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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 1, 2022

495 KINGS STABLE, LLC v. KIMBERLY PATE

Appeal from the Circuit Court for Shelby County
Nos. CT-005776-18, CT-005777-18 Jerry Stokes, Judge

No. W2021-00742-COA-R3-CV

This appeal concerns a dispute between a landlord and a tenant. 495 Kings Stable, LLC (“Plaintiff”), through its owner, filed a forcible entry and detainer warrant against Kimberly Pate (“Defendant”) in the General Sessions Court for Shelby County. Plaintiff prevailed, and Defendant appealed to the Circuit Court for Shelby County (“the Trial Court”). After a trial, the Trial Court ruled in Plaintiff’s favor, awarding it damages and attorney’s fees. Defendant appeals arguing, among other things, that she was constructively evicted because of conditions such as a raccoon in the house. Plaintiff raises separate issues. We affirm the Trial Court’s determinations that Defendant was not constructively evicted and that she breached the lease by failing to pay rent as required. Defendant did not afford Plaintiff a reasonable opportunity to cure the alleged problems. However, we find that the Trial Court erred in declining to award Plaintiff damages for the remaining months of the lease. We vacate the Trial Court’s award of damages and remand for the Trial Court to award Plaintiff additional damages for the remaining months of the lease. In addition, although Plaintiff is entitled to an award of attorney’s fees under the lease, the Trial Court erred by failing to apply the factors used for determining the reasonableness of attorney’s fees found at Tenn. Sup. Ct. R. 8, RPC 1.5. We vacate the Trial Court’s award of attorney’s fees to Plaintiff and remand for the Trial Court to award Plaintiff reasonable attorney’s fees—including reasonable post-trial and appellate attorney’s fees—applying the Tenn. Sup. Ct. R. 8, RPC 1.5 factors.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed, in Part and Vacated, in Part; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which ANDY D. BENNETT and KENNY W. ARMSTRONG, JJ., joined.

Theresa H. Patterson, Memphis, Tennessee, for the appellant, Kimberly Pate.

Preston Wilson, Memphis, Tennessee, for the appellee, 495 Kings Stable, LLC.

OPINION

Background

In February 2017, Plaintiff, through its owner, filed a forcible entry and detainer warrant against Defendant in the General Sessions Court for Shelby County. In turn, Defendant filed a civil warrant against Plaintiff for breach of the lease.¹ In December 2018, the General Sessions Court ruled for Plaintiff. Defendant appealed to the Trial Court. Plaintiff's claim and Defendant's counterclaim were consolidated.

This matter was tried in October 2020. We review the pertinent testimony from trial. First to testify was Plaintiff's manager and owner, Keith Novick ("Novick"). In 2006, Novick built the residence at issue ("the Property"), which is located at 495 Kings Stable Lane in Eads, Tennessee. He and his family lived there for a number of years before moving to Colorado. When Novick moved to Colorado, he leased the Property. In 2016, Defendant hired real estate agent Judy McLellan ("McLellan") to find a residence for her in Shelby County. Defendant is a recording artist who travels for her work. McLellan negotiated an agreement for Defendant to lease the Property from Plaintiff. The lease ran from December 5, 2016 through August 30, 2017, with rent at \$10,000 per month. The Property contains approximately 12,500 square feet of space and has seven bedrooms. The security deposit was \$30,000. The lease stated that the tenant inspected the premises and acknowledged it was in clean, fit and habitable condition. Novick testified to those being the conditions of the premises, as well. A special stipulation between the parties was that there would be "lighting control" on the foyer, kitchen, and rear door, which would be reprogrammed for that purpose. However, Novick acknowledged that nobody reprogrammed the switches until Defendant moved out. With respect to utilities, Novick stated that the lease required Defendant to pay them, but the utilities never were put in Defendant's name. Novick ended up having to pay for the utilities. Novick described how he first came to learn of Defendant's complaints:

Q. All right. Mr. Novick, what was the first notice you had of any complaints from Ms. Pate?

A. The -- only correspondence -- the only communication I had from Ms. Pate after we signed the lease in December [2016] was I received two -- I believe two e-mails from her. One was asking for my phone number in case they had any questions, and the other was wishing me a Merry Christmas, I believe. I didn't hear from them other than that. I didn't hear from them until -- actually, I never received a notice directly from the tenant.

¹ Defendant points out that this civil warrant is not contained in the record. However, both parties agree, and other parts of the record reflect, that Defendant filed a counterclaim against Plaintiff.

Towards the end of January, about two months after we signed the lease, I received a copy of an e-mail that she had sent to a New York attorney, and it was a very long e-mail. It basically said there are issues with the house and I want to cancel the lease.

Q. And was -- was that her attorney, the New York attorney, to your knowledge?

A. Well, she sent -- she sent the email to her attorney in New York, and I believe a copy, went to Ms. McLellan, her agent, and Judy McLellan forwarded a copy of that to me.

