Judgment rendered July 13, 2011
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 46,460-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

HENRY F. GREEN, JR. — Plaintiff-Appellee

versus

BARRY ERWIN d/b/a
ERWIN ENTERPRISES — Defendant-Appellant

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Appealed from
Monroe City Court
Parish of Ouachita, Louisiana
Trial Court No. 2009CV00896

Honorable Tammy Deon Lee, Judge
Honorable Clyde Lain, II, Judge Pro Tempore

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BARRY C. ERWIN — In Proper Person

MYRT T. HALES, JR. — Counsel for Appellee

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Before WILLIAMS, GASKINS and CARAWAY, JJ.

CARAWAY, J.

An apartment landlord appeals a judgment rendered against him for damages sustained by his tenant when he slipped and fell in his apartment after the bathroom roof collapsed on him. The landlord also appeals the denial of his reconventional demand for past due rent. For the following reasons, we affirm the damage award, reverse the denial of the reconventional demand and amend the judgment.

Facts

Henry Green signed a six-month apartment lease with Barry Erwin d/b/a Erwin Enterprises ("Erwin") on May 1, 2008,[1] for an apartment located in a 20-unit apartment complex owned by Erwin. Green initially rented Apartment 12, an upstairs unit, but was allowed to move into Apartment 2, directly below the former apartment on October 1, 2008.

On October 1, 2008, Green reported a leak in the bathroom ceiling of Apartment 2 to the apartment manager, Lenora Wallace. A maintenance employee reported to the apartment on October 2, 2008, but was unable to immediately repair the leak. No repairs had been done by October 6, 2008, when the ceiling collapsed on Green as he sat on the commode in the bathroom. Upon the collapse of the ceiling, Green jumped up and slipped and fell in water on the floor causing injuries to his back, left foot and legs.

Green presented to the E.A. Conway Emergency Room on the date of the fall where he reported falling after the bathroom ceiling collapsed on

[1]The lease term was May 1, 2008-October 31, 2008. Green paid a $300 deposit. The monthly rent for the apartment was $390.00. Because Green moved into the apartment on May 9, 2008, Erwin prorated his May rent.

him. Green was diagnosed with left foot and low back strain. Subsequently, upon advice of his counsel, Green saw a chiropractor on October 9, 2008, with complaints of lower back and left foot pain. After a month, Green's injuries had resolved; his last visit with the chiropractor was November 7, 2008.

Green had a Monroe Code Enforcement Officer inspect the premises on October 9, 2010. Upon observing a "foul odor coming from the bathroom" and that "the sheet rock in the ceiling had fallen and collapsed into the bathtub," the City Inspector concluded that the property was in violation of the Monroe City Code.

Erwin instituted eviction proceedings against Green on October 20, 2008. Green turned in his key to Apartment 2 to the apartment manager on October 28, 2010; he never relinquished the Apartment 12 key.

On March, 26, 2009, Green instituted a personal injury suit against Erwin seeking damages for the injuries he received from the collapse of the roof and the subsequent slip and fall. Erwin filed a reconventional demand against Green seeking past due rent and late charges, cleaning fees, furniture removal costs and penalties in the sum of $1,581.25. After trial of this matter, the trial court granted judgment in favor of Green for $7,368.00[2] on October 28, 2010.[3] This pro se appeal by Erwin ensued.

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[2]The $7,368 judgment represented stipulated lost wages of $100 and medical expenses of $1,768 and general damages of $5,500.

[3]The judgment was silent as to the reconventional demand of Erwin for past due rent. Where a judgment is silent as to a claim or demand, it is presumed that the court denied the relief sought. *TSC, Inc. v. Bossier Parish Police Jury,* 38,717 (La. App. 2d Cir. 7/14/04), 878 So.2d 880; *Stephenson v. Nations Credit Fin. Serv. Corp.,* 98-1689 (La. App. 1st Cir. 9/24/99), 754 So.2d 1011.

Discussion

On appeal, Erwin argues that the trial court committed legal error in determining that Green proved that he was injured as the result of the falling ceiling. Erwin also asserts Green's contributory fault in the accident. Finally, Erwin complains that the trial court erred in rejecting his reconventional demand for past late rent.

Under Louisiana law, the owner/lessor is generally liable for the condition of the leased premises. *Greely v. OAG Properties, LLC,* 44,240 (La. App. 2d Cir. 5/13/09), 12 So.3d 490, *writ denied,* 09-1282 (La. 9/25/09), 18 So.3d 77; *Allstate Ins. Co. v. Veninata,* 06-1641 (La. App. 4th Cir. 11/7/07), 971 So.2d 420, *writ denied,* 08-0067 (La. 3/7/08), 977 So.2d 918.

Liability for a thing under one's ownership or custody is governed by La. C.C. art. 2317.1[4] which provides as follows:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

Article 2317.1 actions require proof that the thing was in the defendant's custody, that the thing contained a defect which presented an unreasonable risk of harm to others, that this defective condition caused the damage and that the defendant knew or should have known of the defect.

