State of New Hampshire Supreme Court

NO. 2011-0456

2012 TERM
AUGUST SESSION

Myla Randall

v.

Nahla Abounaja

RULE 7 APPEAL OF FINAL DECISION OF
ROCHESTER DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT NAHLA ABOUNAJA

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QUESTION PRESENTED

I. Did the court err in holding the landlord liable when the heat worked?
Preserved: trial, *passim*

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Nahla Abounaja[1] owns a 3-bedroom duplex on Chestnut Street in Rochester, New Hampshire. In 2009 she had the old steam heating system with its cast-iron radiators capped off, and installed built-in electric baseboard heating throughout. INVOICE FROM O-BEES ELECTRIC (Jan. 16, 2009), Exh. B, *Appx*. at 14 *May 4 Trn.* at 6-7. Each electric heater in the bedrooms and living room has its own knobbed thermostat. PHOTOS, Exh. C, *Appx.* at 18; *May 4 Trn.* at 55. At the time of events here, the city agreed the heating units were essentially brand new, still under warranty, and never used by any previous occupant. *May4 Trn.* at 34. There are two doors to the basement – one through the downstairs apartment and clearly unavailable to the upstairs tenant, and a second through a bulkhead from outside.

In October 2010 Myla Randall, her three children ages 8, 10, and 12, along with her brother William Poole, leased the upstairs apartment. *Nahla Abounaja v. Myla Randall & Kevin Badger*, N.H. Sup.Ct. No. 11-0241, NOTICE OF APPEAL (April 7, 2011).[2] Rent was $900 per month plus utilities. *Id.*

There is no dispute that the new electric baseboards made adequate heat in the living room

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[1]Nahla Abounaja is the owner of the property. Her brother Robih Abounaja manages it. They are collectively referred to herein as the landlord.

[2]Minor reference is made here to a previous case before both the district court and this Court, which was referenced by the district court in the current case. *See* FINDINGS AND JUDGMENT (May 11, 2011), *Appx.* at 35 ("This action is related to a landlord/tenant eviction action brought by the the defendant landlord against the plaintiff tenant, where on March 9, 2011 the landlord prevailed and received judgment in the amount of $1,300 with writ of possession to issue on the eighth calendar day from the date of the clerk's written notice. ([Rochester District Court] Docket No.: 11-LT-64). Tenant has appealed that judgment to the New Hampshire Supreme Court, which is still pending, and she continues to occupy the premises.)." The case was ultimately declined for appeal by this Court. *Nahla Abounaja v. Myla Randall & Kevin Badger*, N.H. Sup.Ct. No. 11-0241 (declined by orders June 23, 2011 and Aug. 18, 2011).

and children's rooms, *May4 Trn.* at 12, 38 (Co-tenant: "the children's room had heat, and that was basically heating up the whole entire house"); rather Ms. Randall complained she could not turn them down. *Nahla Abounaja v. Myla Randall & Kevin Badger*, N.H. Sup.Ct. No. 11-0241, NOTICE OF APPEAL (April 7, 2011). This case concerns solely the operation of the electric heating unit in the master bedroom, *May4 Trn.* at 12, and at trial the court limited evidence to only that issue. *May4 Trn.* at 21-22, 24 (Court: "The only thing I want to hear about is the heat in the bedroom.").

In early 2011 Ms. Randall notified the landlord and the city regarding a variety of problems with the property. In January and February she conceded the landlord responded to some issues, including a leak that had developed in the discontinued steam heating system. *May4 Trn*. at 37-38, 43. Ms. Randall was not satisfied however, so withheld a portion of her rent, leading the landlord to file for eviction. On March 9, the Rochester District Court held that the rent was due and owing, and awarded the landlord a writ of possession. FINDINGS AND JUDGMENT (May 11, 2011), *Appx.* at 35. While the possessory action was on appeal, however, Ms. Randall filed this action.

In response to Ms. Randall's calls to the city, on March 23, 2011, Robert Dingee, a Rochester code enforcement officer, conducted an inspection, *May4 Trn*. at 5, took pictures, *May4 Trn*. at 19, and a few days later issued a report. LETTER FROM ROBERT DINGEE TO NAHLA ABOUNAJA (Mar. 28, 2011), *Appx*. at 16. As to "Heating Facilities," he found "Electric heat not working." As to "Electrical Facilities," the inspector noted simply "Panel access." *Id.*

Although the court found that the "landlord never responded to [the] March 28th letter," a few days later on April 8 Mr. Abounaja requested service from the electrician who installed the baseboards in 2009. LETTER FROM O-BEES ELECTRIC TO WHOM IT MAY CONCERN (May 14, 2011), *Appx*. at 38.

On April 14 Inspector Dingee went to the premises along with Mr. Abounaja. He was not

able to conduct an inspection, however, because the tenant and landlord were arguing and acting hostile toward each other. *May4 Trn.* at 12-13, 23.

