2012 IL App (1st) 110857-U

FOURTH DIVISION
March 29, 2012

No. 1-11-0857

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH FERRELL and RACHEL BEAGLEY, Plaintiffs and Counterdefendants-Appellants, v. 1513 N. WESTERN AVENUE, LLC, an Illinois Limited Liability Company, Defendant and Counterplaintiff -Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County No. 10 M1 156236 Honorable Pamela E. Hill-Veal, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ *1* *HELD*: The circuit court erred in awarding attorney fees and costs where such fees are prohibited by ordinance and an agreement to terminate the lease early does not operate to render the ordinance inapplicable. However, the circuit court did not err in entering judgment on defendant's counterclaim, despite the fact that defendant did not timely submit paid receipts for damage to the property, where defendant filed a counterclaim rather than merely asserting an affirmative defense. Moreover, the circuit court did not err in awarding the full amount of the counterclaim where, in the absence of a transcript of the proceedings, a reviewing court must presume that the trial court considered the reasonableness of the repair cost and the party responsible for the damage to the porch in

entering its judgment. Finally, the plaintiffs are not entitled to damages caused by the enforcement of a prohibited provision where the complained of provision in the lease authorizing attorney fees does not conflict with the language of the applicable ordinance.

¶ 2 Plaintiffs and counterdefendants-appellants Joseph Ferrell and Rachel Beagley (tenants) filed a claim against defendant and counterplaintiff-appellee 1513 N. Western Avenue, LLC (landlord) to recover their security deposit. The landlord filed a counterclaim for $3,653 in addition to withholding the security deposit in its entirety for damages allegedly caused by the tenants. The circuit court entered judgment in favor of the landlord for $3,653, and also awarded the landlord attorney fees and costs of $3,399. On appeal, the tenants contend that the circuit court erred in awarding attorney fees where such fees are prohibited by section 5-12-140(f) of the Chicago Residential Landlord Tenant Ordinance (Ordinance) (Chicago Municipal Code § 5-12-140(f) (amended November 6, 1991)). The tenants further contend that the circuit court erred in entering judgment on the landlord's counterclaim where the landlord was not authorized to deduct repair costs from the security deposit, $5,000 was not a reasonable and necessary cost to repair the damaged porch, and the tenants were entitled to withhold $400 in rent. For the following reasons, we affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 The tenants signed a lease agreement with the landlord on March 25, 2009, to lease an apartment in the landlord’s building located at 2153 West Schiller, #2R in Chicago, Illinois. The lease period commenced on June 1, 2009, and was to terminate on April 30, 2010. Under the terms of the lease agreement, the tenants were obligated to, and did, provide the landlord with a security deposit in the amount of $1,950.

¶ 5 On June 12, 2009, the tenants invited guests to their apartment. The tenants' witness, Michael Woyan, testified at trial that one of the guests was smoking on the porch and leaning against the porch rail. The porch railing broke and the guest fell and injured himself. The landlord argued that the damage to the porch was caused by the tenants' invitee. Three days after this incident, on June 15, 2009, the City of Chicago posted a sign on the premises stating that the porch was "Dangerous & Hazardous" and should not be used.

¶ 6 On August 1, 2009, the tenants sent a letter to Perry Casalino, the landlord's manager, informing him of their intent, as a consequence of the damaged porch not having been repaired as of that date, to reduce rent payments by $200 a month, decreasing the monthly rent payment from $1,300 to $1,100. Furthermore, the tenants also stated their willingness to resume paying the original monthly rent of $1,300 once the porch was repaired. Subsequently, Casalino and the tenants mutually agreed to terminate the lease early, effective October 1, 2009.

¶ 7 A letter, dated October 30, 2009, was mailed by the landlord to the tenants with an itemized statement of expenses that the landlord intended to withhold from their security deposit. The statement included a charge for "Damage to porch" in the amount of $5,000, and a charge for "Rent shortage for August and September" in the amount of $400. Combined with a few other relatively minor expenses, and after crediting the security deposit and the interest gained thereon, the landlord requested a total of $3,653 from the tenants.

