

2012 IL App (1st) 113145-U

FIRST DIVISION  
September 24, 2012

No. 1-11-3145

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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TUDOR GABLES BUILDING CORPORATION,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 11 M1 715446
ANTOINETTE WELLS,	)	
	)	The Honorable
Defendant-Appellant.	)	George F. Scully, Jr.,
	)	Judge Presiding.
	)	
	)	

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JUSTICE KARNEZIS delivered the judgment of the court.  
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Circuit court did not abuse its discretion in denying post-trial motion for modification of the judgment or a new trial where defendant, who appeared *pro se* at trial, failed to present her defense of breach of an implied warranty of habitability at trial and was free to present it in a separate action because she claimed that there was a recurrent or continuing wrong, which would avoid the bar of *res judicata*.

¶ 2 This appeal arises from a forcible entry and detainer action brought in the circuit court of Cook County by plaintiff Tudor Gables Building Corporation against defendant Antoinette Wells for possession of her unit in a cooperative building located at 4840 South Drexel Boulevard in Chicago, and for \$9,102.80 in unpaid assessments, plus costs. Defendant alleged that she had withheld payment of the assessments pursuant to the advice of a judge in a prior lawsuit because plaintiff had not repaired water damage to her unit. Following a bench trial at which defendant appeared *pro se*, an order for possession of her unit was entered in favor of plaintiff, as well as \$9,102.80 in unpaid assessments. The circuit court indicated that defendant was free to file a new action to assert her claim of breach of a warranty of habitability. The order stated that there was no just reason to delay enforcement pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 3 On appeal, defendant contends that the circuit court erred in denying her post-trial motion for modification of the judgment or a new trial. Defendant argues that the circuit court disregarded prior litigation between the parties that could preclude her from asserting her claim for breach of a warranty of habitability in a new action.

¶ 4 The record discloses that defendant purchased her unit in August 2002. During the

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ensuing years, water infiltrated through the roof and damaged her unit. The water infiltration worsened over the years. Defendant alleged in a counterclaim which she filed in a prior forcible entry and detainer action (08 M1 706230), that when it rained or snowed, water dripped through the walls, her bedroom closet ceiling blistered, mold and puckered areas developed in the bathroom, and the electrical outlets along the windows did not work because of the water infiltration. There is no dispute that plaintiff was responsible for damage due to leaks in the roof of the building. The prior forcible entry and detainer action (08 M1 706230) was dismissed for want of prosecution for the third time on December 15, 2009. In that action, defendant had asserted a counterclaim for breach of a warranty of habitability, which was later treated as an affirmative defense, and for retaliatory eviction. Additionally, a City of Chicago administrative complaint to stop and fix the leak, and a pending housing court case (10 M1 401174) in which contempt proceedings were contemplated or pending against plaintiff, both referred to defendant's unit.

¶ 5 A citation reflected that in defendant's unit, the entire ceiling was cracked throughout, and there were vertical cracks in the bathroom and in the dining room walls. An engineer's preliminary report dated April 20, 2011, noted "moisture penetration" and deterioration of a gabled brick masonry wall, "ponding water" on the "roofing system," and "living room ceiling disrepair," and recommended replacement of part of the roofing system "with proper drainage to ensure watertight conditions," and repair of the ceiling. A work proposal dated August 3, 2010, was for \$184,000.

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¶ 6 The circuit court filed a report of proceedings on January 9, 2012, after having reviewed the parties' proposed alternative reports. The court's report described the proceedings for several dates, and reflected as follows.

¶ 7 On August 19, 2011, the original return date, plaintiff's attorney and defendant appeared in court. No testimony was taken and no rulings were made. The court confirmed that it had jurisdiction over defendant and then set the cause for trial on September 2, 2011.

