaintiff will not be prejudiced by the court so ruling, as plaintiff will be made whole by payment of the amounts owed. Plaintiff filed an objection to defendant's motion.

After considering defendant's motion and plaintiff's objection, the court entered an order on November 20, 1995, vacating its previous order of possession and directing defendant to pay plaintiff \$198, which constituted all past-due and current rent, late charges, and court costs, by 4 p.m. that day. If defendant paid these charges, plaintiff's complaint would be dismissed. Plaintiff appeals from this order vacating the court's previous order granting plaintiff possession.

II. ANALYSIS

Plaintiff first contends that the trial court erred in considering defendant's motion to vacate and for rehearing since this motion was not a valid posttrial motion under section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 1994)). Plaintiff, citing to *Anderson v. Resource Economics Corp.*, 133 Ill. 2d 342 (1990), argues that, to be a valid posttrial motion, the motion must meet one of two criteria: (1) it must be a motion attacking the facts at the time the judgment was rendered, or (2) it must be a motion which raises new facts or matters not presented to the court but which, arguably, would have prevented the entry of the order had they been known to the court. Plaintiff contends that defendant's posttrial motion did not meet either of these criteria. We disagree.

The purpose of a posttrial motion to vacate is to alert the court to errors made and to afford an opportunity for correction of the errors. *Mryszuk v. Hoyos*, 228 Ill. App. 3d 860 (1992); *Rodriguez v. Owaynat*, 137 Ill. App. 3d 1017 (1985). Even in the absence of due diligence, a court may vacate a judgment if justice and fundamental fairness require such relief. *Rodriguez*, 137 Ill.

App. 3d 1017. In the instant case, defendant raised new matters not considered by the trial court which arguably would have prevented the entry of the judgment granting plaintiff possession. Additionally, fundamental fairness and justice required the trial court to consider defendant's motion to vacate since she alleged affirmative defenses which, as will be discussed later, challenged plaintiff's right to possession of the premises. We find that the defendant's posttrial motion was proper and the court did not err in considering the motion.

The next issue raised by plaintiff is that the trial court abused its discretion in granting defendant's motion to vacate because defendant's defenses were not germane to the issue of possession, the sole issue to be considered by a court in a forcible entry and detainer action. plaintiff contends that nonpayment of rent is material noncompliance with the lease, that plaintiff advised defendant of this material noncompliance in its demand for rent and notice of termination of tenancy, and that defendant's equity arguments are not germane to the right of possession.

The granting of a posttrial motion is within the sound discretion of the trial court, and whether a court abused its discretion turns on whether the moving party's right to fundamental justice has been violated. *Mryszuk*, 228 Ill. App. 3d 860. On review, not only must this court examine whether the court's order was an abuse of discretion under section 2-1203, but we must also determine whether substantial justice is being done between the parties. *In re Marriage of Sutherland*, 251 Ill. App. 3d 411 (1993).

As plaintiff correctly noted, a forcible entry and detainer action is a summary statutory proceeding in which possession rights are adjudicated, and other matters not related to this issue should not be considered. *People ex rel. Department of Transportation v. Walliser*, 258 Ill. App. 3d 782 (1994). Claims germane to the issue of possession are generally of four types:

"(1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; or (4) claims' questioning the plaintiff's motivation for bringing the action." *Walliser*, 258 Ill. App. 3d at 788.

It is plaintiff who has the burden of proving that the right to forfeiture clearly and unequivocally exists and that the exercise of the forfeiture will not result in injustice. *Moss v. Elofsson*, 194 Ill. App. 3d 256 (1990).

A construction of the lease can determine who has the right of possession. *Mid-Northern Management, Inc. v. Heinzeroth*, 234 Ill. App. 3d 240 (1992). A lease is subject to the law of contracts, and therefore, it must be read in its entirety, and effect must be given to each of its provisions. *American Apartment Management Co. v. Phillips*, 274 Ill. App. 3d 556 (1995). Any doubts or uncertainties about the lease must be construed most strongly against the drafter, in this case, plaintiff. *American Apartment Management co.*, 274 Ill. App. 3d 556.

Plaintiff argues that provision number 25 of the lease allows for the actions it has taken. That provision provided that

plaintiff could terminate the lease for nonpayment of rent, after a request for payment and due notice of termination were given. The lease did not say that defendant's nonpayment of rent is material noncompliance-under the lease.

Also included in defendant's lease is provision number 35, which states as follows:

"35. Compliance with federal, state, local law. This Lease shall be governed by the laws of the State of Illinois and shall be construed in conformity and compliance with all laws, ordinances, rules, regulations and codes of the federal government, State of Illinois, and the municipality having jurisdiction over the Development." (Emphasis added.)

In addition, another page of the lease contains additional lease provisions which are to be incorporated into the lease for section 8 assistance, and this page has the following clause:

"(g) Notwithstanding anything herein to the contrary, the rights and obligations of the Resident and Owner shall be strictly construed in conformance with the rules and regulations of the Section 8 Program. Questions regarding this program may be directed to the United States Department of Housing and Urban Development, Chicago Area Office."

Thus, while the one provision of the lease provided that plaintiff could terminate defendant's lease for nonpayment of rent, these other provisions also apply.

Under the applicable Federal regulations, a tenant can only be evicted for "good cause" or "material noncompliance" with the

lease. 24 C.F.R. §880.607(b)(1) (1995). When terminating a lease, the owner of the building must specify in its notice of termination which ground it is relying upon for the termination. 24 C.F.R. §880.607(c)(1) (1995). In addition, an owner may not rely upon any other grounds not stated in its termination notice in a judicial eviction proceeding. 24 C.F.R. §880.607(c)(3) (1995). In the case *sub judice*, plaintiff stated in its notice of termination that it was terminating defendant's lease for "material noncompliance."

Material noncompliance under the Federal regulation is defined as one or more substantial lease violations, which are set forth in the regulation and are not applicable to this case, or repeated minor violations which disrupt the livability of the building, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises, interfere with the management of the building, or have an adverse financial impact on the building. 24 C.F.R. §880.607(b)(3)(A),(B) (1995). According to defendant's lease provisions, these regulations apply. Therefore, defendant's defense, that her nonpayment of one month's rent did not constitute material noncompliance, challenged plaintiff's right to possession and was germane to the right to possession. Further, we cannot find that there was material noncompliance by defendant under the circumstances presented here, since the nonpayment of one month's rent does not constitute a repeated violation having an adverse financial impact on the building.

From the bystander's report, it does not appear that the trial court was apprised that it should give due consideration to the Federal regulations in making its ruling on October 17, 1995. Had

the court been so advised at that hearing, it is most likely that the court would not have entered an order granting plaintiff the right to possession of defendant's apartment. Thus, the trial court did not abuse its discretion in granting defendant's motion to vacate, and we find that the trial court did substantial justice in its ruling on defendant's posttrialmotion. See *Sutherland*, 251 Ill. App. 3d 411.

Because we have resolved this appeal on the legal argument, there is no need to prolong this order by considering plaintiff's argument that defendant's equitable argument was not germane to the right of possession. Suffice it to say, equitable defenses can apply in a forcible entry and detainer action if germane to the issue of possession. *Rodriguez*, 137 Ill. App. 3d 1017.

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Jackson County is affirmed.

Affirmed.

HOPKINS, P.J., with GOLDENHERSH, J., and RARICK, J., concurring.