On April 18 the landlord's electrician, who was not immediately available when Mr. Abounaja called him on April 8, went to the premises. He "inspected the units and found the master front bedroom to be in working order." LETTER FROM O-BEES ELECTRIC TO WHOM IT MAY CONCERN (May 14, 2011), *Appx*. at 38. The electrician's invoice noted that the various electric heaters, including the master bedroom, worked, and that the "[b]ulk head to basement was open to access electrical panels." INVOICE FROM O-BEES ELECTRIC (Apr. 18, 2011), Exh. A, *Appx*. at 25; *May4 Trn.* at 14.

Also on April 18, James Grant, Assistant Director of Code Enforcement, visited the premises. He confirmed the heat was working. He also showed the tenant the basement utilities, and educated her about which circuit breakers controlled her apartment. LETTER FROM JAMES GRANT (April 19, 2011), *Appx.* at 28.

On April 19 Thomas Abbott, Director of Code Enforcement, visited the premises. He found "[t]he electric heating units in the living room and bedroom were operation at the time of this inspection." He also noted that the "steam radiator has been disconnected and capped-off at the basement level" and is therefore "no longer a concern." LETTER FROM THOMAS ABBOTT TO RABIH ABOUNAJA (Apr. 22, 2011), Exh. 2, *Appx.* at 29.

The court heard trial in this matter on May 4. It held that there was no heat for 18 days, and that the landlord willfully failed to correct it. The court awarded the tenant $18,000, and the landlord appealed.

SUMMARY OF ARGUMENT

The landlord first notes that the tenant was never without heat. After setting forth the statutory requirements, he notes the court had no basis on which to find either that the tenant's bedroom heat was interrupted, or that she lacked access to her utility panel. He then suggests that had it been communicated to him that all the tenant needed was a basement key, this matter could have been avoided, and that he took reasonable, timely, and directed action in trying to resolve the tenant's complaints.

ARGUMENT

I. There was Plenty of Heat

Despite the tenant's hyperbole and the court's ruling, Ms. Randall's apartment was never cold – the city inspector noted there was plenty of heat either from the lower floor or other heating units in the apartment, *May4 Trn.* at 12, 18, 33, and Ms. Randall's brother/co-tenant agreed. *May4 Trn.* at 38. The issue, however, is immaterial. *Wass v. Fuller*, 158 N.H. 280, 283 (2009) ("To the extent the [landlord] argues that the [tenant] was never actually without heat," the purpose of statute is "deter unacceptable landlord conduct rather than to remedy harm to tenants.").

II. Tenant Must Prove a Period of Wilful Interruption

The New Hampshire landlord/tenant statute provides that:

> No landlord shall willfully *cause*, directly or indirectly, the interruption or termination of any utility service being supplied to the tenant including … heat. … No landlord shall willfully … directly or indirectly deny a tenant access to and possession of such tenant's rented or leased premises, other than through proper judicial process.

RSA 540-A:3, I & II (emphasis added).

In *Wass v. Fuller*, 158 N.H. 280 (2009), this court held that to be wilful, the landlord must take some concrete action to interrupt the utility. The landlord in *Wass* argued that "locking of the [gas] tanks was not willful, but was, at most, a mistake caused by the gas company's earlier-than-anticipated" action. *Id.* at 282. This Court held, however, that because the gas company "lock[ed] the tanks pursuant to the [landlord's] direct order," *id.* at 283, regardless of the mistiming, the landlord had taken interruptive action and was therefore wilful.

Accordingly, to prove liability, the tenant must show that the utility was interrupted, and that the landlord took some willful action to cause the interruption.

Significantly, the statute uses the word "cause." It does not say, for example, that no landlord

shall wilfully *allow* interruption. "Cause" means the action is "a substantial factor in bringing about" the condition. *See Brookline Sch. Dist. v. Bird, Inc.*, 142 N.H. 352, 354 (1997) (quotation omitted). "Allow," however, means "to permit by neglecting to restrain or prevent." *See Prickett v. Farrell*, 455 S.W.2d 74 (Ark. 1970). New Hampshire's statute requires a higher burden of proving "cause" and not merely "allow." Thus mere unknowing neglect cannot constitute "cause."

Finally, the statute also provides that its "violation … entitles the tenant to a separate award of actual damages or $1,000, whichever is greater, for each day that the condition continues." *Wass*, 158 N.H. at 282, citing *Simpson v. Young*, 153 N.H.471, 474-75 (2006). The statute's punitive nature reinforces the legislative intent to require an actual act, and not a mere negligent omission.

III. Court Could Not Know Why the Heat Sometimes Didn't Work

The court made no finding, and there is no evidence in the record had it made one, regarding the reason the bedroom heater did not work.