¶ 8 On June 21, 2010, the tenants filed a small-claims complaint seeking the return of their security deposit, the interest gained thereon, and attorney fees. The complaint alleged that the landlord, despite an alleged agreement to terminate the lease early and return the security deposit,

did not return their security deposit. On October 14, 2010, the landlord filed a counterclaim seeking $3,653 plus costs and attorney fees. Count I of the counterclaim alleged that the tenants breached their lease agreement by damaging the porch. The landlord also claimed damages resulting from the tenants' possession of the apartment, and costs and attorney fees pursuant to a provision in the lease.

¶ 9 A bench trial was held on February 24, 2011. The trial court heard testimony from tenant Ferrell, the tenants' witness, Michael Woyan, and the landlord's manager, Perry Casalino. The trial court ruled in favor of the landlord on both the complaint and the counterclaim. The trial court stressed the importance of credibility in its judgment order and found that Casalino was credible and Ferrell was not credible. The trial court also found that Woyan's testimony was credible; however, the court noted that his view was limited and that he was not in a position to observe any activity prior to seeing the porch railing break. The trial court concluded that there was no agreement between the parties with regard to the $200 reduction in rent and that the tenants "unilaterally reduced the monthly rent from $1,300 to $1,100." Moreover, the trial court found that no evidence was presented that Casalino failed to repair or maintain the porch, and also found that the landlord complied with the provisions of the Ordinance. Finally, the trial court found that the landlord was not obligated to discuss and obtain approval from the tenants for the repairs the landlord made to the porch. Pursuant to its findings, the trial court entered judgment in favor of the landlord and held the tenants jointly and severally liable in the amount of $3,653, plus costs and attorney fees. The landlord was given leave to file a petition for attorney fees and costs.

¶ 10 On February 28, 2011, the landlord filed its petition for costs and attorney fees and on March 8, 2011, the tenants filed their opposition to landlord's petition for costs and attorney fees and their cross-motion for reconsideration. On March 15, 2011, the trial court granted the landlord's petition for costs and attorney fees and entered judgment against the tenants, jointly and severally, in the amount of $3,399. The trial court found that since the parties mutually agreed to prematurely terminate the lease effective October 1, 2009, section 5-12-140(f) of the Ordinance was inapplicable and section 24 B of the lease was enforceable. The tenants timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 The tenants first contend that the trial court committed reversible error when it ruled that section 5-12-140(f) of the Ordinance did not apply and that the landlord was authorized to recover its attorney fees pursuant to the parties' lease. The construction and legal effect of the lease agreement and the provisions of the Ordinance are questions of law, which we review *de novo*. *Lawrence v. Regent Realty Group, Inc.*, 197 Ill. 2d 1, 9 (2001); *Plambeck v. Greystone Management & Columbia National Trust Co*., 281 Ill. App. 3d 260, 266 (1996).

¶ *13* "Generally, in construing municipal ordinances, the same rules are applied as those which govern the construction of statutes." *Application of County Collector of Kane County*, 132 Ill. 2d 64, 72 (1989). Furthermore, "in interpreting a statute or ordinance, a court should not construe them in a manner that renders words or phrases superfluous or meaningless." *Id.* "In interpreting a statute, the primary rule, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature." *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189

(1990). Legislative intent is best demonstrated by "the language used by the legislature, and where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." *Id*. "The best indicator of this intent comes from the language of the ordinance itself, but may also include consideration of the reason behind and the necessity for the ordinance." *American National Bank v. Powell*, 293 Ill. App. 3d 1033, 1038 (1997). "A reviewing court may make an independent determination of the construction of a statute, ordinance, or constitutional provision and need not defer to the decision of the trial court since these are questions of law." *Application of County Collector for Judgment and Order of Sale Against Lands and Lots Returned Delinquent for Nonpayment of General Taxes for Year 1987 and Prior Years*, 278 Ill. App. 3d 168, 171 (1996).

