

Napolski v. Champney, 295 Or. 408, 667 P.2d 1013 (1983)

ROBERTS, Justice.

This is a Forcible Entry and Wrongful Detainer (FED) action brought by a landlord for nonpayment of rent. See ORS 105.105 et seq. The tenant filed an answer and counterclaims, and tendered into court the amount of rent she considered due. The question presented is whether the landlord is entitled to take possession if the amount of rent adjudged due exceeds the sum awarded the tenant on the counterclaim even though it does not exceed the amount that was tendered into court. The Court of Appeals held that a tenant in a FED action is entitled to retain possession "only if he recovers damages on his counterclaims that exceed the rent due the landlord." 60 Or.App. 438, 445, 653 P.2d 1311 (1982).

The relevant historical facts are not in dispute.[Plaintiff rented Defendant a mobile home]. Difficulties soon arose between the parties. Plaintiff became dissatisfied with defendant's maintenance of the property and defendant complained about the lack of a written lease. In January, 1981, plaintiff tendered defendant a written rental agreement. Because it deviated in material respects from the parties' oral agreement, however, defendant refused *411 to sign.² When defendant attempted to make her usual \$100 rental payment in March, plaintiff, apparently deeming it insufficient under the written agreement he had tendered, refused to accept it.

In May, 1981 plaintiff filed the first of three FED actions against defendant. That action and its successor were dismissed without prejudice.³ In August, 1981, plaintiff **1016 sent defendant two termination notices: a 24-hour notice for nonpayment of rent and a 30-day notice for cause. See [ORS 105.120\(2\)](#); [ORS 91.886](#). Thirty days later he filed the present FED action for failure to pay rent of \$200/month as per his proffered written rental agreement. Defendant's answer contained a general denial, an affirmative defense and counterclaim of retaliation,⁴ and a counterclaim for statutory *412 damages under [ORS 91.875](#) for plaintiff's failure to provide a written rental agreement.⁵ In addition, defendant tendered into court \$900, the amount of rent she considered due under the oral rental agreement of \$100/month.

Resolution of the issue necessitates an examination and application of Oregon's Residential Landlord and Tenant Act (ORLTA), ORS 91.700 et seq., a uniform act adopted in this state in 1973. Or.Laws 1973, ch. 559. See 7A Uniform Laws Annotated 499 (1978).⁸ The question is one of first impression before this court, and it is a very important one under the ORLTA as the answer will determine the extent to which, if at all, a tenant can withhold rent to compel a landlord's compliance with the act. Defendant contends that the Court of Appeals' interpretation, by dispossessing the tenant who withholds more rent than the amount of damages the tenant ultimately recovers, effectively precludes tenants' withholding option and thus eviscerates the act.

The ORLTA is without doubt a significant departure from the common law rules which formerly governed the landlord-tenant relationship. Consequently, juxtaposing those rules with the act's provisions is a helpful first step in divining the drafters' and legislature's intent in formulating the statutory scheme.

Landlord-tenant law had its genesis in English feudal real property law.⁹ A lease was viewed strictly as a conveyance of an estate in land rather than as a contract. As a consequence, two principles from real property law, disadvantageous to tenants, were transported into landlord-tenant law: caveat emptor and the doctrine of independent covenants. Under the first, the landlord's obligations with respect to the premises, absent lease covenants providing otherwise, were generally limited to effecting the

conveyance. The landlord was not obligated to ensure that the property leased was habitable or suitable, and was not required to maintain the property during the lease or ensure that it was supplied with services such as water. Moreover, under the doctrine of independent covenants, any obligations placed upon the landlord, either imposed by law or assumed by the lease, were deemed independent of the tenant's, particularly the obligation to pay rent. Hence, notwithstanding that the landlord might be in major breach of some legal obligation with regard to the tenant or the leased premises, the tenant was not excused from the lease or the obligation to pay rent.¹⁰ The dissatisfied tenant was relegated to suing either for damages or for some sort of injunctive relief to compel compliance by the landlord.

The limited rights of the tenant vis-a-vis the landlord were reflected in the forcible entry and detainer statutes as they were originally formulated. Such actions were intended to be expeditious and summary proceedings by which a landlord could dispossess a tenant and regain the premises without being compelled concurrently to litigate the tenant's complaints. Accordingly, in an FED action the only issue was whether the landlord was entitled to regain the premises (e.g., because the tenant was in default of rent), and, except for some limited affirmative and equitable defenses, the tenant was not allowed to counterclaim or interpose the landlord's own defaults in defense.