Q. All right.

A. And when I saw the e-mail, it made -- it had references to a couple of items that she was concerned about, and it was frankly alarming to me because she made it sound as if there were, you know, she said that there was brown water, that there were raccoons in the house, and I don't recall what else.

But those seem to be the two major items, and it was alarming to me because I felt, you know, that I needed to check this out for two reasons; number one, to determine whether this problem existed, and if so, I wanted to fix it.

Novick contacted a general contractor, Mark Bells ("Bells"), to investigate the alleged problems. Bells went to the Property "fairly quickly," "probably that day." Asked what other measures he took, Novick stated:

Well, the two problems that she raised in this e-mail that were significant involved -- said that there were raccoons in the house and that the light wouldn't cut off in the hearth room, which we knew about, and we just weren't able to get anyone in there to fix it at her convenience.

She said that the shower in the master bedroom didn't work, and that was a -- it's a digital control that you just had to push a button to turn it on. I guess she just wasn't familiar with how to work it. The -- she mentioned the -- she said that the water comes out brown, and so I sent Mark by to investigate these three or four issues, and he reported back to me, and we were not able to find any raccoons in the house, the water was not brown according to the inspection.

The heat system that she was talking about, there was a light that indicated that the filter needed to be changed and that was already done but the contractor just didn't hit the reset button on that light.

[A]fter I heard from the report that there wasn't any brown water in the house and there were no raccoons in the house, I was concerned because I tend to believe, you know, I assumed that she was telling the truth.

So I contacted my plumber, Terhune Plumbing, and I said, can you go by? Here is the tenant's phone number. Set up a time to go by and go through this house, make sure it -- see if there is a problem. If there is let me know if it's something I need to address or can address.

[T]here's a company called Critter Control, and I had used them previously. When I was living in the home, we had birds that had nested in one of the chimneys. And they were chirping and keeping us up at night, so we were concerned about how do we get rid of these birds, or how do we prevent them from coming back. And so this is the company that I used back then.

I contacted Critter Control, explained that I was told that there were raccoons in the house, and could they please go by immediately and verify whether this condition existed, and if so, you know, what we needed to do to fix it.

Novick said that he first became aware of Defendant's complaints on January 30, 2017. On February 1, Defendant sent Novick an email stating that all she wanted was her money and that there was nothing else to discuss. That first week of February, it was "obvious" to Novick that Defendant was not going to pay rent or allow anybody to enter the house. Thus, Novick sent Defendant a notice of default. Novick also noted that Defendant had kept a pet in the house, which was prohibited by the lease. Defendant left the Property in March. Meanwhile, Novick received word that the Property had been vandalized. He stated: "There was pink paint that was just randomly applied to several rooms with rollers." Regarding Defendant's claims of brown water, Novick said that the water was "crystal clear." As for the paint, Defendant sent Novick a taunting email saying that her favorite color was hot pink.

William A. McAllister, a plumber engaged by Plaintiff, took the stand at this point. He stated, as relevant:

Q. And did you inspect the house?

A. I looked at everything plumbing-wise in the house.

Q. All right. Tell the Court what you did.

A. I just went around to every toilet, every lavatory, every tub, you know, every sink in there, turned them on, made sure they wasn't leaking. Everything worked properly.

Q. All right. Describe the water that you saw coming out of the various outlets.

A. Clear water.

Q. All right. And no indication of anything amiss?

A. No, sir.

Novick then resumed his testimony. Novick said that it took several weeks, perhaps a month, to repair and repaint the damage done to the Property. Novick said that he leased the Property again in October or November. He said that he made diligent efforts to release the Property. On cross-examination, Novick stated that he no longer owned the Property and that it had been foreclosed upon. Asked about waiting to reprogram the lighting controls until after Defendant moved out, Novick said that it never was convenient for Defendant to meet a contractor at the Property. Novick said that the one exception was when Bells was allowed to go over right after Novick received the email informing him about Defendant's issues. Otherwise, she would not let anyone in.

Defendant testified next. Defendant stated that when she spent her first night at the Property, the lights would not go out. She also said that, beginning at some point in her stay, she could hear scratching noises from above her head. Defendant reported these things to her lawyers. She added that the downstairs shower did not work and that otherwise the water was brown. Asked what opportunities she gave Novick to fix the alleged problems, Defendant testified:

Q. All right. And that the point, ma'am, tell the Court what opportunities you made for Mr. Novick to try to inspect and repair those problems?

A. What I did was I got the house inspected myself which you'll later see. I got the home inspected myself. We made contact with him through e-mail. I also had my fiancée to the house. I also had my mother-in-law to the house, and no one showed up at that time. So like three times no one showed up, and he said that they were on their way to come. Then when he would try after we got tired of that, I'm on the road, no, you're not going to enter into my home when no one is in the home. So he had proper time, just might not have been his time but he had proper time to get in the home and we did let him in.

