The State Of New Hampshire
Supreme Court

No. 2018-0141

Jacqueline Lane v. Antonio Barletta

RULE 7 APPEAL FROM THE

6th Circuit - District Division - Hillsborough

BRIEF OF THE RESPONDENT AND CROSS APPELLANT, JACQUELINE LANE

Jacqueline Lane, Respondent and
Cross Appellant

By her attorney,
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Oral Argument by Kyle McDonald

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2. Did the Court correctly award the Plaintiff damages even though the court did not expressly state the landlord's actions were willful?
3. Did the Court correctly double the award of damages to the Plaintiff?
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5. Did the Court err in denying Plaintiff's motion to reconsider as untimely filed by applying the rules for Landlord and Tenant Actions as opposed to the rules for District Court actions? *October12, 2018 Trn. at 5.*

TEXT OF RELEVANT AUTHORITIES

RSA 48-A:14, XI. Minimum Standards Established

No landlord, as defined by RSA 540-A:1, I, renting or leasing a residential dwelling in a municipality which has not adopted ordinances, codes or bylaws pursuant to this chapter shall maintain those rented premises in a condition in which:
IX. The premises do not have heating facilities that are properly installed, safely maintained and in good working condition, or are not capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms located therein, to a temperature of at least an average of 65 degrees F.; or, when the landlord supplies heat in consideration for the rent, the premises are not actually maintained at a minimum average room temperature of 65 degrees F. in all habitable rooms.

RSA 358-A:2, VII. Acts Unlawful

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following: Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

RSA 358-A:2, IX. Acts Unlawful

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following: Advertising goods or services with intent not to sell them as advertised.

RSA 358-A:10, I. Private Actions

Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this chapter without bond, subject to the discretion of the court.

RSA 540-A:3, I. Certain Specific Acts Prohibited

No landlord shall willfully cause, directly or indirectly, the interruption or termination of any utility service being supplied to the tenant including, but not limited to water, heat, light, electricity, gas, telephone, sewerage, elevator or refrigeration, whether or not the utility service is under the control of the landlord, except for such temporary interruption as may be necessary while actual repairs are in process or during temporary emergencies.

RSA 540-A:4, I. Remedies

All district courts shall have concurrent jurisdiction with the superior court to enforce the provisions of RSA 540-A:2 and RSA 540-A:3.

RSA 540-A:4, II. Remedies

Any tenant or landlord may seek relief from a violation of RSA 540-A:2 or RSA 540-A:3 by filing a petition in the district or county where the rental premises are located.

RSA 540-A:4, IX (a). Remedies

Any landlord or tenant who violates RSA 540-A:2 or any provision of RSA 540-A:3 shall be subject to the civil remedies set forth in RSA 358-A:10 for the initial violation, including costs and reasonable attorney's fees incurred in the proceedings. Each day that a violation continues after issuance of a temporary order shall constitute a separate violation.

District Division Rule 1.1A. Computation and extension of time

In computing any period of time prescribed or allowed by these rules, by order of court, or by applicable law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or a legal holiday as specified in RSA ch. 288, as amended.

District Division Rule 3.11 (E). Motions

A motion for reconsideration or other post-decision relief shall be filed within ten (10) days of the date on the clerk's written notice of the order or decision which shall be mailed by the clerk on the date of the notice. The motion shall state, with particularity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. To preserve issues for an appeal to the Supreme

Court, an appellant must have given the Court the opportunity to consider such issues; thus, to the extent that the Court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal. A hearing on the motion shall not be permitted except by order of the Court.

District Division Rule 5.3 A. Entry of Actions

Landlord and Tenant Writs shall be entered with the Court prior to service of process on the defendant. At the time of entry, the entry fee is payable to the Clerk of Court and the case shall be docketed. At the time of entry, the writ shall be accompanied by proof of service of the eviction notice. Proof of service must be shown by a true and attested copy of the notice accompanied by an affidavit of service, but the affidavit need not be sworn under oath. See RSA 540:5.

District Division Rule 5.10 A. Post Trial Motions and Appeals

Post trial motions in all cases shall be filed within seven days after the date of the Clerk's Notice of Judgment.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This case arose out of a landlord and tenant relationship when the tenant sought to make the landlord fix a broken working heating system in her apartment. The same day the trial court issued a temporary order that the landlord restore the tenants heat. *App at* 5. Lane rented an apartment at 44 Hall Avenue, Henniker, NH from Defendant Antonio Barletta starting in August of 2016. *December1, 2017 Trn. at 5-6*. When Ms. Lane began renting the apartment, she noticed that her heater had a pilot light but did not emit any hot air. *December1, 2017 Trn. at 5-6*. She notified Barletta's maintenance person who inspected the heater and found that the pilot light was lit but it was not producing heat. *December1, 2017 Trn. at 6.* Lane notified Barletta by text message on September 26, 2016 that the heater in her apartment was not producing heat. *December1, 2017 Trn. at 6-7.* Lane requested that Barletta repair her heater multiple times that fall and winter. *December1, 2017 Trn. at 9*. Barletta informed Lane that he would have the heater fixed but instead provided her with a space heater. *December1, 2017 Trn. at 9*. Plaintiff, Jacqueline Lane filed this RSA 540-A petition on November 3, 2017. *App at 3*.