¶ 14 The trial court granted the landlord's petition for costs and attorney fees and entered judgment against the tenants, jointly and severally, in the amount of $3399. In awarding such fees, the trial court found that since the parties mutually agreed to prematurely terminate their lease effective October 1, 2009, section 5-12-140(f) of the Ordinance was inapplicable and paragraph 24 B of the lease was enforceable.

¶ 15 Our review of the Ordinance reveals that it contains no provision that inhibits the applicability of any of its provisions if a lease is ended prematurely by mutual agreement of the involved parties. Had the legislature intended to add such a provision, it would have done so. It is not the duty of the judiciary to add provisions and, in fact, the judiciary may not invade the legislative province and extend a statute. *Giuliano v. Board of Trustees of Firemen's Pension*

Fund of City of Elgin, 89 Ill. App. 2d 126, 129 (1967). Thus, the trial court erred in finding that the agreement to terminate the lease early rendered section 5-12-140(f) of the Ordinance inapplicable.

¶ 16 We now turn to the issue of whether paragraph 24 B of the lease violates section 5-12-140(f) of the Ordinance. The record shows that the tenants and the landlord entered into a written lease agreement on March 25, 2009. Paragraph 24 B of the lease provided that "Lessee shall pay to Lessor all Lessor's costs, expenses and attorney's fees in and about the enforcement of the covenants and agreements of this Lease as provided by court rules, statute or ordinance." The tenants contend that this lease provision violates section 5-12-140(f) of the Ordinance, which provides:

> "Except as otherwise specifically provided by this chapter, no rental agreement may provide that the landlord or tenant:
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> * * *
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> (f) agrees that in the event of a lawsuit arising out of the tenancy the tenant will pay the landlord's attorney's fees except as provided for by court rules, statute, or ordinance." Chicago Municipal Code § 5-12-140(f) (amended November 6, 1991).

¶ 17 This court noted in *VG Marina Management Corporation v. Wiener*, 378 Ill. App. 3d 887, 892 (2008), that the plain language of section 5-12-140(f) of the Ordinance is clear: "a rental agreement may not provide that a tenant agrees to pay attorney fees in connection with a lawsuit, unless such attorney fees are provided for by court rules, statute, or ordinance." The

tenants rely on *Willis v. NAICO Real Estate Property and Management Corporation*, 379 Ill. App. 3d 486, 490 (2008), for the proposition that the Ordinance prohibits any lease provision that requires a tenant to pay the landlord's attorney fees in a lawsuit arising out of the tenancy. This reliance is misplaced. In *Willis*, the paragraph of the lease at issue provided: "Tenant shall pay Lessor all Lessor's costs, expenses and attorney's fees *in and about the enforcement of the covenants and agreements of this Lease*." (Emphasis added.) *Id*. at 487.

¶ 18 In *Plambeck*, this court held that a lease provision that required the tenant to pay the landlord's attorney fees "to the extent permissible by Court rules, Court order, state statute or Local Ordinance" did not violate the Ordinance because the lease provision contained conditions that were compatible with the Ordinance. *Plambeck*, 281 Ill. App. 3d at 267. In the case *sub judice*, the plain language of paragraph 24 B of the lease does not violate section 5-12-140(f) of the Ordinance because it provides that the landlord may recover attorney fees incurred in enforcing a lessee's obligations under the lease agreement only *as provided by court rules, statute or ordinance*. However, even though paragraph 24 B of the lease does not violate section 5-12-140(f) of the Ordinance, the party seeking to enforce this provision must cite to an applicable court rule, statute or ordinance that provides for the recovery of the landlord's attorney fees.

¶ 19 The landlord contends that section 5-12-180 of the Ordinance provides for a landlord to be awarded all court costs and reasonable attorney fees, as long as the rights and remedies which the landlord seeks are "made available" in the Ordinance. The tenants contend that section 5-12-180 of the Ordinance is not applicable in this case because the landlord alleged a common law

breach of contract claim and not a claim under the Ordinance. Section 5-12-180 provides:

> "Except in cases of forcible entry and detainer actions, the prevailing plaintiff in any action arising out of a landlord's or tenant's application of the rights or remedies made available in this ordinance shall be entitled to all court costs and reasonable attorney's fees." Chicago Municipal Code § 5-12-180 (amended November 6, 1991).