Q. All right. And did you eventually decide that you no longer wanted to live there and that you wanted to terminate the lease?

A. After the raccoon it was over, after the brown water, I work too hard for my money. I'm not paying \$10,000.00. I've rented homes for \$10,000.00 before in LA, and I never had to deal with brown water, brown water. I never had to deal with not being able cut off my living room light. I never lived with animals.

Q. Yes, ma'am. Did you actually see any animals on the premises?

A. Yeah, I saw a raccoon at the top of the stairs and he going to tell me -- he going to tell me that it's not there.

Q. This was inside of the home, ma'am?

A. This is in the home with the dogs.

Q. Yes, ma'am. Now, your lease says you weren't supposed to have any dogs in the home; are you aware of that?

A. He knew I had dogs. I don't know why, but he knew from the beginning when I moved in. I've never hid that I had dogs from anybody when I lease.

Defendant testified that she only lived at the Property sporadically for around ten days total. She said that she was frustrated that she could not take a bath, and that the water from the sink in the master bedroom's bathroom was brown. Defendant also asserted that Novick sent a drunk friend of his to the Property to try to deal with the problems.

On cross-examination, Defendant agreed that as soon as she saw a problem, she was going to cancel the lease. She stated: "Yeah, I was ready to go. I called him to fix it though. I did attempt several times, and he told me there was no raccoons and there was no brown water, and that's completely not the truth, and we will prove it." Defendant stated that Novick was a liar and that the Property is "a trash house that he can't get off his hands so he's trying to place it on me." Asked about the incident with the paint, Defendant said that she did not recall how many people were present for that. Referring to the paint, Defendant said: "It wasn't splatter, it was art."

Dr. Kaston Sims ("Sims"), Defendant's fiancé, testified. Sims testified to a photograph he took which he contended showed brown, or yellowish-brown, water. Sims testified that he asked Terminix to come out to the Property. Sims said that he heard noises "like something was banging into the walls or running into the ceiling like pretty heavily." However, Sims had not seen a raccoon in the house himself; he said that he heard Defendant scream and say that she had seen a raccoon. On cross-examination, Sims said that he could not recall how many people attended the event at which paint was put on the walls. Asked if he had applied any paint to the walls himself, Sims said: "I do not believe I did."

Kim Sims, Sims' mother, testified as well. She stated that she went out to wait for people sent to service the Property on at least three occasions, but no one showed up. Kim Sims also testified to having seen brown water. However, she did not see any rodents in the house.

In November 2020, the Trial Court entered an order ruling in favor of Plaintiff. The Trial Court stated, as relevant:

A Tennessee lease agreement involving a residence is governed by the lease agreement of the parties[.] The lease will determine the rights and responsibilities to the parties to the extent that the lease does not violate the Tennessee Residential Landlord and Tenant Act. (TRLLTA) [T.C.A.] § 66-28-102, *et seq*[.] The parties are bound by their agreement.

On February 3, 2017, 495 King Stable, LLC sent a written notice to Ms[.] Pate declaring default as a result of Ms. Pate's failure to pay rent for the month of February 2017. Paragraph 15 of the lease agreement states in bold letter the following[:] "Written Notice of Failure to Pay Rent is hereby waived by Tenant[.]"

Ms[.] Pate's claim of constructive eviction is predicated on the presence and sound of a raccoon in the premises, brown water coming from the faucet in the master bedroom, a foul smell in one of the rooms, and the failure to fix an electrical problem in the foyer and kitchen. Under the TRLLTA, a landlord's failure to provide essential services can constitute the constructive eviction of a tenant[.] The Act defines "essential services" as utilities, gas and electricity and ["]any other obligations imposed [upon] the landlord which materially affect the health and safety of the tenant." T.C.A. 66-28-502(a)(3)[.]

Further, Paragraph 4 of the lease states

"Upon receipt of written notice from Tenant, landlord shall, within a reasonable period of time thereafter, repair all defects in the faculty and system that are the responsibility of landlord to maintain the premises in good working order and repair."

In this case, the presence of a raccoon, brown water in one room, an inoperable programmable lighting system in the foyer and kitchen were conditions and events that were subject to remediation by Mr. Novick within a reasonable period of time. Mr. Novick attempted to address Ms. Pate's written complaints within a 48 hour period of receipt of the same[.] The Court rules that Ms. Pate's list of complaints do not constitute essential services under the lease or the TRLLTA. Further, Ms. Pate did not afford 495 Kings Stable, LLC an opportunity to make the necessary repairs and to remediate the defective conditions.