¶ 8 On September 2, 2011, no testimony was taken, no rulings were made, and no documents were reviewed. Plaintiff's attorney appeared in court with Deanna Hicks, the property manager of the building. Defendant also appeared in court. The court asked what the disputed issues were. Defendant admitted that she had not paid her assessments to the cooperative from December 2007 through July 2009. Defendant stated that there were issues concerning the condition of her unit and that there had been a previous lawsuit between the parties in which she had filed a counterclaim. Defendant described damages to the unit and said that she had pictures of unrepaired damage to show to the court. Defendant stated that the judge in the previous case had told her not to pay any rent until the roof was fixed. The court then had its clerk look up the previous case, using the court's computer, which indicated that an action entitled *Tudor Gables v. Wells*, 2008 M1 706230, had been pending before the late Judge Sheldon Garber. The court in the present case took judicial notice that the case had been filed, and that the case and defendant's counterclaim had been dismissed for want of prosecution on December 15, 2009. The court asked defendant if she had any documents to support her claim that Judge Garber had advised her

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not to pay rent until the roof was fixed. At that time, defendant did not have documents, but she said that she had an attorney in the previous action. The court told defendant that if she wanted an attorney, she needed to retain one before the next court date, that she had the burden of proof as to any affirmative defense or counterclaim, and that if plaintiff proved an amount of damages for unpaid assessments that exceeded the proof of damages on a counterclaim, plaintiff might be entitled to an order of possession. The case was set for trial on September 16, 2011. The court had the parties agree on a date and time that plaintiff could inspect defendant's unit and take photographs.

¶ 9 On September 16, 2011, a bench trial was held. First, the court inquired if the parties were ready for trial and they responded affirmatively. Deanna Hicks testified on behalf of plaintiff that she was the manager of the cooperative and that defendant occupied her unit pursuant to an occupancy agreement that the parties had executed. Plaintiff marked a copy of the ledger for defendant as Exhibit 1. Hicks was familiar with the ledger, which was kept in the ordinary course of business. Defendant's assessments were \$443.89 per month from December 2007 through April 2008, but defendant did not pay any money to plaintiff during those five months. In May 2008, defendant's assessments increased to \$458.89, and she did not tender any money to the cooperative during the 15-month period from May 2008 through July 2009. On May 26, 2011, Hicks served a notice of termination to defendant for the unpaid assessments of \$11, 213.38. A copy of the notice was marked as Exhibit 2. After late fees were removed, defendant owed a total of \$9,102.80 in unpaid arrearages. The court offered defendant the

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opportunity to cross-examine Hicks, and defendant declined.

¶ 10 Plaintiff introduced Exhibits 1 and 2 into evidence, and rested its case. The court then asked defendant if she wanted to present any evidence or make any statements to the court. She declined. The court took a recess and suggested to defendant that she formulate her presentation and argument. The trial resumed after a brief recess. The court asked defendant if she wished to present anything to the court. Defendant asked the court to consider documents and pictures that had been shown to the court, and her statements to the court, at prior hearings. The court responded that it had made no record of such information and that information from prior hearings would not be considered. The court informed defendant that only evidence, testimony, and arguments presented at trial would be considered, and the court reminded her that she had not presented anything at trial. Defendant had nothing to present. The court asked defendant if she was sure. Defendant confirmed that she did not wish to present any testimony or exhibits, and she stated, "I just want it to be over." The trial then concluded.

¶ 11 The circuit court determined that plaintiff had proved a *prima facie* case and that its claims were not controverted. The court entered judgment in favor of plaintiff and entered an order for possession and a money judgment against defendant in the amount of \$9,102.80, and costs, and stayed enforcement to December 31, 2011. The stay of the order was so extended that the court conditioned it on defendant's payment of her use and occupancy/assessments in the amount of \$458.89 per month. The court said that if defendant failed to make a payment, that on plaintiff's motion, the court would consider accelerating the stay date.

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¶ 12 On October 5, 2011, defendant and attorneys for the parties appeared in court in connection with a motion for modification or new trial pursuant to section 2-1203 of the Code of Civil Procedure that counsel had filed for defendant on September 26, 2011. Defendant's attorney argued that defendant had defenses to plaintiff's claims and that in 2008, she had had a previous case with the cooperative in which she alleged that there were defects in her unit. Defendant's attorney argued that she was entitled to her day in court to present evidence concerning the implied warranty of habitability.

¶ 13 Plaintiff's attorney responded that defendant's motion was improper because its attached documents referred to matters that had not been asserted during the trial. Plaintiff's attorney also argued that the court had given ample time to defendant to retain counsel and/or to present a defense, and that defendant already had had her day in court and had been given an opportunity to present a defense.

¶ 14 The court stated that it distinctly remembered asking defendant four times whether she wished to assert a defense, and that she declined each time. The court then denied the section 2-1203 motion, but held that defendant was free to file a separate action for breach of the implied warranty of habitability. The court stated that it certified the report of proceedings.