As society moved from agrarian to predominantly urban, the factual basis underlying landlord-tenant law shifted, and legal and public opinion echoed increasing dissatisfaction with the established rules. This discontent manifested itself in judicial decisions and statutory changes which abrogated, to a certain extent, the doctrines of caveat emptor and of independent covenants. Perhaps the clearest examples of this liberalizing trend are the Restatement (Second) of Property (Landlord and Tenant) (1971) and the Uniform Residential Landlord and Tenant Act (1972).

Although this court took some tentative steps towards modernizing Oregon's landlord-tenant law judicially, see *Wright v. Bauman*, 239 Or. 410, 398 P.2d 119 (1965), it was the legislature which finally effected the change through its adoption of ORLTA ^{***}. In addition, the FED statutes were amended to reflect tenants' expanded rights under the ORLTA.

As examples of how the ORLTA has altered landlords' and tenants' respective rights and duties, the act affirmatively obligates residential landlords to maintain rental properties in "habitable condition," ORS [90.320], and provides that such obligation is not independent of a tenant's reciprocal obligation to pay rent ORS [90.417]. Further, under ORS [90.360] a landlord's noncompliance with his or her obligations under the act entitles the tenant either to terminate the lease or bring ^{*416} an action for damages or injunctive relief or both terminate and bring an action. See *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979); *L & M Investment Co. v. Morrison*, 286 Or. 397, 405, 594 P.2d 1238 (1979). And under some circumstances, the tenant is entitled to a "repair and deduct" remedy if the landlord fails to maintain an "essential service," ORS [90.368].

Of particular relevance here, the ORLTA expressly grants to a tenant the right to assert counterclaims in FED actions for nonpayment of rent. ORS [90.370] provides:

"(1) In an action for possession based upon non-payment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount, not in excess of the jurisdictional limits of the court in which the action is brought, that he may recover under the rental agreement or ORS 91.700 to 91.900. In the event the tenant counterclaims, the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be ^{**1019} paid first from the money paid into court, and shall be paid

the balance by the other party. The court may at any time release money paid into court to either party if the parties agree or if the court finds such party to be entitled to the sum so released. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession.

“(2) In an action for rent when the tenant is not in possession, he may counterclaim as provided in subsection (1) of this section but is not required to pay any rent into court.

“(3) If the tenant does not comply with an order to pay rent into the court as provided in subsection (1) of this section, the tenant shall not be permitted to assert a counterclaim in the action for possession.

“(4) When a tenant is granted a continuance for a longer period than two days, and has not been ordered to pay rent into court under subsection (1) of this section, the tenant shall be ordered to pay rent into court under ORS 105.140(2).” (Emphasis added.)

The relevant FED provision, ORS 105.115(3), recognizes a tenant's right to counterclaim and states that in an FED action based upon nonpayment of rent or termination allegedly for cause, the provisions of the ORLTA shall be applied to determine the rights of the parties, including:

“(a) Whether and in what amount rent is due;

“(b) Whether a tenancy or rental agreement has been validly terminated; and

“(c) Whether the tenant is entitled to remedies for retaliatory conduct by the landlord as provided by ORS 91.865 and 91.870.”

3In applying these provisions to the facts at bar, we first emphasize three facts: (1) defendant had not paid her rent, (2) she had a valid claim for damages against plaintiff arising out of his noncompliance with the ORLTA, and (3) she had paid into court all the rent that was due plaintiff. The first fact entitled plaintiff to commence this FED action, ORS 105.115(2)(a). The second fact entitled defendant to counterclaim for damages, ORS 91.810(1). The effect of the third fact turns upon what the legislature intended when it adopted the last sentence in ORS 91.810(1), the italicized portion quoted above.

The language at issue appears to us unambiguous: if a tenant counterclaims and tenders into court any outstanding rent, the tenant is entitled to retain possession provided the counterclaim award plus the tendered rent equal or exceed the amount of rent adjudicated due. This interpretation is in accord with that suggested by several commentators ***.