With regard to Ms. Pate's breach of the lease, the Court finds by a preponderance of the credible evidence that Ms[.] Pate committed the initial breach of the lease agreement by failing to pay rent for February, 2017[.] After Ms[.] [Pate] vacated the residence in March, 2017, it took 495 Kings Stable, LLC over one month to clean up and make all necessary repairs at the residence. As a result, 495 Kings Stable, LLC is entitled to the following damages stemming from Ms[.] Pate's initial breach of the lease:

Rent from February, March, April, 2017	\$30,000.00
Late Payments 850.00 x 4 =	\$3,400.00
Utilities for December 2016 to April 2017	\$3,103.64
Carpet replacement in closet:	\$849[.]00
Cleaning fees:	\$2,850[.]00
Mark Rourke (clean up).	\$1,100.00
Change locks	\$1,500[.]00
Painting labor:	\$7,719[.]00
Attorney fees: Preston Wilson:	\$19,950[.]00
Attorney fees: Craig Beard:	\$20,422.00
Total	\$90,893[.]64

Although 495 Kings Stable, LLC has not produced or introduced receipts or cancelled checks of payment for the repairs and expenses, this Court does find that 495 Kings Stable, LLC has proven by a preponderance of credible evidence that it suffered damages and losses to this property as a direct consequence of Ms. Pate's breach of the lease[.] As a result, 495 Kings Stable, LLC is hereby granted a judgment in the amount of \$90,893.64, minus the \$30,000.00 deposit which Ms[.] Pate paid to 495 Kings Stable, LLC, for a net judgment of \$60,893.64.

Ms. Pate's complaint for breach of lease based upon failure to provide a habitable residence and constructive eviction is hereby denied and dismissed for failure to prove the same by a preponderance of the evidence.

Both parties filed motions to alter or amend the Trial Court's judgment. Plaintiff asked for additional rent damages and attorney's fees. For her part, Defendant argued that the Trial Court awarded more monthly late fees than the actual number of months that the Trial Court had found her to be in breach of the lease. She also reiterated her constructive eviction argument. A hearing was held on the parties' motions. Plaintiff filed an affidavit and supporting exhibits for its attorney's fees request. In May 2021, the Trial Court entered an order granting Defendant's motion to alter or amend in part, finding that because of a mathematical error in calculating late fees, it would reduce the judgment by \$850. Otherwise, the parties' respective motions to alter or amend were denied. The Trial Court stated, in relevant part:

It appears that Kings Stable is contending that there has been an error in fact by this Court as to the number of months that it alleged that Pate failed to pay rent (six months) versus the number of months the Court found Pate was obligated to pay Kings Stable (three)[.] Further, Kings Stable contends that pursuant to the lease agreement between the parties, additional attorney

fees should have been awarded to Kings Stable for past and present attorney fees beyond that which was presented at the trial[.] Kings Stable now presents its motion to alter or amend requesting and presenting evidence of its attorney fees, even though such opportunity was afforded it at the trial of this matter.

At the hearing of the Motion to Alter or Amend Judgment, which was held months later, Kings Stable's attorney made a request for attorney fees incurred during trial[.] Such request did not comply with Rule 8 of the Tennessee Supreme Court Rule and 1.5 of the Rules of Professional Conduct, nor with Rule 20 of the Shelby County Tennessee Local Rules which requires an affidavit as to the reasonableness of the attorney fees being requested[.] At trial, Kings Stable provided neither testimony nor affidavits as to the reasonableness of attorney fees it paid in this litigation. After the hearing on the Motion to Alter or Amend, and while the matter was taken under advisement, Kings Stable filed an affidavit which appears to comply with Tenn[.] Sup.Ct. Rule 8 and 1.5 of the Rules of Professional Conduct.

A motion to alter or amend is not designed to provide parties a second opportunity to present evidence that could have been and should have been present[ed] at trial[.] Also, a motion to alter or amend does not give parties a second opportunity to make the same arguments given at the end of the trial on the merits.

The Court heard, considered and weighed the evidence at trial as to the amount of rent owed by the tenant, as well as the issue of all attorney fees being sought[.] The issue of rent was decided and resolved. As to the issue of attorney fees, no reasons were given for not presenting all of Kings Stable's evidence of attorney fees at the trial or making a request at the end of the trial to present additional evidence regarding attorney fees. These claims were already decided at trial. Further, there is no newly discovered evidence, no change of law, no manifest injustice or error in law or fact found by this Court[.] As a result, Kings Stable's Motion to Alter or Amend Judgment is denied on these issues[.]

Ms[.] Pate contends that the Court should have deemed that Pate was constructively evicted because there was brown water and a raccoon sighting at the leased premises[.] The Court has already heard, considered and weighed the evidence regarding her claim of constructive eviction and found there was insufficient evidence to support her contention[.] Again, Rule 59[.]¹⁰⁴ motion does not afford a party a second opportunity to present and argue again the same evidence offered at trial[.] As a result, Ms[.] Pate's Motion to Alter or Amend Judgment on this issue is denied[.]