In the fall of 2017, one of Barletta's heating repair people visited the premises and informed Lane that the propane tank for her apartment's heater was empty and had been physically shut off. *December1, 2017 Trn. at 12*. Lane testified that she did cause this and had not turned the heater on since September of 2016. *Id*. For the entire time Lane occupied the apartment, Lane's only heat source was a space heater. *December1, 2017*

Trn. at 14. William Lane also testified that when Jacquelyn Lane moved in, he saw a pilot light on the heater but it was not producing heat when it was turned on. *December1, 2017 Trn. at 17*.

At trial on December 1, 2017, Barletta testified that did not pay attention to Lane's complaints because he "knew that the unit worked." *December1, 2017 Trn. at 20*. Barletta also testified that he had not had anyone at the premises who could say if the heating system worked or not, and that he was aware that the heating system may have been messed with by unidentified unqualified people. *December1, 2017 Trn. at 30*. He further stated he told Lane he would have a technician inspect the heater if she filled the propane tank, but went on to state that he did not think the tank was empty if there was a pilot light burning. *December1, 2017 Trn. at 24*. Barletta went on to testify that he was not going to send someone to inspect the heating system until Lane informed him she had had the propane tank filled because he knew the heating system worked and was not going to pay for propane when Lane owed him rent. *December1, 2017 Trn. at 33*. The Trial Court continued the hearing so that the parties could obtain expert opinions on the condition of the heating system. *December1, 2017 Trn. at 56*.

On December 20, 2017, Lane had her heating technician inspect the unit who determined that there was an issue with the gas line, and it was unsafe to test the unit. *January12, 2018 Trn. at 3*. Barletta's technician inspected the heater on December 21, 2017. *January12, 2018 Trn. at 3*. Barletta's technician was unable to get the heater working and informed

Lane that it might need a new gas valve. *January12, 2018 Trn. at 3*. Lane moved out of the apartnet on January 1, 2018. *January12, 2018 Trn. at 3*.

Following the January 12, 2018 hearing, the Trial Court issued a judgment finding that the Defendant had violated RSA 540-A:3, I. The Trial Court found that the Defendant had violated the temporary order from its issuance on November 3, 2017 to December 6, 2017 and awarded the Plaintiff damages of $1,000 per day for 33 days, doubled in accordance with RSA 358-A:10 for a total of $66,000. The clerk's notice of judgment was sent to the parties on February 22, 2018. The Defendant appealed this decision.

The Plaintiff filed a motion for reconsideration on March 5, 2018 requesting the Court recalculate damages to the period between the issuance of the temporary order and when Lane vacated the apartment. The Trial Court denied this motion on the grounds that the motion had to be filed within seven days of the notice of decision, not ten. The Plaintiff appeals this decision.

SUMMARY OF ARGUMENT

The court correctly found that the landlord violated RSA 540-A:3, I by refusing to fix the heater in the tenants apartment. RSA 540-A:3, I and RSA 48-A:14, XI requires that a tenant have a permanently installed heat source and, as a matter of law, this requirement cannot be met by a space heater being the only source of heat for a tenant. The evidence in the record supports the court's decision that the landlord violated RSA 540-A:3, I, by ignoring the tenants complaints that her heat broken. Doubling of damages pursuant to RSA 358-A:10, I, was proper because a violation of RSA 540-A:3, I, is a willful action and the remedy is specifically incorporated into RSA 540-A.

The court erred in denying the Plaintiff's motion for reconsideration. The District Division Rules for Landlord and Tenant Actions apply to possessory actions, not petitions under RSA 540-A. Petitions under RSA 540-A are governed by the rules for District Court Cases.

ARGUMENT

I. A landlord is required to provide a tenant with a permanent working heat source

RSA 540-A:3, I. requires landlords to refrain from interfering with the tenants utilities, which includes the tenants heat. *RSA 540-A:3, I.* A landlord's refusal to repair the heating system for a rental unit can be considered interfering with the tenants utilities. *Randall v. Abounaja*, 164 N.H. 506, 509 (2013).

