FILED
NOV 10 1977
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

KENNETH BOURNE,)
Appellee,) Filed November 10, 1977
vs.)
THE LOW RENT HOUSING AGENCY,) 223
CITY OF DES MOINES,) 2-58909
Appellant.)

Appeal from Polk District Court - John N. Hughes, Judge.

Defendant Low Rent Housing Authority appeals jury verdict allowing plaintiff rents for lease period following foreclosure of a mortgage; plaintiff cross-appeals seeking interest on damages awarded and treble damages for waste. - Affirmed in part, reversed in part and remanded with directions.

Norman Jesse and Jerry Crawford, of Des Moines, for Appellee.

Frank Comito and John Roehrick, of Des Moines, for Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Low Rent Housing Authority of Des Moines appeals a judgment on a jury verdict allowing plaintiff Kenneth Bourne to recover rents for the period of a lease following foreclosure of a mortgage on the premises and appointment of a receiver. Additionally, the housing authority urges the trial court erred in allowing the jury to consider evidence of damage to the property which it contends Bourne failed to disclose during discovery. Bourne has cross-appealed seeking an allowance of interest upon the damages awarded and treble damages for waste. On defendant's appeal, we affirm as to liability for rent; on plaintiff's appeal we reverse as to the denial of interest upon damages awarded and affirm as to the denial of treble damages.

I. The trial court instructed the jury that, to the extent proved, plaintiff was entitled to recover gross rentals called for in the lease between the parties. This measure of recovery was to apply to rentals accrued both before and after the appointment of a receiver to collect the rentals in plaintiff's stead. While apparently conceding gross rentals to be the measure of recovery prior to appointment of a receiver defendant urges that a different measure of recovery should prevail after the occurrence of that event. It is contended that loss, if any, after the appointment of the receiver is ". . . limited to the loss he actually suffers by reason of the breach; he should not be placed in a better position than he would be in if the contract had not been broken." DeWaay v. Muhr, 160 N.W.2d 454, 459 (Iowa 1968). Defendant contends that this limits recovery to net rents and that the damages awarded under Division I should be reduced by $20,976.82 as drawn from Bourne's testimony relating to his expenses for mortgage payments, utilities, water, insurance and maintenance costs which would have been incurred throughout the remainder of the lease.

However appealing this argument may be, we must reject it for the reason that it was not properly raised in the trial court and preserved for appeal. No objection was made to instruction no. 7 which embodied the "gross rental" theory both before and after the appointment of the receiver. While the record supports defendant's contention that he was entitled, under rule 196, Rules of Civil

Procedure, to object to the giving of instruction no. 9A in a motion for new trial because it was added after the taking of exceptions, this does not apply to instruction no. 7. We see nothing in instruction no. 9A which in any way relates to the issue of gross rentals versus net rentals. For the reasons stated we do not disturb the jury's verdict on Division I of the petition.

II. We find no ground for reversal in Low Rent Housing Authority's claim that Bourne failed to disclose damages during discovery. In overruling Low Rent Housing Authority's motion in limine, the trial court specifically noted that should the need arise for further investigation of some new or novel claim for damages during the remainder of the trial a continuance would be allowed. The record reveals no subsequent request for such a continuance. Much of the evidence subject to the motion concerned Bourne's claim for loss and damage to furnishings in the apartments. A jury instruction specifically limited recovery for personalty to the refrigerators, stoves, and carpeting covered by the lease. Furthermore, no appeal of the Division II recovery for physical damage to the property has been taken. Low Rent Housing Authority has failed to demonstrate any prejudice under Division I flowing from the asserted failure to disclose damages.

III. Bourne has cross-appealed the denial of his motion for interest upon damages awarded under Divisions I and III and his motion for treble damages for waste under Division II. Under section 535.2, The Code 1975, Bourne was entitled to 7% interest upon "a) money due by express contract" and "b) money after the same becomes due." The general rule is that interest runs from the time the money becomes due and payable. Olberding Const. Co., Inc. v. Ruden, 243 N.W.2d 872, 879 (Iowa 1976). It may be allowed on unliquidated claims whenever it appears the damage was complete at a particular time. Thomas Truck & Cast. Co. v. Buffalo Cast. & Wh. Corp., 210 N.W.2d 532, 536 (Iowa 1973).

The matter of interest may be considered by the jury, or, if not, it may be added by the court as a matter of entitlement following the verdict. Abel v. Dodge, 261 Iowa 1, 152 N.W.2d 823 (1967). Here there is no indication that any allowance of interest was included in the jury's verdict under either Division I or Division III. On Division I plaintiff asks for interest on each individual rental

payment from the date said payments were due. The record does not enable us to make this determination. We therefore direct addition of interest from those dates which were established in the jury's answers to interrogatories. This means that the judgment should include interest at 5% per annum (the legal rate prior to July 1, 1973) on the sum of $6,825.00 until July 1, 1973, and at the rate of 7% thereafter. It should also include interest at the rate of 7% per annum on the sum of $25,500 from April 1, 1974.

With respect to the claim for interest on the verdict returned on Division III we believe the damage was not complete during the period for which plaintiff was awarded recovery for rentals. But it was complete no later than April 1, 1974, and plaintiffs are entitled to interest added to the sum of $4500 from the date last indicated at the rate of 7% per annum.

We find no cases which have allowed the assessment against an abandoning tenant of treble damages for waste under section 658.1, The Code. The trial court was within its discretion to refuse such an award.

We affirm Bourne's recovery under Division I. Bourne's request for interest upon damages awarded under Divisions I and III is granted as outlined above.

We do not intend by our disposition of this case to sanction the appellee's failure to timely file his appeal brief. We do note, however, that even a complete failure of an appellee to file a brief does not entitle an appellant to a reversal as a matter of right. Bowen v. Kaplan, 237 N.W.2d 799, 801 (Iowa 1976). We are bound to consider all Iowa decisions, whether cited or not, which properly bear on the questions presented. Covert v. Town of Lovilia, 167 Iowa 163, 149 N.W. 67 (1914).

Affirmed in part, reversed in part, and remanded with directions.