Ms. Pate also contends that there was a mathematical error made by this Court when this [Court] found that four months of late charges were

owed by Pate[.] The Court, on the other hand, found that Pate owed to King Stable three months of unpaid rent[.] The number of late charges were associated with and triggered by the number of months of unpaid rent.

A motion to alter or amend judgment can be utilized to correct mathematical errors[.] Clearly, the Court found Ms[.] Pate missed and therefore owed three months' rent[.] Ms[.] Pate could not owe four monthly late charges for three months of unpaid rent to Kings Stable[.] This Court made an obvious mathematical error[.] Rule 59[.]04 allows a court to correct an obvious mathematical error before the order becomes final[.] As a result, Ms[.] Pate's Motion to Alter or Amend Judgment is hereby granted to the extent that the Court hereby corrects the mathematical error and hereby decreases by \$850[.]00 (the amount of the additional and erroneous late charge) the judgment heretofore taken against Ms. Pate[.]

Defendant timely appealed to this Court.

Discussion

Although not stated exactly as such, Defendant raises the following issues on appeal: 1) whether the Trial Court erred in dismissing Defendant's claim for constructive eviction; 2) whether the Trial Court erred in awarding Plaintiff the cost of clean-up and necessary repairs when Plaintiff failed to submit proof of the costs of repairs at trial; and 3) whether the Trial Court erred in awarding Plaintiff its attorney's fees without applying the factors contained in Tenn. Sup. Ct. R. 8, RPC 1.5. Plaintiff raises a separate issue of whether the Trial Court erred in its calculation of damages by failing to include rent, late charges, and utilities for the last months of the lease term. In addition, after filing its brief, Plaintiff filed a motion in this Court seeking an award of attorney's fees incurred after trial and on appeal.

This matter was resolved through a bench trial. Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Regarding witness credibility, our Supreme Court has stated:

When it comes to live, in-court witnesses, appellate courts should afford trial courts considerable deference when reviewing issues that hinge on the witnesses' credibility because trial courts are "uniquely positioned to observe the demeanor and conduct of witnesses." *State v. Binette*, 33 S.W.3d

215, 217 (Tenn. 2000). “[A]ppellate courts will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary.” *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); *see also Hughes v. Metro. Gov’t of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011). In order for evidence to be clear and convincing, it must eliminate any “serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 221 (Tenn. 2009)). Whether the evidence is clear and convincing is a question of law that appellate courts review de novo without a presumption of correctness. *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 515 (Tenn. 2013), (citing *In re Bernard T.*, 319 S.W.3d 586, 596-97 (Tenn. 2010)), *cert. denied*, — U.S. —, 134 S.Ct. 224, 187 L.Ed.2d 167 (2013).

Kelly v. Kelly, 445 S.W.3d 685, 692-93 (Tenn. 2014).

We first address whether the Trial Court erred in dismissing Defendant’s claim for constructive eviction. On this issue, Defendant relies on the Uniform Residential Landlord and Tenant Act, Tenn. Code Ann. § 66-28-101, *et seq.* She cites Tenn. Code Ann. § 66-28-502 for the provision that a landlord’s failure to provide essential services permits a tenant to obtain substitute housing and halt rent payments. The statute defines essential services as “utility services, including gas, heat, electricity, and any other obligations imposed upon the landlord which materially affect the health and safety of the tenant.” Tenn. Code Ann. § 66-28-502(a)(3). In her brief, Defendant asserts: “It is well-known that racoons carry diseases. [Defendant’s] reaction and desire to terminate the lease was reasonable and understandable.” In response, Plaintiff contends that a tenant’s remedy is dependent upon whether “the landlord deliberately or negligently fails to supply essential services....” Tenn. Code Ann. § 66-28-502(a)(1). Plaintiff states that there was no such deliberate or negligent failure to supply essential services here. As relevant to this issue, the Trial Court found:

In this case, the presence of a raccoon, brown water in one room, an inoperable programmable lighting system in the foyer and kitchen were conditions and events that were subject to remediation by Mr. Novick within a reasonable period of time. Mr. Novick attempted to address Ms. Pate’s written complaints within a 48 hour period of receipt of the same[.] The Court rules that Ms. Pate’s list of complaints do not constitute essential services under the lease or the TRLLTA. Further, Ms. Pate did not afford 495 Kings Stable, LLC an opportunity to make the necessary repairs and to remediate the defective conditions.