Barletta asserted that the permanent heater was working when Lane began occupying the apartment. *December1, 2017 Trn. at 20*. This working permanent heat source established a baseline for utility service covered by RSA 540-A:3, I. The testimony presented at trial established that Lane had repeatedly informed Barletta that the heater in her apartment was not working and requested that he repair the heater. *December1, 2017 Trn. at 9*. To satisfy RSA 540-A:3, I, the landlord was required to provide the tenant with a working permanent heat source.

In *Wass v. Fuller*, the landlord caused the tenants heating fuel tanks to be turned off, disabling the tenants heat. *Wass v. Fuller*, 158 N.H. 280, 283 (2009). The actions of the landlord disabled the tenant's heat which was found to be a willful action by the landlord. *Id.* The landlord in *Wass* argued that the landlord had not willfully interfere with the tenants heat because the landlord provided electric heaters. This Honorable court denied that argument stating, "To the extent the defendant argues that the plaintiff was never actually without heat because she had electric heaters,

the focus of RSA chapter 540-A is 'to deter unacceptable landlord conduct rather than to remedy harm to tenants.'" *Wass*, 158 N.H. at 283 citing *Johnson v. Wheeler*, 146 N.H. 594, 596 (2001). This honorable Court correctly decided in *Wass* that an electric heater did not remedy a landlord failure to provide a working heating system, there is no reason to overturn this precedent now.

The Landlord argues that space heater he provided was sufficient to satisfy his obligation to not willfully interrupt the tenants utility of heat. As decided in *Wass*, the space heater was not a substitute for a permanent heat source. RSA 48-A:14 establishes the requirement for heat in residential rental units. RSA 48-A:14 prohibits landlords from renting residential rental units where:

> "The premises do not have heating facilities that are properly installed, safely maintained and in good working condition, or are not capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms located therein, to a temperature of at least an average of 65 degrees F; or, when the landlord supplies heat in consideration for the rent, the premises are not actually maintained at a minimum average room temperature of 65 degrees F. in all habitable rooms." *RSA 48-A:14*.

Statutes are interpreted based on their plain meaning. *Simpson v. Young*, 153 N.H. 471, 476-77 (2006). RSA 48-A:14 specifically states that a premises is required to have heating facilities that are installed. A space heater cannot be said to be installed. A space heater is portable and plugs

into a regular electrical outlet to operate. There is no installation process. Because a space heater cannot be installed, it cannot satisfy RSA 48-A:14 and therefore cannot count as a substitute for a heater that was installed when the tenant began to occupy the rental unit.

II. THE TENANT PROVED THE LANDLORD'S ACTIONS WERE WILLFUL

Barletta argues that his failure to fix the apartments heat was not willful because he believed that the cause of the failure was because the fuel tank was empty. Whether an action was willful is a factual determination. *Randall*, 164 N.H. at 507-08. This Honorable Court will, "Not disturb the findings of the trial court unless they lack evidentiary support or are erroneous as a matter of law." *Id*. at 508, citing *Miller*, 508 N.H. at 659. The, "Inquiry is to determine whether the evidence presented to the trial court reasonably supports its findings, and then whether the court's decision is consonant with applicable law." *Randall*, 164 N.H. at 508.

A willful action is, "A voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact." *Miller*, 150 N.H. at 662, citing *Rood v. Moore*, 148 N.H. 378, 379 (2002). *Miller* further held that a landlord is responsible for knowledge of the law and maintaining rental property to the standards required in RSA 540-A. *Id*.

In *Randall v. Abounaja*, the tenant filed a petition against the landlord after the landlord refused to fix the tenants heat. *Randall*, 164

N.H. at 507. This Honorable Court determined that while a heater breaking might not initially be a willful violation of RSA 540-A:3, I, after refusing to fix the heat system for a period of time, the landlords actions could become willful. *Id*. at 508-09.

The finding of the trial court in this case was that the landlord violated RSA 540-A:3, I. *Addendum to Brief at 25*. The Court's order was issued on both the form for a decision on an RSA 540-A petition and supplemented with a written decision. In the order, the court checked the box indicating that it found that the landlord had violated RSA 540-A:3, I. *Addendum to Brief at 25*. In finding that the landlord had violated RSA 540-A:3, I, the Court made the finding that the landlord's actions were willful. The judgment form does not have a location for the court to add that the actions of the landlord were willful, or any of the other elements of RSA 540-A. That the Court did not state the actions were willful in its written supplemental order does not invalidate the court's finding.