The inspector only *inspected*. He had no opinion about cause, and made no effort to inquire. He testified:

> [I]f I don't feel heat coming out of the thing, I assume something's wrong, all right? That's all I did. I don't have any equipment to test anything. It was just my observation. That's all it was. That's all I found, that's all I saw, and that was it.

May4 Trn. at 15.

His inspection was purposely superficial. The inspector testified "I had her turn it on. I don't touch anything in the apartment." *May4 Trn*. at 10. He said that "[s]he put the knob on, it didn't work." *May4 Trn*. at 20. When asked: "Did you check it or did she check it?" the inspector testified: "No, she did. I had her check the knob. She said it wasn't working then." *May4 Trn*. at 28. The inspector testified that the tenant "tried the electric heat and told me that it wouldn't come on. I checked it, it didn't." *May4 Trn*. at 6. He said, "I asked her to turn the heater on, but the heater

didn't work. That was it." *May4 Trn*. at 10. The inspector testified, "I checked what she told me to check." *May4 Trn*. at 21.

The inspector did not know why the heater didn't work. "At that time, the electric heat was not working… . I don't know why it wasn't working, but I don't touch it because if I touch it I'm liable for it through the city." *May4 Trn*. at 15-16. He ventured that it "might have been a breaker that tripped. … But I don't know. It just didn't work. Maybe the breaker was tripped. I'm not saying it … wasn't workable, but it wasn't working at the time." *May4 Trn*. at 22.

There is no way to tell whether the tenant operated the heat correctly, or even twisted the knob in the wrong direction. Rather than touch the controls, the inspector relied on the tenant's actions and instructions, making it impossible to know whether the heater didn't work, or whether it was improperly operated. The inspection did not establish anything other than heat was not being created. It thus cannot be relied on to support a finding that Ms. Randall's bedroom was without an operating heating unit.

Accordingly, the court's findings are not supported by the evidence and should be reversed.

IV. Ms. Randall Did Not Know How Her Heating System Operated

Moreover, it is apparent Ms. Randall did not know how her heat worked. As late as April 18 city inspector James Grant clearly believed she did not understand her utility system, and dutifully taught her its operation. In his report the following day he wrote:

> On April, 18th, 2011 I went to 34A Chestnut Street to verify a complaint dealing with the electric heaters not working.
>
> Once outside we went to the basement and I pointed out that all of the breakers for her apartment were in the on position. We all exited the basement and she talked about her court involvements dealing with her landlord. She complained about her water bill. I asked whether she was talking about water or electric. She stated that the whole building was on one water heater. I asked that we go to the basement again. I pointed out that there are two electric water heaters. Each wired to their respective tenant panels. I then showed her that the boiler for the heating is wired

> to the first floor's panel. The directory in the other tenant's panel states that one of the breakers is for first floor boiler. I then opened her panel and pointed out the three two-pole breakers that go to her apartment.

LETTER FROM JAMES GRANT (April 19, 2011), *Appx.* at 28.

At the least Ms. Randall did not understand the heating system. At the most Mr. Abounaja failed to adequately inform her. Negligent education however, is not wilful interruption.

V. Court Could Not Know Whether Tenant had Bulkhead Access to Basement Electrical Panel

Inspector Dingee's casual inspection also did not include the basement bulkhead access to the electrical panel.

The tenant's brother, who also lived at the premises and claimed some knowledge of building maintenance, *May4 Trn*. at 40, 50, testified that the electric heaters from time to time tripped the circuit breakers, and that he was able to remedy by going to the basement and flipping them back. *May4 Trn*. at 38. He said that although the tenant initially had access to the basement, it was subsequently locked. *May4 Trn*. at 37-38, 40. He did not specify what door he used to get to the cellar.

The landlord asserted that the only basement door that was locked was the one through the downstairs tenant's apartment, but that the bulkhead door remained unlocked. He offered that the inspector and electrician had no problem entering. MOTION TO RECONSIDER (May 19, 2011), *Appx.* at 39; *May4 Trn*. at 49 (Testimony of James Grant, Assistant Director of Code Enforcement: "Q: When you went on [April] 20th, did you have any problem accessing the basement? A: On the 20th, no. Q: So it was available for you? A: It was available. Q: One of them available? A: It was available at the time."); INVOICE FROM O-BEES ELECTRIC (Apr. 18, 2011), *Appx*. at 25 ("Bulk head to basement was open to access electrical panels.").

Inspector Dingee did not attempt to check, but took the tenant's word for it. He testified:

> So I went and I asked her, I said maybe the breaker was off, so I want to get down to the downstairs. I guess that's where the panel was. And the basement door was locked, so I had no access to get to it. So at that time I couldn't get to it.