¶ 20 By its plain language, section 5–12–180 allows attorney fees only in actions "arising out of a [party's] application of the rights or remedies made available in [the Ordinance]." *Id.* In *Willis*, a residential tenant filed an action against a landlord, seeking the return of her security deposit and interest. *Willis*, 379 Ill. App. 3d at 487. The landlord filed a counterclaim for breach of the lease and sought attorney fees. *Id.* The tenant contended that the landlord sued under common law and not under the Ordinance and, therefore, was not entitled to attorney fees. *Id.* at 488. This court held that because the defendant did not cite to or rely on the Ordinance in its counterclaim, but instead relied on provisions of the lease, the counterclaim had nothing to do with " 'the rights or remedies made available in [the Ordinance].' " *Id.* at 490.

¶ 21 Similarly, in *Wiener*, the landlord alleged that it was "entitled to reimbursement of its fees of counsel and costs incurred in this action pursuant to the Lease." *Wiener*, 378 Ill. App. 3d at 889. This court noted that the landlord's complaint merely alleged a breach of the lease agreement and made no reference to the Ordinance. *Id.* at 893. Therefore, we concluded, because the landlord "did not seek a remedy under the [Ordinance], it is not entitled to its attorney fees under section 5-12-180 of the [Ordinance]." *Id.*

¶ 22 In the case *sub judice*, there is no indication in the record that the landlord based its counterclaim on the Ordinance. Specifically, count I of the counterclaim is entitled "Breach of Lease," and paragraph 4 of the counterclaim states that "as a direct and proximate result of the guest's conduct, the porch deck was damaged, *clearly in breach of the aforementioned paragraphs of the Lease*." (Emphasis added.) Thus, the landlord's counterclaim sought to enforce its rights under the lease, rather than rights or remedies made available by the Ordinance. As this court has enunciated, "[a] party must recover, if at all, according to the case he has made for himself by his pleadings. [Citation.] Proof without pleadings is as defective as pleadings without proof. [Citation.]" *American Standard Insurance Co. v. Basbagill*, 333 Ill. App. 3d 11, 15 (2002). Thus, we conclude that the landlord is not entitled to attorney fees under section 5-12-180 of the Ordinance.

¶ 23 The landlord further contends that section 5-12-130(b) of the Ordinance provides it with the s*ame* remedy as is provided in the lease, specifically, the recovery of attorney fees if there is material noncompliance by a tenant with a rental agreement or with section 5-12-040. However, this section is inapplicable to the case at bar. Section 5-12-130(b) of the Ordinance provides as follows:

> "If there is material noncompliance by a tenant with a rental agreement or with Section 5-12-040, the landlord of such tenant's dwelling unit may deliver written notice to the tenant specifying the acts and/or omissions constituting the breach and that the rental agreement will terminate upon a date not less than 10 days after receipt of the notice, unless the breach is remedied by the tenant within that period

> of time. If the breach is not remedied within the 10 day period, the residential rental agreement shall terminate as provided in the notice. The landlord may recover damages and obtain injunctive relief for any material noncompliance by the tenant with the rental agreement or with Section 5-12-040. If the tenant's noncompliance is wilful, the landlord may also recover reasonable attorney's fees." Chicago Municipal Code § 5-12-130(b) (amended November 6, 1991).