This decision is supported by the evidence presented to the Trial Court. Barletta testified both that he would not fix the heater until Lane filled the propane tank because he believed she owed him rent, and then that the reason Lane did not have heat in the apartment was that she had not filled the propane tank for the apartment. *December1, 2017 Trn. at 24, 30, 33*. This admission from the landlord is evidence from which the Court could conclude that the landlord knew that the heat did not work or was willfully refusing to fix it. The admission also supports the finding that Barletta was not under a mistaken belief that the heater was working but out

of fuel. Lane's testimony that she could original see a pilot light burning supports the Court's ruling that the landlord had willfully interfered with the tenants heat by refusing to fix it by proving the heater was broken before there were any issues with fuel. *December1, 2017 Trn. at 5-6.*

The trial court's decision is further supported by Lane's testimony that she informed Barletta repeatedly that her heat was not working. *December1, 2017 Trn. at 9.* In *Randall*, the landlord's refusal to fix the heat over a period of time became willful even though the landlord did not initially cause the heat to break, because, the landlord knew of the issue and did not fix it. *Randall v. Abounaja*, 164 N.H. 506, 506-07 (2013). The situation in *Randall* is identical to the situation in this case.

Barletta's defense he believed a lack of fuel was the cause of Lane's lack of heat is undercut by his argument that Lane had a working heating system because he provided her with a space heater that could sufficiently heat the apartment. By providing a space heater, Barletta took action that supports he knew there was an issue with the heating system, rather than just an issue with the propane tank being empty.

The courts temporary order required the landlord to fix the heater. This order was not contingent upon the tenant providing fuel for the heater. In order to comply with the order Barletta was required to make sure the heater worked, including supplying fuel if necessary, as the order superseded the obligations of the lease agreement. *Wass*, 158 N.H. at 283-284. Barletta's obligation was to make sure the heater worked regardless of its fuel status. The presence or absence of fuel for the heat

does not change the issue of if the heater worked or not, and the temporary order was not contingent upon the tenant filing the fuel tank.

Barletta also argued that he did not willfully refuse to fix Lane's heat because he offered in court to pay for the repair if necessary. Making an offer at trial does not changes the landlord's burden under the temporary order to fix the heater, or make the actions not willful. There was sufficient evidence introduced at trial to support that Barletta's actions were a willful violation of RSA 540-A;3, I.

III. THE TRIAL COURT CORRECTLY AWARDED DOUBLE DAMAGES

After properly finding that the landlord had failed to repair the heater in the apartment, the court correctly doubled the award of damages. RSA 540-A:4, IX(a) provides that, "Any landlord or tenant who violates RSA 540-A:2 or any provision of RSA 540-A:3 shall be subject to the civil remedies set forth in RSA 358-A:10 for the initial violation, including costs and reasonable attorney's fees incurred in the proceedings. Each day that a violation continues after issuance of a temporary order shall constitute a separate violation. " RSA 358-A:10, I provides that "Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing

violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount."

The Defendant cites several cases where a plaintiff was awarded $1,000 per day for a violation of RSA 540-A. *Simpson v. Young*, is the only case which discusses the issue of multiplied damages pursuant to RSA 358-A:10, and support for multiplied damages was not fully briefed. *Simpson v. Young*, 153 N.H. 471, 476-77 (2006). Based on the plain meaning of the statute, RSA 540-A supports an award of increased damages. The statute provides that damages for the violation of a temporary order shall be in accordance with RSA 358-A:10, without limitation. This places anyone on notice that a violation of RSA 540-A:3 is subject to the initial initial $1,000 damages and multiplier of two to three times because it is in the same paragraph of RSA 358-A:10, I.

In interpreting statutes, it is presumed that the legislature would not intend for the statute to create an absurd result. *Simpson*, 153 N.H. at 475. RSA 358-A:10, I consists of six sentences. The first sentence allows for a private action when a person has been injured by another's deceptive business practice or method of unfair competition. If the absence of calling a violation of RSA 540-A:4, IX an unfair or deceptive business practice causes a plaintiff to not be entitled to multiplied damages, then the lack of this language would also prevent a plaintiff from recovering $1,000 per day for a violation of RSA 540-A. The second sentence of RSA 358-A:10, I awards a prevailing plaintiff actual damages or $1,000. The third sentence states that if the, "Use of the method of competition or the act or practice

was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount." RSA 358-A:10, I. The use of the word "or" means that only one of the conditions set forth in the sentence must be met. Because a violation of RSA 540-A:3, I, includes a finding that the action was willful, the statute does not limit damages to only the initial $1,000 in damages, and RSA 540-A:4, IX, expressly incorporates the penalties of RSA 538-A:10, I, all of the elements for multiplied damages are met. To say that a Plaintiff is entitled to damages for the initial violation but not the multiplied damages which is included in the same paragraph would arbitrarily change the wording of the statute.