May4 Trn. at 7. But the inspector *did not* ever say he actually went to the basement door, turned the knob or lifted the latch or whatever, and tried to open it. Rather, he testified:

> "Like I said, at that time I couldn't get access to see if the breakers were going. I guess they couldn't get access; they told me, anyway."

May4 Trn. at 7.

The court found that as to Inspector Dingee, "[h]is first action was to check the electric panel box in the basement." FINDINGS AND JUDGMENT (May 11, 2011), *Appx.* at 35. But the record does not support this finding.

Moreover, when on April 19 Thomas Abbott, the Director of Code Enforcement, inspected, he was easily able to access the basement. In his followup report he wrote:

> Access to Electrical Panel: At the time of this inspection the door providing access from the tenants dwelling unit to the electrical breaker panel, located in the basement, had been locked from the basement side of the door.... The second access to this basement is through the bulkhead door at the rear of the building which was unlocked at the time of this inspection, but is equipped with hardware suitable for the locking.... The complaint regarding access to the tenant electrical panel could not be verified at the time of this inspection as the unlocked bulkhead door provides for sufficient access to the panel.

LETTER FROM THOMAS ABBOTT TO RABIH ABOUNAJA (Apr. 22, 2011), Exh. 2, *Appx.* at 29, 32.

There is no evidence in the record suggesting that the bulkhead door was ever equipped with a lock. The tenant never testified she went to the bulkhead door and observed a lock of some kind affixed to its hardware, or even that she tried to open it and found it locked. Rather the evidence suggests the tenant believed her access was supposed to be through another tenant's downstairs apartment, to which she understandably had no key.

Accordingly, the court's findings go beyond the evidence and should be reversed.

VI. No One Asked the Landlord for a Basement Key

Even assuming that Ms. Randall was fully conversant in the peculiarities of the system and the location of its basement controls, it appears that the problem was not so much the capability of the system to make heat in her bedroom, but that she lacked access to the basement. There is nothing in the record, however, suggesting that anyone – tenant or city – ever simply asked Mr. Abounaja to give Ms. Randall the key, combination, or secret trick, to open the basement bulkhead.

The landlord heard the tenant and the city complaining that the *heat* didn't work, not that the *door* was locked. Thus, the landlord was never given actual knowledge of the real problem, nor ever presented with an opportunity to address it. This is not the wilful facilitation of an interruption, but a mistake or mis-communication as to the nature of what needed fixing.

VII. Landlord's Response Was Timely and Directed

The court based its conclusion of wilfulness in part on its finding that the "landlord never responded to [the city's] March 28th letter." It is true that Mr. Abounaja never drafted a letter or telephonically contacted city government. But within days he called his electrician in an effort to address the problem more directly. Although he failed a bureaucratic response, he took steps directed to actually getting the job done. It is not accurate to say he didn't respond.

VIII. Landlord Reasonably Doubted Complaints of Non-Working Heat

The heating system was essentially new, and Mr. Abounaja relied on his electrician's invoices as bills of operability. He conceded the fledgling system still had quirks including blowing circuit breakers from time to time. *May4 Trn*. at 54. But he, his electrician, and also the city, knew that simply flipping them back solved the problem. He assumed, with some justification based on the testimony of her brother, that the tenant knew as well.

Thus Ms. Randall's repeated complaints that the heat did not work did not ring credible to

Mr. Abounaja. There was a pending eviction action, and landlords occasionally encounter difficult tenants. Mr. Abounaja was not unreasonable in regarding Ms. Randall as that. Probably had he simply been asked for a key, he would have happily complied and viewed Ms. Randall with less hostility and more humility.

IX. Ms. Randall Does not Believe Mr. Abounaja Interrupted her Heat

During trial Mr. Abounaja noted to Inspector Dingee: "Well, sir, your job, if somebody claims in the middle of the winter that I shut the heat on them, your job is … ." Inspector Dingee interrupted: "She didn't claim you shut the heat. She just said they had no heat. They didn't say anything about you shutting the heat. … I didn't hear anything about shutting the heat off, you shutting the heat off." *May4 Trn*. at 21.

Thus the evidence suggests that even the tenant did not believe the landlord actually interrupted her utility.

CONCLUSION

Based on the forgoing, this court should reverse the holding of the Rochester District Court, and vacate the award of damages.

Respectfully submitted,

Nahla Abounaja
By her Attorney,

Law Office of Joshua L. Gordon

Dated: August 26, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Nahla Abounaja requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the statutory issues raised in this case have not been addressed in this jurisdiction.

I hereby certify that on August 26, 2012, copies of the foregoing will be forwarded to Emmanuel Krasner, Esq.

Dated: August 26, 2012

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Joshua L. Gordon, Esq.

APPENDIX

1. INVOICE FROM O-BEES ELECTRIC (Jan. 16, 2009), Exh. B 14
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