¶ 24 The landlord focuses on the last sentence of this provision and contends that it is entitled to attorney fees because the tenant's noncompliance was willful. However, the provision must be considered in its entirety. The record contains no indication that the landlord delivered any notice to the tenants specifying the acts and/or omissions it considered to be a breach of the rental agreement. Furthermore, the record does not indicate, and neither does the trial court's decision, that there was any willful material noncompliance by the tenants. As stated by both parties, it is unfortunate that there is no transcript available from the bench trial. This case centers upon the issue of who was at fault in the damage to the porch and neither the record before us nor the lower court judgment makes that factual determination clear. "Unless there is a stipulation between the parties regarding certain matters, those items cannot be considered by the appellate court, as they are matters outside the record." *People v. Haas*, 100 Ill. App. 3d 1143, 1149 (1981). Thus, because there is no finding of willful noncompliance and no evidence in the record that the landlord gave notice to the tenants of any material noncompliance, the landlord cannot recover attorney fees under section 5-12-130(b). Therefore, in light of the absence of any applicable court rule, statute or ordinance that would allow for the recovery of the landlord's

attorney fees, we conclude that the trial court erred in awarding such fees and entering judgment against the tenants in the amount of $3,399.

¶ 25 The tenants next contend that the trial court committed error when it entered judgment for the landlord on the counterclaim and assessed damages for the porch repairs in the amount of $5,000. The tenants first argue that the damage to the porch was a result of reasonable wear and tear, and the Ordinance does not permit a landlord to deduct repair expenses for reasonable wear and tear from a security deposit. In the alternative, the tenants argue that even if something other than reasonable wear and tear caused the damage to the porch, $5,000 is not a reasonable and necessary amount for replacing a porch railing. Finally, the tenants contend that the landlord did not comply with the requirements imposed by the Ordinance for withholding repair costs from the security deposit.

¶ 26 Section 5-12-080 of the Ordinance provides, in pertinent part:

> "(d) The landlord shall, within 45 days after the date that the tenant vacates the dwelling unit or within 7 days after the date that the tenant provides notice of termination of the rental agreement pursuant to Section 5-12-110(g), return to the tenant the security deposit or any balance thereof and the required interest thereon; provided, however, that the landlord may deduct from such security deposit or interest due thereon for the following:
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> (2) a reasonable amount necessary to repair any damage caused to the premises by the tenant or any person under the tenant's

> control or on the premises with the tenant's consent, reasonable wear and tear excluded. In case of such damage, the landlord shall deliver or mail to the last known address of the tenant within 30 days an itemized statement of the damages allegedly caused to the premises and the estimated or actual cost for repairing or replacing each item on that statement, attaching copies of the paid receipts for the repair or replacement. If estimated cost is given, the landlord shall furnish the tenant with copies of paid receipts or a certification of actual costs of repairs of damage if the work was performed by the landlord's employees within 30 days from the date the statement showing estimated cost was furnished to the tenant." Chicago Municipal Code § 5-12-080(d)(2) (amended November 6, 1991).

¶ 27 As previously noted, it is unfortunate that the record on appeal does not contain a transcript of the lower court proceedings. "The law is well settled that the appellant bears the burden of presenting a sufficiently complete record to support her claim of error, and any doubts arising from the incompleteness of the record will be resolved against her." *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902 (2010). Where the appellant fails to present a complete record, the reviewing court should "indulge in every reasonable presumption favorable to the judgment 'from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App.

3d 80, 84 (1985)).

¶ 28 Moreover, "while legal conclusions are reviewed *de novo*, the trial court's factual and credibility determinations are accorded great deference, and the reviewing court reverses only if the findings are against the manifest weight of the evidence." *People v. Bennett*, 376 Ill. App. 3d 554, 563 (2007). "The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence and [the reviewing court] will not substitute its judgment for that of the trier of fact on these matters." *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005).

¶ 29 There is nothing in the record to indicate a finding by the trial court that the damage to the porch was the result of reasonable wear and tear. Indeed, the language of the trial court's written order implies the opposite, and further support for this conclusion is found in the trial court's judgment in favor of the landlord for the repair costs. Because this court must, in the absence of a complete record, presume that the trial court ruled or acted correctly, and because we must give deference to the trial court's credibility determinations, we conclude that the landlord is entitled to deduct reasonable repair costs for the damage to the porch from the tenants' security deposit.