The actions of the landlord violating RSA 540-A:3, I, can be a violation of the enumerated RSA 358-A:2 acts, specifically of RSA 358-A:2, VII or RSA 358-A:2, IX. By renting an apartment with a working heat source and then refusing to fix the heat source when it breaks, a landlord has advertised the good as being of a specific quality but then has provided a good of a lesser quality. Alternatively a landlord refusing to fix the heating source for a tenants apartment is in violation of RSA 358-A:2, IX by advertising the rental apartment as having a working permanent heat source but when the tenant renews the purchase of the good by paying rent without having a working heater the landlord has not sold the good as advertised.

IV. THE TRIAL COURT CORRECTLY DENIED THE ADMISSION OF DEFENDANTS EXHIBITS INTO EVIDENCE

The admission of Barletta's evidence was properly denied. "The admission of evidence falls within the trial court's sound discretion. *State v. Oakes*, 161 N.H. 270, 280, (2010); *State v. Giddens*, 155 N.H. 175, 179, (2007). We review the trial court's ruling for an unsustainable exercise of discretion. See *Giddens*, 155 N.H. at 179. To prevail under this standard, the defendant must demonstrate that the challenged evidentiary ruling was "clearly untenable or unreasonable to the prejudice of his case." Id." *State v. Addison*, 165 N.H. 381, 419 (2013).

Because as a matter of law, a temporary heater is not sufficient for a landlord to provide as a sole heat source, the court properly denied the admission of the Defendant's exhibits. It was within the trial court's discretion to deny the admission of the exhibits when Barletta could not provide the basis for the exhibits admission. *December1, 2017 at 23*.

V. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

The court erred in denying Plaintiff's motion for reconsideration. *District Division Rule 3.11 (E)*, allows for motions for reconsideration to be filed within 10 days of the clerk's notice of decision. In the calculation of time, the day of the event is not included. *District Division Rule 1.1A. District Division Rule 5.10* provides that in Landlord and Tenant actions, motions for reconsideration be filed within 7 days of the clerk's notice of decision. RSA 540-A:4, II states that the action to enforce RSA 540-A:3, is initiated by filing a petition. RSA 540-A:4, I grants power to the district court and superior courts to enforce RSA 540-A:3.

The District Division Rules for Landlord and Tenant actions are specifically written for possessory actions. *District Division Rule 5.3* covers entry of Landlord and Tenant Actions stating, specifically referencing starting landlord and tenant actions with the filing of a writ. The rule does not make any allowance for the commencement of a landlord and tenant action other than by the filing of a writ. Similarly each rule in Rule 5 except for Rule 5.10, specifies that the rules cover landlord and tenant writs, not petitions. Based on the complete reading of District Division Rule 5, it implements the procedures set forth in RSA 540 covering possessory actions not RSA 540-A Petitions.

Applying District Division Rule 5.10 to this proceeding amounts to selectively applying only a single section of the Rule while ignoring that the entire rest of the Rule applies to cases involving a writ.

The defendants own appeal was filed as a mandatory appeal. Appeals from landlord and tenant actions are discretionary appeals. By filing his appeal as a mandatory appeal and not a discretionary appeal, the landlord has treated this proceeding as something different from a Rule 5 landlord and tenant action. Because the RSA 540-A Petition does not proceed as a landlord and tenant action following Rule 5, post trial motions are governed by *District Division Rule 3.11(E)*, and the Plaintiff had ten days to file its post trial motions.

CONCLUSION

The Defendant's appeal should be denied because the Trial Court properly decided that the landlord willfully violated RSA 540-A:3, I. The Trial Court properly decided in accordance with precedent that the landlord's provision of a space heater did not remedy his failure to provide the tenant with a permanent working heat source. Admision of the Defendants exhibits was properly denied because it was within the trial court's discretion to find that the exhibits were not relevant to the proceeding. The trial court correctly doubled the award of damages to the plaintiff in accordance with a willful violation of RSA 358-A;10. I. The trial court erred in denying the Plaintiff's motion for reconsideration because the proceding is a District Court proceeding not a proceeding under District Division Rule 5. The Defendant's appeal should be denied, the Plaintiff awarded reasonable costs and attorney's fees associated with this appeal, and this case should be remanded to the Hillsborough District Court for a ruling on the Plaintiff's motion for reconsideration.

Statement Regarding Oral Argument

Jacqueline Lane requests a fifteen-minute oral argument.

Certification Regarding the Appealed Decision

A copy of the written decisions by the 6th Circuit - District Division - Hillsborough are attached to this brief.

Certification of Word Count

I hereby certify that this brief contains no more than 3872 words, exclusive of those portions which are exempted

Respectfully submitted
Jacquelyn Lane
By her attorney,

June 10, 2019

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Certificate of Service

I, Kyle McDonald, Esq. Attorney for Respondent and Cross Appellant Jacquelyn Lane, hereby certify that on June 10, 2019, I electronically served a copy of this Brief, along with Appendix, on Attorney Deb Bess Urbaitis.

June 10, 2019 By: /s/ *Kyle McDonald*
Kyle McDonald, Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit - District Division - Hillsborough
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February 22, 2018

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CONCORD NH 03301

Case Name: **Jacquelyn Lane v. Antonio Barletta**
Case Number: **444-2017-LT-00045**

Attached please find Final Order Under RSA 540-A:4 and Court Order for the above referenced matter.

Nancy E. Ringland
Clerk of Court

(768)

C: Antonio Barletta

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit - District Division - Hillsborough
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FINAL ORDER
(Pursuant to RSA 540-A:4)

FILE COPY

Case Name: **Jacquelyn Lane v. Antonio Barletta**
Case Number: **444-2017-LT-00045**

On January 12, 2018, a hearing was held on the above entitled matter at said Court.
Defendant ☒ was present ☐ was not present.
After hearing the evidence presented, the Court,

☒ Finds that the Defendant has violated RSA 540-A: 3(I)

☒ Orders the defendant to restore and maintain all utility services provided as part of the rental agreement with the plaintiff until such time as the rental agreement is lawfully modified or the plaintiff's tenancy is lawfully terminated.

☐ Orders the defendant not to interfere directly or indirectly with plaintiff's access to or use and enjoyment of the premises rented by the plaintiff (or any part thereof) without prior judicial authorization.

☐ Orders the defendant not to interfere directly or indirectly with plaintiff's access to a possession of his/her personal property without prior judicial authorization.

☐ Orders the defendant not to enter the premises rented by the plaintiff without permission from the plaintiff or a court of competent jurisdiction, except to make emergency repairs which include the formulation of a plan for remediation of, or to engage in emergency remediation of, an infestation of insects, including bed bugs or rodents.

☐ Orders the defendant not to interfere with the quiet enjoyment of the premises by the plaintiff or members of his/her household.

☐ Orders the defendant not to damage or permit any damage to any part of the premises he/she is renting from the plaintiff.

☐ Orders the defendant to permit the plaintiff to have access to the premises at reasonable times with reasonable prior notice in order to make necessary repairs.

☐ Orders the defendant to permit the plaintiff to have access to the premises at reasonable times with reasonable prior notice in order to evaluate whether bed bugs are present.

☐ Orders the defendant to comply with reasonable written instructions to prepare the dwelling unit for remediation of an infestation of insects or rodents, including bed bugs.

☐ Orders the defendant to investigate the plaintiff's report of an infestation of insects, including bed bugs or rodents.

Case Name: Jacquelyn Lane v. Antonio Barletta
Case Number: 444-2017-LT-00045
FINAL ORDER PURSUANT TO RSA 540-A:4

☐ Orders the defendant to immediately take reasonable measures to remediate an infestation of insects, including bed bugs or rodents.

☒ Orders ☐ plaintiff ☒ defendant to pay damages to the ☒ plaintiff ☐ defendant in the amount of $ 66,000"

☐ Orders ☐ plaintiff ☐ defendant to pay attorney's fees in the amount of $ TBD to the ☐ plaintiff ☐ defendant

☒ Other orders: See attached order

See attached order

☐ Orders ☐ plaintiff ☐ defendant to pay the following fees to the sheriff/police:
Service: _____ $ _____ Travel: _____ $ _____
Other: _____ $ _____ **TOTAL** _____ $ _____

WILLFUL VIOLATION OF THIS ORDER CONSTITUTES CONTEMPT OF COURT AND MAY RESULT IN THE IMPOSITION OF CIVIL PENALTIES, FINES AND/OR IMPRISONMENT.

2/14/18
Date

Signature of Judge

Edward B. Tenney
Printed Name of Judge

(768)
C: Antonio Barletta; Kyle A. H. McDonald, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

MERRIMACK COUNTY

6TH CIRCUIT – DISTRICT DIVISION – HILLSBOROUGH

Jacquelyn Lane v. Antonio Barletta

Case No. 444-2017-LT-00045

ORDER

This matter came before the Court for the second of two hearings on January 12, 2018. Both parties appeared. Ms. Lane was represented by Kyle McDonald, Esquire.

The tenant alleges in this 540-A action that the landlord failed to provide heat to her apartment since the summer of 2016. She notified him of the problem numerous times and provided heat for herself through a space heater.

She finally brought a 540-A Petition on November 3, 2017. The Court issued Temporary *Ex Parte* Orders the same day, requiring the landlord to take necessary steps to provide heat to the apartment. The landlord failed to do so until December 6, 2017. The landlord maintained for a long period of time that the unit in the building was working properly and just needed propane. However, subsequent inspections by heating contractors hired by both the tenant and the landlord conclusively showed that the heating unit was not working and the heating system was, in fact, defective. The heating system was finally repaired on December 6, 2017 by Ayer & Goss, who was paid to do so by the landlord.

The Court finds a violation of RSA 540-A: 3, (I) and the damages are assessed in accordance with the RSA 540-A: 4, IV, (a) and also RSA 358-A: 10. The remedy for this violation is $1,000.00 a day for each separate day the violation occurs after Temporary Order was issued. The Order to restore heat to the apartment was issued in this matter on November 3, 2017. The heating unit was not fixed and put in working order until December 6, 2017. This is a period of 33 days. Under RSA 540-A: IV, IV and RSA 358-A: 10, the damages shall be doubled **at a minimum**. Under RSA 540-A: IV, attorney's fees may also be ordered.

Damages in this case are assessed in the amount of $66,000.00 ($1,000.00 a day times 33 days times two).

Ms. Lane shall submit an Affidavit with specific requests for attorney's fees within 10 days of the date of this Order. Mr. Barletta shall have 10 days to file a written response regarding the attorney's fees. The Court will then issue a further written order on attorney's fee without further hearing.

So Ordered.

February 20, 2018
Date

Hon. Edward B. Tenney, Presiding Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit - District Division - Hillsborough
15 Antrim Road Box #3
Hillsborough NH 03244

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF APPELLATE RIGHTS

Case Name: **Jacquelyn Lane v. Antonio Barletta**
Case Number: **444-2017-LT-00045**

CIVIL CASES

*Small Claims, Landlord/Tenant Matters, Domestic Violence, Civil Stalking, Civil Writs

If you receive an adverse decision in the District Court or Family Division in any one of these cases, you have the right to appeal the decision of the District Court or Family Division by filing an appeal in the New Hampshire Supreme Court. This is an appeal only on questions of law. In other words, the Supreme Court will not redetermine questions of fact already decided by the District Court or Family Division. You must file your appeal with the Supreme Court within thirty days of the date on the District Court or Family Division's written notice of the decision. In landlord/tenant cases, you must notify the District Court or Family Division within seven days of the Notice of Judgment date of your intent to file an appeal in the Supreme Court.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHT OF APPEAL, PLEASE SPEAK WITH THE CLERK OF THIS COURT.

☒ Copy mailed to Pro Se Litigant

February 22, 2018

Nancy Ringland
Nancy E. Ringland, Clerk of Court

☐ My signature below attests that I have received a copy of this Notice of Appellate Rights.

Date

Pro Se Litigant

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

6th Circuit - District Division - Hillsborough
15 Antrim Road Box #3
Hillsborough NH 03244

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October 16, 2018

KYLE A. H. MCDONALD, ESQ
MCDONALD ROGERS & LORMAN PLLC
2 WHITNEY RD STE 11
CONCORD NH 03301

Case Name: **Jacquelyn Lane v. Antonio Barletta**
Case Number: **444-2017-LT-00045**

Attached please find Motion For Reconsideration and Affidavit Of Attorney's Fees for the above referenced matter.

Nancy E. Ringland
Clerk of Court

(768)

C: Deborah Bess Urbaitis, ESQ

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

6th CIRCUIT - DISTRICT DIVISION
HILLSBOROUGH

Docket No. 444-2017-LT-45

Jacquelyn Lane

v.

Antonio Barletta

PLAINTIFF'S AFFIDAVIT OF ATTORNEY'S FEES

NOW COMES Jacquelyn Lane, by and through her attorney, Kyle McDonald, Esq. of Law Office of Kyle McDonald Esq., P.L.L.C. and respectfully submits this Affidavit of Attorney's Fees and requests the court add Plaintiffs Attorney's fees to the judgment in this case, and in support states as follows:

1. Pursuant to this honorable courts February 20, 2018 order, Plaintiff is to submit an Affidavit with specific requests for attorneys fees to have attorneys fees awarded as part of the judgment.
2. I, Attorney Kyle McDonald, was retained to represent Plaintiff Jacquelyn Lane in the above captioned matter.
3. I was retained to Represent Jacquelyn Lane on an hourly basis, at a rate of One-Hundred-Fifty ($150) dollars per hour.
4. During the course of this litigation, I kept contemporaneous records of time spent on the matter, consistent with my regular billing practices.
5. I have reviewed the attached itemized bill and find that it is an accurate representation of my billable time in this matter. (Exhibit 1).

6. Per my regularly kept records, I spent 7.5 hours of billable time on this matter, for a total bill of $1,125

WHEREFORE, Jacquelyn Lane, by and through her attorney, respectfully requests that this Honorable Court:

A. Accept this affidavit of attorney's fees;

B. Grant Plaintiff an award of attorney's Fees in this case; and

C. Grant such further relief as justice so requires.

Attorney's fees in the amount of $1,125.00 approved,
Edward B. Tenney
10-12-18

Respectfully submitted this 2nd day of March, 2018,

Kyle McDonald, Esq.,
Bar No.: 266712
Law Office of Kyle McDonald Esq., P.L.L.C.
2 Whitney Road, Suite 11
Concord, NH 03301
(603) 753-4033

Signed this 2nd day of March, 2018, under the pains and penalties of perjury,

Kyle McDonald, Esq. Bar# 266712

State of New Hampshire
County of Merrimack

On March 2, 2018 personally appeared Kyle McDonald, known of satisfactorily proven to be the person whose name is subscribed in the foregoing affidavit and executed the same in my presence acknowledging that the testimony contained therein is true, accurate, and correct to the best of his knowledge, under the pains and penalties of perjury.

Sworn and subscribed before me this 2nd day of March, 2018

10/1/19

Certificate of Service

I hereby certify that on the 2nd day of March, 2018, I served via United States mail, a true and accurate copy of this Affidavit of Attorney's Fees to Defendant, Antonio Barletta, P.O. Box 346, Salem, MA.

STATE OF NEW HAMPSHIRE

RECEIVED

MERRIMACK COUNTY

6th CIRCUIT - DISTRICT DIVISION - HILLSBOROUGH

2018 MAR -5 P 2:14

Docket No. 444-2017-LT-45

Jacquelyn Lane

v.

Antonio Barletta

PLAINTIFF'S MOTION FOR RECONSIDERATION

NOW COMES Jacquelyn Lane, by and through her attorney, Kyle McDonald, Esq. of Law Office of Kyle McDonald Esq., P.L.L.C. and respectfully submits this Motion for Reconsideration, and in support states as follows:

1. Pursuant to this honorable courts February 20, 2018 order, Plaintiff was awarded damages for Defendant's violation of RSA 540-A:3(I) for 33 days.
2. The 33 day period was calculated based on the temporary order in this case being issued on November 3, 2017, and repaired on December 6, 2017.
3. Under District Division Civil Rule 3.11, Plaintiff asks the court reconsider the finding that the heating unit was fixed on December 6, 2017, and instead find that the heat was not fixed until Plaintiff moved out of the premises on December 31, 2017.
4. According to the testimony of both Jacquelyn Lane and Antonio Barletta at the hearing, the propane was filled by Ayer and Goss at the landlord's expense on December 6, 2017. Neither witness testified at the heating that the heating unit was fixed on December 6, 2017, not was any evidence submitted that the heating unit was fixed on December 6, 2017.

5. At the hearing Plaintiff submitted a report from Space Kraft LLC, that on December 20, 2017 the heating technician examined the heating unit and found that it did not work. The report was submitted as evidence by Plaintiff at the second hearing. (Exhibit 1).
6. Defendant had his own technician visit the premises on December 21, 2017. The technician also found that the heating unit was not working.
7. Because both technicians visited the premises after December 6, the Defendant did not fix the heating unit as ordered by the temporary order on December 6.
8. Plaintiff testified that she vacated the premises on December 31, 2017.
9. Plaintiff's damages should be calculated based on the period from the issuance of the temporary order on November 3, 2017 to when she vacated on December 31, 2017, because the landlord did not fix the heating unit on December 6.
10. Plaintiff's damages should therefore be based on a violation by the Defendant of 58 days, not 33 days.

WHEREFORE, Jacquelyn Lane, by and through her attorney, respectfully requests that this Honorable Court:

A. Grant this motion;

B. Recalculate the award of damages based on a duration of 58 days; and

C. Grant such further relief as justice so requires.

Motion has not timely filed so it was not filed within 7 days of the notice of judgment. Motion is denied.

Edward B. Tenney 10-12-18

Respectfully submitted this 2nd day of March, 2018,

Kyle McDonald, Esq.,
Bar No.: 266712
Law Office of Kyle McDonald Esq., P.L.L.C.
2 Whitney Road, Suite 11
Concord, NH 03301

(603) 753-4033

Certificate of Service

I hereby certify that on the 2nd day of March, 2018, I served via United States mail, a true and accurate copy of this Affidavit of Attorney's Fees to Defendant, Antonio Barletta, P.O. Box 346, Salem, MA 01970.