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[4] Lessor liability can also arise in warranty which runs only to the lease under La. C.C. arts. 2696-2699. Green has limited his claim to La. C.C. art. 2317.1.

Beckham v. Jungle Gym, LLC, 45,325 (La. App. 2d Cir. 5/19/10), 37 So.3d 564. A landowner is not liable for an injury that results from a condition that should have been observed by the individual in the exercise of reasonable care or was as obvious to a visitor as it was to the landowner. *Greely, supra.*

Louisiana courts of appeal apply the manifest error standard of review in civil cases. *Detraz v. Lee* 05-1263 (La. 1/17/07), 950 So.2d 557; *Hall v. Folger Coffee Co.,* 03-1734 (La. 4/14/04), 874 So.2d 90. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. *Smith v. Louisiana Dept. of Corrections,* 93-1305 (La. 2/28/94), 633 So.2d 129. In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Id*.

The appellate court must not reweigh the evidence or substitute its own factual findings because it would have decided the case differently. *Pinsonneault v. Merchants & Farmers Bank & Trust Co.,* 01-2217 (La. 4/3/02), 816 So.2d 270. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong, even if the reviewing court would have decided the case differently. *Id.*

The determination of whether a defect presents an unreasonable risk of harm is a matter "wed to the facts" and must be determined in light of the facts and surrounding circumstances of each particular case. *Dupree v. City of New Orleans* 99-3651 (La. 8/31/00), 765 So.2d 1002; *Beckham, supra*. The trial court's factual findings concerning the presence of a defect should be afforded deference, and such factual findings should be disturbed only if clearly wrong or manifestly erroneous. *Heflin v. American Home Wildwood Estates, L.P.,* 41,073 (La. App. 2d Cir. 7/12/06), 936 So.2d 226.

To the extent that a party defendant seeks to have the benefit of comparative fault of another as an affirmative defense, La. C.C.P. art. 1005, it bears the burden of proof by a preponderance of the evidence that the other party's fault was a cause-in-fact of the damage being complained about. *Dupree, supra*; *Pruitt v. Nale,* 45,483 (La. App. 2d Cir. 8/11/10), 46 So.3d 780. The trier-of-fact is owed great deference in its allocation of fault. Even if the reviewing court would have decided the case differently had it been the original trier of fact, the trial court's judgment should be affirmed unless manifestly erroneous or clearly wrong. *Dupree, supra.*

Causation is a factual finding which should not be reversed on appeal absent manifest error. *Detraz, supra; Martin v. East Jefferson General Hosp.,* 582 So.2d 1272, 1276 (La. 1991).

At trial, the parties jointly presented documentation of Green's medical expenses relating to the accident and the lease agreements. Photographs of the premises were also submitted jointly into evidence by the parties. Erwin submitted original copies of his rent ledger, copies of the

eviction proceedings he instituted against Green, and copies of Green's 2008-2010 medical records.

Erwin admitted in his testimony that Green reported the leak in the ceiling of Apartment 2 to Lenora Wallace on October 1, 2008, five days before the accident. Erwin also testified that Randy Stamy,[5] a maintenance employee of his, went to the apartment to fix the leak but did not do so because he needed assistance. Erwin admitted that he learned of the leak "somewhere about the day that it happened." He had a plumber go out and fix the leak on October 14; the plumber discovered that the problem was in the drain pipe that caused a leak directly over the commode. Erwin conceded that he had "never seen that much ceiling fall in from a leak or drain pipe ever in my life." Erwin testified that the maintenance employee "did not consider it a big leak problem or he would have put it at a higher point on the priority list."

Lenora Wallace testified that she was the property manager for Erwin Enterprises. She personally went into the apartment after the ceiling collapsed and saw that the ceiling had fallen in the bathroom. Wallace testified that the photographs of the scene correctly depicted what the bathroom looked like after the ceiling collapsed. She also testified that the leak was repaired on October 14, 2008, approximately 2 weeks after the leak was first reported.

Upon direct examination by Erwin, Wallace identified the rent ledger sheets, submitted into evidence as D-1, relating to Green's residence in

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[5]The employee's name was also spelled Stamie in the record.

Apartment 12. Wallace also identified the rent ledger for Apartment 2, submitted into evidence as D-2. Wallace testified that eviction proceedings were instituted against Green in October. Green stipulated to Wallace's testimony regarding the amounts due under the reconventional demand according to the rent ledgers submitted into evidence.

Finally, Green confirmed that he and his girlfriend had resided in both Apartments 12 and 2. He recalled that when he moved into Apartment 2, he saw a leak in the bathroom which he reported to Wallace. While Green was out of the apartment, a maintenance employee came by to look at the leak, but he did not repair it. Green testified that the leak worsened. On the morning of the accident Green got up to use the bathroom, and as he was sitting on the commode, the ceiling caved in on his head and neck. Green recalled that the floor was previously wet from the leak and that the leak and ceiling were never repaired while he lived in the apartment.

As the ceiling came down, Green testified that he "jumped up" and "slipped and fell." Green hurt his foot and back as he fell. He initially went to the emergency room for treatment and then saw a chiropractor. Green testified that he called his sister sometime after he went to the emergency room. His back and foot pain resolved in about a month. He had no pain at the time of trial, missed one day of work and had to take time off to go to the chiropractor. He worked as a janitor. Green conceded that he moved from the apartment because he was given an eviction notice.[6]

[6]After the conclusion of the presentation of evidence, Erwin stipulated to lost wages of $100.

Initially we note that both the comparative fault and causation determinations of the trial court are findings of fact which are subject to the manifest error standard of review. In this matter, Erwin concedes that he knew of the apartment leak before the ceiling collapsed and was a "little bit slow on getting his problems fixed." Such an admission is sufficient evidence to show his knowledge of the defective condition and failure to repair it timely. The photographs of the scene which were introduced into evidence depict the condition of the apartment after the ceiling collapse. Erwin described those conditions as "horrible," in his argument concerning Green's assumption of the risk and comparative fault. Nevertheless, Erwin presented no evidence showing the condition of the ceiling before it fell. While Green testified that the floor was wet and that "stuff" was coming from the ceiling, his testimony showed his complete surprise at the events which transpired. Erwin admitted that his maintenance employee did not consider the leak a big problem when he first inspected it. From this evidence, the court could have concluded that Green was unaware of the extent of the deterioration of the ceiling when he entered the bathroom. Even with a wet floor, the collapse of the ceiling could be viewed by the trier of fact as such a startling event to be the sole cause of the accident. Accordingly, we find no error in the court's determination that Erwin failed to sustain his burden of showing that the risk of the ceiling collapse was obvious to Green such that he bore some responsibility for his injuries.

We also conclude that the record supports the court's causation determination. Green testified that he reported to the emergency room on

the same day that he claimed to have fallen. The medical records submitted into evidence corroborate his testimony and show that Green reported both to the emergency room personnel and the chiropractor that he had fallen while in the bathroom. The medical reports from both facilities showed that Green received treatment for injuries to his foot and back. Green's sister also testified that her brother had reported to her that he had fallen and gone to the emergency room. He also asked her to take photographs of the apartment. The trial court obviously accepted Green's testimony as credible. This court is bound to give such credibility evaluations great discretion because of the trial court's superior capacity to observe variations in demeanor and tone of voice. *Nwokolo v. Torrey,* 31,412 (La. App. 2d Cir. 1/20/99), 726 So.2d 1055. Given the corroborating medical evidence, we find no error in that determination. For these reasons, we affirm the trial court judgment relating to the issues of fault and causation.

We find, however, that the trial court erred in failing to find that Erwin sustained his burden of proving his entitlement to past due rent and late charges from Green thus rejecting his reconventional demand. The burden of proving entitlement to past due rent is preponderance of the evidence. *Davis v. Alsup,* 627 So.2d 775 (La. App. 2d Cir. 1993); *Beaird v. Willis,* 1 So.2d 809 (La. App. 2d Cir. 1941); *Barnes v. Park Place Homes, Inc.,* 398 So.2d 1196 (La. App. 4th Cir. 1981). As noted above, Erwin submitted original copies of his rent ledgers into evidence. The leases reflect that Green agreed to pay late charges for delinquent rent. The ledgers show that as of September 30, 2008, Green owed $414 in late rent

and charges on Apartment 12 and that Erwin then began charging Green rent for Apartment 2 on October 1, 2008.[7] The evidence showed Green was unable to reside in Apartment 2 after the early October ceiling collapse. Therefore we find Erwin entitled to $414 in past due rent and late charges from Green. Although Erwin instituted eviction proceedings against Green, those proceedings were never completed. Thus, the trial court did not err in failing to award Erwin penalties for these proceedings. Finally, Erwin is not entitled to sums due for cleaning, furniture removal and court costs. The records show that Erwin secured a $300.00 deposit from Green which he did not return. Those proceeds offset any cleaning or furniture removal costs that Erwin claims.[8] For these reasons, we amend the judgment to award Erwin the sum of $414 in past due rent and late charges, lowering the amount of the judgment in Green's favor accordingly, and as amended, affirm the judgment. Costs of this appeal are assessed equally to the parties.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND AMENDED.

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[7]Green was never charged rent on the two apartments. Rather, the ledgers show that when he took possession of Apartment 2 in early October, Erwin had ceased charging him rent on Apartment 12 by the end of September.

[8]La. R.S. 9:3251 provides that the landlord may retain all or any portion of the advance or deposit which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises upon furnishing an itemized statement to the tenant. It is also true that Erwin possessed a Lessor's privilege on Green's movables under La. C.C. art. 2707 such that removal of the furniture by Erwin was an unnecessary expense.