¶ 30 The tenants argue that because the Ordinance only permits the withholding of *reasonable* repair costs from a security deposit, and because it "defies common sense" to believe that repairs to a wooden porch railing would cost $5,000, the trial court erred in awarding the full $5,000 to the landlord. We note that once again, there is nothing in the record to indicate that any discussion was held at trial regarding the reasonableness of the cost to repair the damaged porch. The trial court's order contains no explicit findings related to the reasonableness of the repair

costs. However, the trial court awarded the full $5,000 as the cost of repairing the porch. "Where the failure of an appellant to include a report of the proceedings deprives a reviewing court of the ability to scrutinize the reasoning behind a lower court's decisions, a reviewing court presumes that the lower court's decisions were in conformity with the law and had sufficient factual basis." *People v. Probst*, 344 Ill. App. 3d 378, 385 (2003). Therefore, we conclude that the $5,000 cost to repair the porch was reasonable.

¶ 31 We now turn to the issue of whether the landlord complied with the necessary requirements imposed by the Ordinance for the withholding of repair costs from a security deposit. The tenants contend that although the landlord sent an estimate of the porch repair costs within the time allotted, it did not send any paid receipts for porch repairs. The landlord contends that it introduced evidence at trial of the letter and itemization sent to the tenants, an invoice in the amount of $5,000 issued by Frackiel Builders, and payments made to Frackiel Builders in the amount of $4,500. The landlord further contends that testimony by Casalino at trial confirmed that the entire $5,000 was paid to Frackiel Builders.

¶ 32 As an initial matter, we note that evidence in the record that Frackiel Builders was ultimately paid a total of $5,000 is irrelevant for the purposes of section 5-12-080(d). Section 5-12-080(d) deals with the timely return of a tenant's security deposit and requires that, in the event that a landlord provides an estimate of repair costs within 30 days of the termination of the lease, paid receipts must be provided within 30 days of the estimate. Chicago Municipal Code § 5-12-080(d)(2) (amended November 6, 1991). A landlord is not entitled to take any length of time to repair damage caused by a tenant and still deduct that money from the tenant's security deposit.

Under section 5-12-080(d), security deposits must be returned within 45 days of the termination of the lease, and a maximum of 60 days is allowed for submitting paid receipts to the tenant for any deductions related to repair costs. Chicago Municipal Code § 5-12-080(d)(2) (amended November 6, 1991).

¶ 33 We note that it is clear from the record that the landlord did not submit paid receipts for the entire $5,000 within 30 days of the date the estimate was sent. The record includes an invoice from Frackiel Builders dated October 28, 2009, showing that repair costs to the porch were $5,000 and stating that $1,250 was already paid as of the date of the invoice. The record further includes copies of two bank statements with copies of the front side of all canceled checks for those particular statement periods. The first statement includes a check made out to Frackiel Builders in the amount of $1,250, dated August 3, 2009. Although the second statement also includes a check made out to Frackiel Builders in the amount of $500, the check is dated April 22, 2010, well outside the 30 day time limit required by the Ordinance. The record contains no further evidence of payments made to Frackiel Builders, and no evidence that any additional paid receipts were sent within 30 days of sending the estimate.

¶ 34 We note that the record is not clear on the issue of whether the paid receipt for $1,250 was, in fact, provided to the tenants. The tenants assert on appeal that it was not, but because no transcript of the proceedings is available and because the trial court's order does not include any reference to paid receipts, this court has no basis for accepting the tenants' assertion. According to the letter sent by the landlord, a copy of the landlord's inventory of the security deposit and an itemization of damages, as well as any paid receipts to date were enclosed with the letter. The

certified mail receipt is evidence that the letter itself was mailed within the time required by section 5-12-080(d). The tenants point to an e-mail included in the record from the landlord's attorney to tenant Ferrell on November 2, 2009. The e-mail states that in response to Ferrell's request, a copy of the security deposit inventory was attached to the e-mail and was also mailed in a separate envelope to the tenants on October 30, 2009, because it was inadvertently left out of the initial envelope. However, this does not support the tenants' assertion that no paid receipts were provided. The e-mail does not mention the paid receipts, so we must presume that the only item that was inadvertently left out of the initial envelope was the inventory, which contained the itemization, and was mailed in a separate envelope on October 30. Therefore, the total amount in paid receipts that were submitted within the time allotted by section 5-12-080(d) for the porch repair was $1,250.