Under ORS 91.820(2):

“If rent is unpaid when due and the tenant fails to pay rent within seven days the landlord, after 72 hours' written notice of nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within that period, may immediately terminate the rental agreement and take possession in the manner provided in ORS 105.105 to 105.165 [the FED statutes].”¹⁴

As noted earlier, however, the applicable FED statute, ORS 105.115(3), states that in an action for possession based upon nonpayment of rent the provisions of the ORLTA “shall be applied to determine the rights of the parties, including [w]hether and in what amount rent is due [and w]hether a tenancy or rental agreement has been validly terminated[.]” This reference returns us to ORS 91.810(1) and indicates that, for purposes of the ORLTA/FED statutory scheme, a tenant is not in default of rent and a landlord is not entitled to terminate the lease for nonpayment of rent if the tenant has refused to pay the rent because of some default of the landlord's which entitles her to damages and she tenders sufficient funds into court to cover any rent that ultimately may be determined to be due.

The net effect of all this is an implicit withholding remedy: if the landlord is in noncompliance with his obligations under the ORLTA to the monetary damage of the tenant, the tenant can withhold rent, and if the landlord commences an FED action the tenant can counterclaim and pay the rent arrearage into

court to protect her right to possession. Withholding effectively shifts to the landlord the burden to commence any litigation necessary to determine the parties' rights in the dispute and, further, confronts the landlord with the risk of becoming liable for costs and attorney fees if the tenant "prevails." Withholding at first blush appears to be a rather formidable weapon in the tenant's arsenal. On closer inspection, however, this withholding remedy is narrowly circumscribed and comports well with the ORLTA's policy of achieving a fair balance between the rights of tenants and landlords.

First, because ORS [90.370(1)] deals only with a tenant's right to counterclaim for damages for a landlord's noncompliance with his obligations under the rental agreement or the act, the tenant's withholding remedy is correspondingly limited. The statute does not authorize withholding in order to rectify any complaint of the tenant, nor does it permit the tenant to withhold rent because of claims she may have against the landlord unrelated to her rights under the act.

Second, the ORLTA expressly provides that, as a prerequisite to the rights and remedies under the act, the party must act in good faith. ORS[90.130]. Spurious, frivolous, or improperly motivated counterclaims may not be used to justify a tenant's rent withholding.

Third, if the tenant does have a legitimate complaint under the act, the simplest and most obvious way for the landlord to avoid withholding, and obviate an FED action, is to rectify the default. In the case at bar, for example, plaintiff could have prevented defendant's withholding simply by tendering her, as he was statutorily obliged to do anyway, a written lease conforming to their oral agreement. In this respect, the withholding remedy is an effective method by which a tenant can coerce a recalcitrant landlord into compliance with his statutory obligations without being forced herself to commence litigation.

Fourth, assuming that the parties are embroiled in a bona fide dispute over whether the landlord is in noncompliance with the act, the rent-into-court scheme set out in ORS [90.370(1)] protects the landlord's interests. After the FED action has been commenced and the tenant has counterclaimed, the court "may order the tenant to pay into court all or part of the rent accrued and thereafter accruing" and "may release money paid into court to either party if the parties agree or if the court finds such party to be entitled to the sum so released." Thus, if the tenant counterclaims for a sum less than the rent she acknowledges as due, the court can order her to pay the accrued rent into court and release to the landlord the undisputed excess. If the tenant refuses to comply with such an order, she forfeits her right to counterclaim, ORS [90.370(3)], and will lose possession under ORS [90.370(1)] if the court determines that any rent is due.

Finally, the FED process remains rather summary and expeditious and rent withholding will not, in the usual case, deprive the landlord of his money for an appreciable period of time. Ten days after rent default, a landlord can commence an FED action. The matter is then to be tried within 15 days. ORS 105.137(5). If the court grants the tenant any continuances longer than two days, the tenant must provide an undertaking or pay the accrued rent into court. ORS 105.140; ORS [90.370(4)].

In sum, we conclude that because defendant here had asserted a valid counterclaim against plaintiff under the ORLTA and had tendered into court sufficient funds to cover the rent that was ultimately adjudged due plaintiff, under ORS 91.810(1) she was entitled to retain possession of the premises. Moreover, since she prevailed on both her counterclaim and on the issue of possession, she was also entitled to recover costs and disbursements, and attorney fees.¹⁷ We therefore hold that the trial court was correct in its disposition of this case.