We disagree with the Trial Court’s conclusion on this point in one respect. The Trial Court’s statement that “brown water in one room” does not fall under the category of essential services is incorrect. Clean water is an essential service. It is a basic necessity, and a faucet emitting brown water needs to be fixed. Nevertheless, the evidence does not preponderate against the Trial Court’s finding that “Ms. Pate did not afford 495 Kings Stable, LLC an opportunity to make the necessary repairs and to remediate the defective conditions.” The evidence reflects that when Defendant raised complaints, Plaintiff quickly arranged for services to address the alleged problems. The Trial Court clearly credited Novick’s testimony from trial that he moved swiftly to address any problems Defendant may have had but that he essentially was rebuffed by Defendant. There is no clear and convincing evidence that would serve to overturn the Trial Court’s implicit or explicit credibility determinations. It is also clear from Defendant’s testimony that she wanted to get out of the lease no matter what remedial steps Plaintiff might make. With respect to the alleged problems, the evidence is lacking or insufficient to support Defendant’s claims. The evidence reflects that the water in the house was clear both before and after Defendant’s stay. As for the raccoon sighting, even if Defendant saw one in the house, that alone would not automatically relieve her from her obligations under the lease—she had to give Plaintiff a chance to address the issue.² If Plaintiff were made aware of problems and failed to swiftly address them, that would be another matter. That is not what the Trial Court found happened here. Plaintiff could not address problems without Defendant’s reasonable cooperation in letting contractors into the house to identify and correct any problems. Plaintiff also could not address problems that could not be found. In sum and as found by the Trial Court, Defendant was not constructively evicted from the Property. Instead, she breached the lease by her unjustified failure to pay rent as required under the lease. The evidence does not preponderate against the Trial Court’s dispositive factual findings as to this issue. We affirm the Trial Court in its dismissal of Defendant’s claim of constructive eviction.

We next address whether the Trial Court erred in awarding Plaintiff the cost of clean-up and necessary repairs when, according to Defendant, Plaintiff failed to submit proof of the costs of repairs at trial. Defendant states that Plaintiff relied on nothing but a spreadsheet containing claimed expenses for things like painting, cleaning fees, and carpet replacement. Contending that the Trial Court erred in its award of damages to Plaintiff, Defendant says that “[t]he trial court had no factual basis to determine the actual damages and expenses incurred by Plaintiff, other than Plaintiff’s testimony.” However, Novick’s testimony about damages is evidence in itself. Defendant has pointed to no law providing that damages may not be proven in this manner. Further, Defendant does not cite to any

² This is assuming the raccoon was getting into the house through a hole or was otherwise living in the house. On the other hand, if the issue were simply that the tenant or a guest left a door or window open, it would not be the landlord’s fault that a raccoon got into the house. There would be no problem with the residence for the landlord to correct in that scenario.

objection she made to Novick's testimony as to his basis for damages, and our own review of the transcript reveals no such pertinent objection. Defendant's issue regarding proof of these damages is without merit.

Plaintiff raises a separate issue concerning damages. Plaintiff contends that the Trial Court erred in its calculation of damages by failing to include rent, late charges, and utilities for the last months of the lease. Plaintiff notes that the Trial Court did not explain its reasoning for failing to do so. The lease ran from December 5, 2016, through August 30, 2017. Plaintiff acknowledges that Defendant paid two months rent for December and January. The Trial Court awarded Plaintiff damages for February, March, and April, but not the remainder of the term of the lease. It did not explain why. In its order denying Plaintiff's motion to alter or amend in which this issue was raised by Plaintiff, the Trial Court simply stated: "The issue of rent was decided and resolved." Plaintiff cites an opinion from this Court, *Loans Yes v. Kroger Limited Partnership I*, in which we stated, in part:

This court addressed a tenant's breach of a lease and the landlord's entitlement to damages in the case *Kahn v. Penczner*, No. W2006-02527-COA-R3-CV, 2008 WL 2894827 (Tenn. Ct. App. July 24, 2008), where we wrote:

It is well settled that the measure and elements of damages upon the breach of a lease is governed by the general principles that determine the measure of damages on claims arising from breaches of other kinds of contracts. The general rule of contracts, to the effect that the plaintiff may recover damages only to the extent of its injury, applies to leases. Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the injured party in the same position as he or she would have been in had the breach not occurred and the contract been fully performed, taking into account, however, the duty to mitigate damages. In addition, damages resulting from a breach of a lease must have been within a contemplation of the parties; must have been proximately caused by the breach; and must be ascertainable with reasonable certainty without resort to speculation or conjecture.

Kahn, 2008 WL 2894827, at *4 (citing 49 AM. JUR. 2D *Landlord & Tenant* § 96 (2003)). When a tenant abandons rental property, the landlord "is required to mitigate the damages suffered," *Bellevue Props., LLC v. United*

Retail Inc., No. M1999-01480-COA-R3-CV, 1999 WL 1086221, at *2 (Tenn. Ct. App. Dec. 3, 1999) (citing *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991)), by doing “ ‘what is fair and reasonable under the circumstances to reduce [the landlord’s] damages,’ ” *id.* (quoting *Nashland Assocs. v. Shumate*, 730 S.W.2d 332, 333 (Tenn. Ct. App. 1987)). *See also Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 353 (Tenn. Ct. App. 2007) (stating that party injured by another’s breach of contract must “ ‘exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage’ ”) (quoting *Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co.*, 480 S.W.2d 542, 545 (Tenn. Ct. App. 1971)). The breaching party carries the burden of proving the landlord failed to mitigate its damages. *Bellevue Props.*, 1999 WL 1086221, at *2 (citing *Hailey v. Cunningham*, 654 S.W.2d 392, 396 (Tenn. 1983)).