¶ 35 In *Mallah v. Barkauskas*, 130 Ill. App. 3d 815, 818 (1985), this court held that the tenants were entitled to the return in full of their security deposit where, although the landlord timely provided an initial estimate of damages, the landlord failed to provide the substantiating receipts within the allotted time under the applicable ordinance. Thus, under section 5-12-080(d), the landlord is only entitled to withhold $1,250 of the total $5,000 cost of the porch repair from the security deposit. However, this does not end our analysis.

¶ 36 The *Mallah* court explained that where the landlord, even despite his best efforts, was unable to obtain the receipts in time, his remedy was to refund the security deposit and commence an action for damages against the tenants. *Id.* This court recently addressed the issue of whether the landlord was entitled to a setoff of any kind against the security deposit, despite

not satisfying the requirements under the applicable ordinance to deduct repair costs from the security deposit. *Nadhir v. Salomon*, 2011 IL App (1st) 110851, ¶ 36. In *Nadhir*, the tenants filed a small-claims complaint against the landlord, alleging a violation of the relevant ordinance for failure to deliver written notice of the amount of damages or refund the security deposit. *Id.* ¶ 11. At trial, the landlord proved that damages to the property exceeded the amount of the security deposit and the trial court entered judgment in favor of the landlord for the difference. *Id.* ¶ 12. The *Nadhir* court determined that the landlord was not entitled to any setoff against the amount it owed on the security deposit because it merely raised an affirmative defense and failed to assert a counterclaim against the tenants. *Id.* ¶ 37. The court further noted that the landlord could have filed a counterclaim and sought not only a setoff but also affirmative relief for the damage to the property. *Id.* ¶ 40. Therefore, the landlord in *Nadhir* was not only liable to the tenants for failing to return the security deposit but was also not entitled to any setoff for the damage the tenants caused to the property. *Id.* ¶ 41.

¶ 37 However, in the case *sub judice*, the landlord asserted a common law counterclaim and the trial court determined that the landlord prevailed on the counterclaim. Thus, despite the landlord's failure to comply with the requirements of section 5-12-080(d), it is still entitled to offset a judgment in its favor on the counterclaim against any remaining amount owed on the tenants' security deposit, and also to recover any additional amount for damage to the property. The trial court heard the evidence related to the damage done to the porch, determined that the landlord was credible and the tenants were not credible, and entered judgment in the landlord's favor for the full amount of the counterclaim. Thus, the landlord is entitled to a setoff against

any amount still owed on the security deposit, and is also entitled to recover the additional amount as damages.

¶ 38 The final item from the security deposit inventory that the tenants contest is the charge for $400 in rent shortage for August and September. The tenants contend that they were entitled to withhold $400 in rent payments because the landlord's failure to repair the porch in a timely manner deprived them of the use of the porch and the stairway leading to the backyard. Section 5-12-070 of the Ordinance provides: "The landlord shall maintain the premises in compliance with all applicable provisions of the municipal code and shall promptly make any and all repairs necessary to fulfill this obligation." Chicago Municipal Code § 5-12-070 (amended November 6, 1991).

¶ 39 Furthermore, section 5-12-110(d) provides:

> "If there is material noncompliance by the landlord with the rental agreement or with Section 5-12-070, the tenant may notify the landlord in writing of the tenant's intention to withhold from the monthly rent an amount which reasonably reflects the reduced value of the premises due to the material noncompliance. If the landlord fails to correct the condition within 14 days after being notified by the tenant in writing, the tenant may, during the time such failure continues, deduct from the rent the stated amount. A tenant shall not withhold rent under this subsection if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of the tenant's family, or other person on the premises with the tenant's consent." Chicago Municipal Code § 5-12-110(d)

(amended November 6, 1991).