¶ 15 Our review of the post-trial motion and defendant's supporting affidavit discloses that defendant made the following post-trial allegations. During a July 23, 2009, pretrial conference in the prior forcible entry and detainer case, Judge Garber ordered her to begin paying use and occupancy without prejudice, and for consideration ordered plaintiff's board president Jerald

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Deron, who was present, to have the roof repaired, which was never done. In the present case, on September 3, 2011, the circuit court checked the 2008 cases on the computer and suggested that plaintiff's attorney get the transcript and speak with defendant's attorney in the 2008 case, but plaintiff's attorney did not do so. Around December 2010, an unlicensed general contractor performed "very shoddy work on the roof." After a February 2, 2011, snowstorm, water poured in "like Niagara Falls" because the contractor had left open spaces on the roof. At a May 2011 shareholders meeting, they were told that the roof work cost around \$180,000. Not all of the money had been paid because the contractor had disappeared without having completed the work. Water continued to infiltrate into defendant's ceiling. On September 16, 2011, defendant told the circuit court that the \$11,100 amount was incorrect, but defendant agreed with the circuit court that she had not paid her "proprietary rent" from December 2007 until August 2011. The circuit court never ordered defendant to retain an attorney. The roof remains unrepaired. Defendant has an affirmative defense for breach of an implied warranty of habitability in the nature of a set-off against her "proprietary monthly rent." The court instructed plaintiff's attorney to investigate the set-off for breach of an implied warranty of habitability, but he failed to do so. Defendant requested a rehearing "or else" to vacate the order of possession and judgment for rent, and a new trial. It was not fair for plaintiff to claim to be entitled to the full market rent while contempt proceedings were pending against plaintiff in housing court for failure to make the court-ordered repairs.

¶ 16 On October 5, 2011, the circuit court denied defendant's motion for modification or a new

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trial, refused to stay the eviction, and stated that no further stays would be allowed. The order provided further that "defendant may file a separate action for breach of implied warranty of habitability."

¶ 17 On December 30, 2011, the circuit court entered an order stating in part that defendant did not have to pay any further use and occupancy to plaintiff pursuant to the September 16, 2011, judgment.

¶ 18 On appeal, defendant contends that, during her post-trial motion for modification of the judgment or for a new trial, the circuit court should have taken into account the other, prior lawsuits involving the same parties and facts. Defendant argues that the circuit court should have allowed her to file a counterclaim in the present action instead of telling her to file a separate lawsuit because *res judicata* may have barred a separate lawsuit.

¶ 19 Plaintiff responds that the circuit court took judicial notice of the other lawsuits, that defendant's evidence was not newly discovered, and that defendant chose not to present a defense even though the circuit court repeatedly gave her the opportunity to do so. Plaintiff maintains that *res judicata* would not apply to a separate action because the court reserved defendant's right to bring the action.

¶ 20 Defendant replies that the circuit court erroneously disregarded the prior lawsuits between the parties, that *res judicata* would preclude a separate action because the court refused to hear evidence regarding her potential counterclaims and did not reserve her right to bring the action, and that plaintiff's attorneys did not comply with the court's instruction to "pull the transcript" of

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the prior litigation between the parties. Defendant maintains that the court recognized that she might have a meritorious cause of action based on the same property and the same contract, and should have granted relief.

¶ 21 A motion pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/1203 (West 2010)) invokes the sound discretion of the circuit court. *Regas v. Associated Radiologists, Ltd.*, 230 Ill. App. 3d 959, 967 (1992).

¶ 22 We find no basis to disturb the judgment of the circuit court. We are not unsympathetic to defendant's ongoing problems with water infiltration and mold. However, defendant was given time to retain counsel to represent her at trial. She had done so in the prior forcible entry and detainer case. She chose not to do so in this case and she completely failed to assert a defense at trial. She now has been given the option of filing a new action to try to litigate the issue of the implied warranty of habitability. The new action should not be barred by *res judicata* because the breach of warranty of habitability allegedly involves "a continuing or recurrent wrong." See *Law Offices of Nye & Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 16 (quoting other citations). We cannot say that the circuit court abused its discretion in denying defendant's motion for modification of the judgment or a new trial. We have considered, and rejected, defendant's arguments on appeal.

¶ 23 Therefore, we affirm the judgment of the circuit court.

¶ 24 Affirmed.