Loans Yes v. Kroger Ltd. P’ship I, No. M2019-01506-COA-R3-CV, 2020 WL 6386884, at *4-5 (Tenn. Ct. App. Oct. 30, 2020), *no appl. perm. appeal filed*.³

Plaintiff argues that it acted promptly and diligently to mitigate the damage done to the Property; that the damages took months to repair; and that Defendant offered no proof that Plaintiff failed to mitigate damages. Plaintiff also cites Tenn. Code Ann. § 66-28-505(c) (West March 28, 2014 to June 30, 2018),⁴ which states: “(c) Notwithstanding notice of a breach or the filing of a detainer warrant pursuant to this section, the rental agreement is enforceable by the landlord for the collection of rent for the remaining term of the rental agreement.” We agree with Plaintiff on this issue. The Trial Court provided no legal reasoning for its decision to not award Plaintiff damages for the remaining months on the lease. While the evidence reflects that Defendant left the Property in March, the Trial Court did not find that Plaintiff failed to mitigate damages, nor does Defendant make that argument. As the Trial Court found and we have affirmed, Defendant breached the lease, which ran through August 30, 2017. We therefore vacate the Trial Court’s award of damages to Plaintiff and remand for the Trial Court to award Plaintiff additional damages to include rent, late charges, and utilities for the remaining months of the lease.

The final issue we address is whether the Trial Court erred in awarding Plaintiff its attorney’s fees without applying the factors contained in Tenn. Sup. Ct. R. 8, RPC 1.5 for the determination of a reasonable fee. Generally speaking, “[t]he trial court is vested with wide discretion in matters of the allowance of attorney’s fees, and this Court will not

³ We note that *Loans Yes* concerned a commercial lease rather than a residential lease. However, the Uniform Residential Landlord and Tenant Act provides as well that “[t]he aggrieved party has an obligation and duty to mitigate damages.” Tenn. Code Ann. § 66-28-515(a).

⁴ Plaintiff erroneously cites to Tenn. Code Ann. § 66-28-202(c), but the quoted language is found at Tenn. Code Ann. § 66-28-505(c).

interfere except upon a showing of an abuse of that discretion.” *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987) (citation omitted). Regarding the abuse of discretion standard of review, “[a] court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.” *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020) (internal quotation marks omitted) (quoting *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305-06 (Tenn. 2020) (citations omitted)). Defendant points out that the Trial Court failed to apply the Tenn. Sup. Ct. R. 8, RPC 1.5 factors.⁵ Regarding the consequences of a trial court’s failure to apply the Tenn. Sup. Ct. R. 8, RPC 1.5 factors, this Court has discussed as follows:

In *Wright [ex rel. Wright v. Wright]*, 337 S.W.3d 166 (Tenn. 2011), the Tennessee Supreme Court provided additional guidance:

[T]he trial court should develop an evidentiary record, make findings concerning each of the factors, and then determine a reasonable fee that “depend[s] upon the particular circumstances of the individual case.” To enable appellate review, trial courts should clearly and thoroughly explain the particular circumstances and factors supporting their determination of a reasonable fee in a given case.

⁵ Tenn. Sup. Ct. R. 8, RPC 1.5 provides, as relevant:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Wright, 337 S.W.3d at 185-86 (citations omitted). This Court has remanded numerous cases for reconsideration when a trial court has not followed this prescribed procedure. For example, in *First Peoples Bank of Tennessee v. Hill*, we stated:

Where a trial court awards a fee, but there is nothing in the record to indicate that the trial court actually evaluated the amount of the fee to see if it is reasonable in light of the appropriate factors, the correct approach is to vacate the award and “remand [the] case to the trial court for a new determination of an attorney’s fee award under [Supreme Court Rule 8, RPC 1.5] and the applicable case law.”

First Peoples Bank of Tennessee v. Hill, 340 S.W.3d 398, 410 (Tenn. Ct. App. 2010) (citations omitted).

Here, the trial court did not make a finding of reasonableness, nor did it refer to Rule 1.5 or any of its factors; it simply awarded Wife an amount of fees with no further findings or explanation. Accordingly, we vacate the trial court’s award of attorney’s fees and remand for a new determination as to whether Wife should be awarded her attorney’s fees and, if so, the reasonableness of such fee award, with findings by the trial court reflecting that it considered all of the factors outlined above and the applicable case law.

Ellis v. Ellis, 621 S.W.3d 700, 709 (Tenn. Ct. App. 2019).