¶ 40 On June 15, 2009, the City of Chicago posted a sign on the premises that stated that the porch was "Dangerous & Hazardous" and should not be used. A letter dated August 1, 2009, written by one of the tenants to the landlord, informed the landlord of the tenants' intention to reduce their monthly rental payments by $200 due to the damage to the porch and the consequences of that damage, *e.g.*, their inability to use the backdoor exit and access to the backyard from the apartment. The tenants also stated that they would resume paying the original monthly rent of $1,300 once the porch had been repaired.

¶ 41 Under section 5-12-110(d) of the Ordinance, it is clear that a tenant may not invoke the benefits the ordinance provides under this subsection if the condition that is complained of was caused by the deliberate or negligent act of a person who was on the premises with the tenant's consent. Chicago Municipal Code § 5-12-110(d) (amended November 6, 1991). However, whether there has been a breach by the landlord in this case or whether the tenants were at fault for the condition of the porch are questions of fact to be determined by the trial court. The trial court found that the tenants failed to prove that the landlord was materially non-compliant with the provisions set forth in section 5-12-070 of the Ordinance. The trial court also determined that the tenant's testimony was not credible and that the landlord did not fail to repair or maintain the porch in a normal and reasonable manner and in a safe condition. "The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence; and the [reviewing court] will not substitute its judgment for that of the trier of fact on these matters." *Slinkard*, 362 Ill. App. 3d at

857. Because the reasonableness of the amount withheld from the regular rent payments as well as the decision to withhold a certain amount in rent payments are premised on factual allegations that a trial court must resolve, this court cannot substitute its view for the findings of the trial court. Therefore, we conclude that the trial court did not err in awarding the $400 rent shortage to the landlord.

¶ 42 Although the record is not clear how much of the counterclaim award is an offset against what the landlord owed on the security deposit for its failure to comply with section 5-10-080(d), the trial court awarded the full amount of the counterclaim, which includes all of the items contested on appeal as well as other items included on the landlord's security deposit inventory. Because we have determined that the landlord is entitled to a setoff against whatever is owed on the security deposit and affirmative relief for the remaining damages, we affirm the trial court's judgment of $3,653 against the tenants on the landlord's counterclaim.

¶ 43 As a final matter, we must consider whether the tenants are entitled to damages under the Ordinance on the basis that paragraph 24 B of the lease violates the Ordinance. Section 5-12-140 provides in pertinent part:

> "Except as otherwise specifically provided by this chapter, no rental agreement may provide that the landlord or tenant:
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> * * *
>
> (f) agrees that in the event of a lawsuit arising out of the tenancy the tenant will pay the landlord’s attorney’s fees except as provided for by court rules, statutes, or ordinance.

***

> The tenant may recover actual damages sustained by the tenant because of the enforcement of a prohibited provision. If the landlord attempts to enforce a provision in a rental agreement prohibited by this section the tenant may recover two months rent." Chicago Municipal Code § 5-12-140 (amended November 6, 1991).

¶ 44 As previously stated, the plain language of paragraph 24 B of the lease in the case before us does not violate section 5-12-140(f) of the Ordinance because it provides that the landlord may recover attorney fees incurred in enforcing lessee's obligations under the lease agreement only *as provided by court rules, statute or ordinance*. As this court has noted, the plain language of section 5-12-140(f) of the Ordinance is clear: "a rental agreement may not provide that a tenant agrees to pay attorney fees in connection with a lawsuit, unless such attorney fees are provided for by court rules, statute, or ordinance." *Wiener*, 378 Ill. App. 3d at 892. Because the clear language of section 24 B of the lease does not conflict with the plain language of section 5-12-140(f) of the Ordinance, we conclude that the tenants are not entitled to recover damages under section 5-12-140 of the Ordinance.

¶ 45 For the reasons stated, we reverse the trial court's award of $3,399 in attorney fees and costs and affirm the trial court's judgment of $3,653 against the tenants on the landlord's counterclaim.

¶ 46 Affirmed in part and reversed in part.