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Is a failure to repair common elements germane to a forcible entry and detainer suit brought by a condo association against a unit owner?

By Adam B. Whiteman

Introduction

In a Rule 23 Order captioned *Spanish Court Two Condominium Association v. Lisa Carlson*, 2012 Ill App. (2d) 110473, the Illinois Second District Appellate Court determined that, under some circumstances, a condo owner may withhold payments of assessments if the board of managers breaches its duty to repair and maintain the common elements.

In the opinion of this author, the holding in *Spanish Court* is cause for concern because (1) it is based on the incorrect premise that condominiums should be treated the same as rental properties for purposes of evaluating the germaneness of a defense to a forcible entry and detainer (FED) suit and (2) it relies on cases involving a landlords' implied warranty of habitability, a legal doctrine that should not be enforced against condominium associations.

Summary of the Spanish Court decision

In *Spanish Court*, a condo association ("Plaintiff") filed an FED action against a unit owner ("Defendant") due to her failure to pay various general and special assessments, late fees, costs and attorney fees (referred to as "assessments"). The Defendant asserted affirmative defenses sounding in estoppel and set off denying she owed the assessments in light of property damage sustained by her condominium unit as a result of the association's failure to properly maintain the roof and brickwork directly above her unit.

The court framed the question as follows: "whether, in an action brought under the Forcible Entry Act by the board of managers of a condominium property against a unit owner for possession of the unit due to unpaid assessments, the owner may claim as a defense that her responsibility for the assessments was diminished or nullified by the failure of the board to maintain the common elements of the property as required in the condominium instrument." (¶16)

The court then noted that there are no decisions on point involving evictions of condominium unit owners and stated, "we hold, by analogy to the case law brought under the Forcible Entry Act by landlords for possession of leased property due to unpaid rent, that the unit owner may claim neglect as a defense to the board's suit under the Act." (¶16)

In analyzing the defenses that can be raised, the court notes 735 ILCS 5/9-106 of the FED Act which states, in relevant part, "no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or

otherwise." (¶20)

The court then turns to the definition of what the word "germane" means, but makes no attempt to examine the word in the context of the statutory setting which requires germaneness to relate "to the distinctive purpose of the proceeding."

The court then examines the word "germane" as it has been used in a series of landlord/tenant cases. Although a number of different eviction cases are examined, the court principally relies upon *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 367 (1972) in which the Illinois Supreme Court permitted a tenant to interject a breach of an implied warranty of habitability as a defense to an action for possession due to unpaid rent.

The court concludes that the principles of the FED cases, like *Jack Spring* "apply equally under the Forcible Entry Act in which the board of managers of a condominium property seeks possession of a condominium unit because of the owner's nonpayment of assessments." (¶25) In support of this conclusion, the court cites 765 ILCS 605/18.4(a) of the Condo Act which dictates that a board of managers is under a duty "[t]o provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." (¶25) The court compares a condo association's statutory duty regarding condo maintenance/upkeep/etc. with a landlord's "promise to maintain the property in a livable condition" and concludes that the failure of a condo board with respect to the common elements is as viable a defense under the FED Act as a landlord's failure to maintain a rented dwelling.

The court's holding is that "where a condominium board of managers sues for possession of a unit because of delinquent assessments, and the condominium instrument indicates (as presumably most do) that the unit owner's promise to pay assessments is in exchange for the board of managers' promise to use those assessments for the repair and maintenance of the condominium property, the unit owner may claim, as a justification for nonpayment of assessments, that the board of managers breached its duty of repair and maintenance." (¶28)

The question of germaneness and the "distinctive purpose" of an FED action involving a condominium owner

The underlying right of a condominium to evict a unit owner can be found in the Illinois Condominium Property Act:

> Other remedies. (a) In the event of any default by any unit owner, his tenant, invitee or guest in the performance of his obligations under this Act or under the declaration, bylaws, or the rules and regulations of the board of managers, the board of managers or its agents shall have such rights and remedies as provided in the Act or the condominium instruments including the right to maintain an action for possession against such defaulting unit owner or his tenant for the benefit of all the other unit owners in the manner prescribed by Article IX of the Code of Civil Procedure.
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> (b) Any attorneys' fees incurred by the Association arising out of a default by any unit owner, his tenant, invitee or guest in the performance of any of the provisions of the condominium instruments, rules and regulations or any applicable statute or ordinance shall be added to, and deemed a part of, his respective share of the common expense.

765 ILCS 605/9.2.

The Forcible Entry and Detainer Act, in turn gives the board of managers of a condominium association the power to evict a unit owner as follows:

> (a) The person entitled to the possession of lands or tenements may be restored thereto under any of the following circumstances:
>
> * * *
>
> (7) When any property is subject to the provisions of the Condominium Property Act, the

> owner of a unit fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon or any unpaid fine, the Board of Managers or its agents have served the demand set forth in Section 9-104.1 of this Article in the manner provided for in that Section and the unit owner has failed to pay the amount claimed within the time prescribed in the demand * * *.

735 ILCS 5/9-102(a)(7).

The nature and type of defenses that can be raised by a defendant in an FED action are controlled by 735 ILCS 5/9-106 which permits only those matters "*germane to the distinctive purpose of the proceeding*" to be raised. (emphasis added).

The *Spanish Court* decision relies on broad principles of contract law and summarily equates what is "germane" as a defense for a renter with what is "germane" as a defense for a condo owner. This line of thinking is flawed. First, the word "germane" must be put in context. The statute instructs that the context is "the distinctive purpose of the proceeding." The *Spanish Court* decision fails to analyze this statutory language and so it's analysis was incomplete. What the court failed to recognize is that the "distinctive purpose" of evicting a condo owner is actually different from the "distinctive purpose" of evicting a tenant.

The "distinct purpose" of an FED action against a tenant is to collect rent for use and occupancy of the property. The ultimate goal of this action is to permanently dispossess the tenant of use and occupancy of the premises. Therefore, the question of whether a landlord has prevented a tenant from using or occupying the property is germane to such an action. It would be unfair to force a tenant to bring a separate suit to address issues regarding the condition of the property.

The "distinct purpose" of an FED action against a condo owner is to collect money that is owed for the administration, upkeep and management of the property. According to *Knolls Condominium Assn. v. Harms*, 781 N.E.2d 261, 768, 202 Ill. 2d 450 (2002), (a case where a condo unit owner was prohibited from asserting a homestead exemption as a defense to an FED) the statutory scheme provides "a procedure for the temporary eviction of a unit owner who fails to pay assessments." (emphasis added). Thus, unlike a tenant, the unit owner retains their ownership interest and is only temporarily dispossessed until full payments are recovered up to a maximum of 13 months absent court order of extension (735 ILCS 5/9-111.1). Therefore the question of the condition of the property is not germane to whether the owner owes his assessment. The only germane defenses to a condo FED action should be whether the assessments were paid. If the condo owner has a dispute over how assessments are being spent, then he can bring a separate suit in which the management (or mismanagement) of the association can be examined.

By relying upon landlord/tenant cases for guidance as to the question of germaneness, the *Spanish Court* ignores a critical difference between tenants and condo owners, i.e. condo owners are owners. Tenants are not. Thus, a condominium unit owner has a distinctly different relationship with the property, with other co-owners of the property, and with the entity managing the property than a tenant has with a landlord.

According to the Condominium Property Act, a condo unit owner is an owner. (765 ILCS 605/2(g)) He owns an undivided interest in his unit and a shared interest in the common elements which he holds with the other units in the building as set forth in the condominium declaration. (765 ILCS 605/4(e)). As a group, these owners must work together to manage and administer the common elements of the property. They accomplish this through their automatic membership to an association and the election of a board that acts on the association's behalf. (765 ILCS 605/2(o), 765 ILCS 605/18.3) The funds available to the board to accomplish this purpose on behalf of the owners is principally generated by assessments collected from the owners themselves who must pay in accordance with their proportionate share interest of the common elements (765 ILCS 605/9(a), 765 ILCS 605/18.4(b)). A condo board cannot spend more than it has. The condominium declaration, along with the condo by-laws and rules, sets forth the terms, conditions and guidelines through which the above-described relationship operates. In a very real sense, these documents are like a partnership

agreement among the owners regarding how they will operate to their mutual benefit.

Conversely, a tenant has no ownership interest in the property or the common areas. The relationship between a landlord and a tenant is adverse and their contract (i.e. the lease) seeks to set out the terms under which the tenant may occupy the premises. In a landlord/tenant situation, a landlord can be obligated to repair the premises regardless of whether he is charging sufficient rent to pay for said repair. Indeed, in *Spiegel v. Hollywood Towers Condominium Ass'n.*, 671 N.E.2d 350, 356, 283 Ill.App.3d 992 (1st Dist. 1996), the First District determined that a condo association conducting a forcible entry and detainer eviction was not subject to the Chicago Residential Landlord Tenant Ordinance (RLTO). This case is instructive in that it denies a unit owner the right to interject violations of the RLTO as a defense to the eviction case.

The analysis for a condo board cannot simply be whether it failed to make necessary repairs to the building because it is necessarily restricted by what money it has in its budget. If the court in a condo FED action begins discussing whether certain repairs were done, then it will then have to determine why they were not done and what other obligations the board must meet. Then if the court orders the board to fix a problem, the board will likely have to vote on levying a special assessment. Can the court then force the members of the association to pay for that special assessment just because one of the unit owners wants a repair to be made? What if the complaining owner refuses to pay the special assessment on the grounds that the building is not repaired? It is a vicious circle.

The point here is that by determining that building repairs are germane to a FED action for a condominium, the court is necessarily involving itself in the entire management and administration of the association, a calculus which is not necessary when examining building repairs to be made by a landlord.

Because the condo association's remedy is temporary, the issue of the speed of the process is very important. Indeed, according to the historical notes under Section 9-111(a), "This section was adopted to provide a constitutionally permissible, *quick method for collection of assessment arrearages in condominium associations*, and it has provided one of the better collection procedures found in any state." (Emphasis added) This express statement of statutory intent is frustrated if every condo eviction case turns into a battle over the condo board's budget decisions.

Warranty of habitability is not implied in a condominium declaration

The *Spanish Court* decision relies, in large part, upon *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 367 (1972) wherein the Illinois Supreme Court permitted a tenant to interject a breaches of covenants to repair and of an implied warranty of habitability as defenses to an action for possession due to unpaid rent. The *Spanish Court* determines that the principles of this case would "apply equally" to FED actions for nonpayment of assessments. Therefore, the court is allowing a condo owner to interject an implied warranty of habitability against an association.

In applying this implied warranty against the association to the case at hand, *Spanish Court* states that the "particular failure to repair and maintain alleged by defendant here is germane to plaintiff's action for possession," that it "affects the basic comfort of the dwelling," and that "[A] sound roof and exterior walls are perhaps the most fundamental expectations of those who purchase condominium units and expend considerable sums each year for "maintenance-free" living." (¶29-30).

Jack Spring recites key policy reasons underlying its decision to imply a warranty of habitability by landlords to tenants. These statements are:

1. Today's urban tenants are interested, not in the land, but solely in a house suitable for occupation,

2. In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time and may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented,

3. The tenant cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection,

4. Since the lessees continue to pay the same rent, they are entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term.

These policies do not apply to condo owners. Unlike tenants, condo owners (1) are interested in the land, (2) are not merely occupying the property for a limited period of time, and (3) have an obligation to maintain the common elements by their participation in the association and through their board.

The suggestion by *Spanish Court* that a condo owner has a "fundamental expectation" of "maintenance-free living" is simply incorrect. Quite to the contrary, as an owner, the condo owner is obliged to participate in the maintenance of the property and the common elements. Conversely, a tenant has no such power, right or obligation.

Thus if the common elements are not being cared for, it is, to some degree, the unit owner's own fault. If the condo owner does not agree with the conduct of the association, then that owner has remedies available to him under the Condominium Act. For example, under 765 ILCS 605/18, the Condo Act empowers a unit owner with rights of participation in the election and removal of board members and the right to participate in meetings regarding the creation of condo budgets and regarding violations of rules and regulations by the association.

Warranties regarding the condition of the property relate to one who is purchasing or renting the property from another and arise out of situations where one with superior knowledge and control over the property is tendering ownership or possession to one with inferior knowledge and control. No cases are known to apply where co-owners are held to provide a warranty to each other. The condo owner generally does not buy his unit from the association, nor does he rent his unit from the association. Therefore, condo ownership does not fit into the body of cases applying the warranty of habitability.

Manifold are the problems that would occur if a condo owner is excused from payment of assessments due to a perception that the board has failed to repair the property.

First, the resources available for property repairs are derived almost exclusively from the unit owners themselves by way of assessments. If one of these unit owners unilaterally decides that the budget is being misspent, then he can simply refuse to pay his assessments until the condition is corrected. If all the unit owners act in this way, then there will be no funds available to manage the property or correct the problem conditions.

Next, giving one owner the power to withhold assessments because he does not like the way the assessments are being spent would significantly alter the balance of power and effectively give that owner veto power over board decisions.

Next, allowing a unit owner with withhold assessments would permit an owner to eschew his ownership duties and responsibilities and refuse to participate in the condo board activities and meetings yet sit back and second guess those decisions by forcing an FED action to be filed by the association.

Next, an owner could vote for low assessments and then complain that his unit is not being repaired. However, part of the fault for the failure to repair falls at the feet of the unit owner who voted for low assessments.

Finally, the unilateral withholding of assessments will prevent the association of meeting other financial obligations that are not related to the particular building repairs the withholding tenant has claimed. It may very well be that the bricks need tuck pointing and the roof leak needs to be fixed. But if the owners are withholding assessments, then that means that electricity, heating, water and/or insurance bills cannot be paid. Indeed, this could lead to a cancellation of the very insurance policy that could have provided coverage for the repairs the unit owner was actually seeking.

Conclusion

The *Spanish Court* decision does not fully examine the realities of condominium living arrangements when determining what is germane to an FED action of a condo owner. The comparison of the landlord/tenant relationship to a condo association/condo owner relationship is overly simplistic and leads to incorrect conclusions and holdings.

The FED statute directs that only those defenses may be raised that "germane to the distinctive purpose of the proceeding." In the case of a condominium related eviction, the only issue that is germane is whether the owner paid his assessments. Matters relating to the condition and maintenance of the property are not germane to this limited question as they relate to a far broader issues pertaining to the overall management, control, budgeting and operation of the association. If a unit owner has an issue regarding the association's failure to honor its obligations, the unit owner can separately sue the association for mismanagement but that does not mean the assessments were not due.

There is no language in the Condominium Property Act that permits an owner to unilaterally withhold payment of assessments. Indeed, the legislature felt so strongly about the owners obligation in this regard that it provided the association with the power to evict an owner from his own unit if he fails in his obligation to pay his assessments. The legislature even provided an unconditional lien in favor of an association against any owner who "shall fail or refuse to make any payment of the common expense...when due...." (765 ILCS 605/9(g))

The *Spanish Court* decision effectively adds a judicially created provision to the Condominium Property Act that would permit a unit owner to withhold payment of their assessments if they believe the association is interrupting an expectation of "maintenance-free" living. In reality, however, a condo owner shares an ownership interest in the entire building with the other owners and therefore bears the responsibilities, duties and obligations incumbent upon all property owners, and this means paying his bills on time. ■

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