Continuing her argument, Defendant states that “[o]ther than the testimony of Mr. Novick, and spreadsheet exhibit he prepared, Plaintiff offered no other documentary proof of attorney fees, no affidavit, no invoice, and no canceled checks.” Defendant also asserts that Plaintiff violated Rule Twenty of the Local Rules of the Circuit Court of Tennessee for the 30th Judicial District, which provides:

Whenever it is necessary for the Court to determine fees of attorneys, the attorney must file an affidavit setting forth an itemized statement of the services rendered, the time spent, a suggestion of the fee to be awarded, along with a statement of other pertinent facts, and such other information as the Judge may request.

Defendant concludes by stating: “Because Plaintiff failed, despite numerous opportunities, to provide adequate information from which the trial court could evaluate the

reasonableness of the request for attorney fees, no attorney fees should be awarded.” In response, Plaintiff performs its own analysis of certain Tenn. Sup. Ct. R. 8, RPC 1.5 factors that it deems applicable, resulting in its conclusion that the attorney’s fees awarded to it by the Trial Court were reasonable. Plaintiff also describes the attorney’s fees it paid as “actual damages” to which it is entitled.

The lease agreement between the parties provides, as relevant: “16. ATTORNEY’S FEES AND COURT COSTS. Tenant agrees to pay all reasonable attorneys’ fees together with any court costs and expenses which Landlord incurs in any action for breach of this Lease Agreement or failure to pay Rent.” Thus, by the plain terms of the lease, Plaintiff is entitled to an award of attorney’s fees incurred in this action. We disagree with Defendant’s contention that Plaintiff waived attorney’s fees because of the timing by which it submitted the necessary supporting information to the Trial Court. However, as stated by this Court in *Ellis*, determining what constitutes “reasonable” attorney’s fees requires courts to consider the factors contained in Tenn. Sup. Ct. R. 8, RPC 1.5 and applicable law. The Trial Court did not apply these factors or otherwise explain why the attorney’s fees at issue were reasonable. While Plaintiff undertakes an examination of certain Tenn. Sup. Ct. R. 8, RPC 1.5 factors in its brief, that does not rectify the Trial Court’s failure to consider the factors. In addition, Plaintiff’s contention that the attorney’s fees it has already paid constitute actual damages to which it is simply entitled—without any further examination—is incorrect. Such an interpretation just presumes the reasonableness of the attorney’s fees incurred and is contrary to Tennessee law. The amount of attorney’s fees that the Trial Court awarded Plaintiff may well be reasonable, but the Trial Court needed to consider the Tenn. Sup. Ct. R. 8, RPC 1.5 factors to make such a determination. We therefore vacate the Trial Court’s award of attorney’s fees to Plaintiff and remand for the Trial Court to consider the Tenn. Sup. Ct. R. 8, RPC 1.5 factors in determining an award to Plaintiff of its reasonable attorney’s fees.

As a final matter, Plaintiff filed a motion in this Court seeking attorney’s fees incurred after trial and on appeal. We allowed the parties to engage in additional briefing on this issue, and the record was supplemented. In her supplemental brief, Defendant argues that (1) this issue is waived for Plaintiff’s failure to raise it in its appellee’s brief and (2) that if we do consider the issue and decide that Plaintiff is entitled to an award of post-trial and appellate attorney’s fees, we should remand for the Trial Court to conduct an evidentiary hearing as to the reasonableness of the fees. Defendant is correct in that the better, less convoluted option for Plaintiff would have been to simply raise the issue of post-trial and appellate attorney’s fees in its brief. However, based on the attorney’s fees provision in the lease and our consideration of Plaintiff’s motion for attorney’s fees including additional briefing by the parties, Plaintiff is entitled to an award of attorney’s fees including post-trial and appellate attorney’s fees, and as we are already remanding for a new determination of reasonable attorney’s fees incurred below, we decline to find

waiver. On remand, the Trial Court is to determine and enter an award to Plaintiff of reasonable attorney's fees—including reasonable post-trial and appellate attorney's fees—applying the Tenn. Sup. Ct. R. 8, RPC 1.5 factors.

In summary, we affirm the Trial Court's dismissal of Defendant's claim of constructive eviction. We vacate the Trial Court's award of damages to Plaintiff and remand for the Trial Court to award Plaintiff additional damages including rent, late charges, and utilities for the remaining months of the lease. We also vacate the Trial Court's award of attorney's fees to Plaintiff and remand for the Trial Court to consider the Tenn. Sup. Ct. R. 8, RPC 1.5 factors to determine and enter an award to Plaintiff of reasonable attorney's fees incurred in this matter, including reasonable post-trial and appellate attorney's fees.

Conclusion

The judgment of the Trial Court is affirmed, in part, and vacated, in part, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion. The costs on appeal are assessed against the Appellant, Kimberly Pate, and her surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE