

NOTICE

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FIFTH DIVISION
August 10, 2007

No. 1-06-3028

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEN LANDIS and ANA LANDIS,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County
)	
v)	No. 06 M1 100202
)	
MARC REALTY and ELLIOTT WEINER,)	Honorable
)	Moira S. Johnson,
Defendants-Appellees.)	Judge Presiding.

ORDER

Ken Landis and Ana Landis sued Marc Realty and Elliott Weiner, alleging that defendants wrongfully failed to return their security deposit. The trial court dismissed plaintiffs' suit, finding it was time barred because the complaint was not filed within a two-year statute of limitations. On appeal, plaintiffs contend that their suit was subject to a five- or ten-year statute of limitations, was timely filed, and should not have been dismissed.

BACKGROUND

On April 30, 2001, the parties signed a two-year residential lease for an apartment located in Chicago. The two-year term ran from June 1, 2001, to May 31, 2003, with \$4,500 monthly rent for the first year and \$4,600 monthly rent for the second year. Pursuant to the lease, plaintiffs tendered

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an \$8,400 security deposit to defendants.

According to plaintiffs, the following events transpired during the term of the lease. A leak appeared in the apartment. Plaintiffs requested that the leak be repaired, but defendants were unable to do so. Due to their inability to fix the leak, defendants allowed plaintiffs to move out of the apartment and agreed to return plaintiffs' security deposit. On November 16, 2001, plaintiffs moved out of the apartment and surrendered their keys to defendants. Defendants did not return the security deposit or pay interest on the two-year lease or on a prior lease for the same apartment.

On April 25, 2006, plaintiffs filed a four-count complaint against defendants. Counts III and IV were withdrawn by plaintiffs and are not at issue in the instant appeal. In count I, plaintiffs sought damages for defendants' failure to return the security deposit in violation of the Chicago Residential Landlord and Tenant Ordinance (RLTO) (Chicago Municipal Code § 5-12-080(d) (amended November 6, 1991)). Count II requested damages for defendants' failure to pay interest on the security deposit in violation of the RLTO Chicago Municipal Code § 5-12-080(c) (amended November 6, 1991).

Defendants filed a motion to dismiss counts I and II of the complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2004)), arguing that plaintiffs' suit was time-barred by the two-year statute of limitations for actions seeking statutory penalties contained in section 13-202 of the Code (735 ILCS 5/13-202 (West 2004)).

On September 20, 2006, the trial court granted defendants' motion to dismiss the complaint.

ANALYSIS

On appeal, plaintiffs contend that their complaint was timely filed. They argue that the two-

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year statute of limitations does not apply because they are not seeking a statutory penalty but, rather, remedial relief pursuant to an ordinance. Plaintiffs assert that the proper limitations period was either five years pursuant to the catch-all provisions of section 13-205 of the Code (735 ILCS 5/13-205 (West 2004)) or ten years for a written contract pursuant to section 13-206 of the Code (735 ILCS 5/13-206 (West 2004))

Dismissal of a complaint is proper under section 2-619(a)(5) of the Code if the “action was not commenced within the time limited by law ” 735 ILCS 5/2-619(a)(5) (West 2004). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts affirmative matter to avoid or defeat the claim. *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill. App. 3d 352, 359 (2005). When considering a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light more favorable to the nonmoving party *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill. 2d 1, 5 (2004). The trial court should grant the motion only if the plaintiff cannot prove any set of facts to support a cause of action *Paszkowski*, 213 Ill. 2d at 5. Both the decision to dismiss a complaint and the interpretation of a statute are subject to *de novo* review *Paszkowski*, 213 Ill. 2d at 6

Plaintiffs’ appeal requires us to determine which statute of limitations applies to counts I and II of their complaint: the two-year limit contained in section 13-202 of the Code; the five-year limit contained in section 13-205 of the Code; or the ten-year limit contained in section 13-206 of the Code. See 735 ILCS 5/13-202, 205, 206 (West 2004). The determination of which statute of limitations applies hinges on the nature of the relief sought by plaintiffs

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In count I, plaintiffs alleged that defendants violated subsection (d) of section 5-12-080 of the RLTO, which provides in relevant part as follows:

“(d) The landlord shall, within 45 days after the date that the tenant vacates the dwelling unit or within 7 days after the date that the tenant provides notice of termination of the rental agreement pursuant to Section 5-12-110(g), return to the tenant the security deposit or any balance thereof and the required interest thereon ***.” Chicago Municipal Code § 5-12-080(d) (amended November 6, 1991).

In count II, plaintiffs alleged a violation of subsection (c) of section 5-12-080 of the RLTO, the relevant portion of which provides as follows:

“(c) A landlord who holds a security deposit or prepaid rent pursuant to this section for more than six months, after the effective date of this chapter shall pay interest to the tenant accruing from the beginning date of the rental term specified in the rental agreement at the rate, determined in accordance with Section 5-12-081. The landlord shall, within 30 days after the end of each 12-month rental period, pay to the tenant any interest, by cash or credit to be applied to the rent due.” Chicago Municipal Code § 5-12-080(c) (amended November 6, 1991).

Based on the alleged violations of subsections (c) and (d), plaintiffs sought relief under subsection (f) of section 5-12-080 of the RLTO:

“(f) If the landlord or landlord’s agent fails to comply with any provision of Section 5-12-080(a)–(e), the tenant shall be awarded damages in an amount equal to two times the security deposit plus interest at five percent. This subsection does not preclude the tenant from recovering other damages to which he may be entitled under this chapter.” Chicago Municipal Code § 5-12-080(f) (amended November 6, 1991).

Defendants maintain that counts I and II of the complaint were properly dismissed as untimely, as the complaint was not filed within the two-year statute of limitations for actions “for a statutory penalty.” 735 ILCS 5/13-202 (West 2004) We find that this court’s decision in *Namur v. Habitat Company*, 294 Ill App. 3d 1007 (1998), directs our determination on this issue.

In *Namur*, the plaintiffs alleged that the defendant landlord had commingled the plaintiffs’ security deposit with other assets in violation of section 5-12-080(a) of the RLTO *Namur*, 294 Ill. App. 3d at 1008-09. The defendant filed a motion to dismiss, arguing, *inter alia*, that section 5-12-080(f) of the RLTO, which imposes damages for violations of sections 5-12-080(a)–(e) of the RLTO, was a statutory penalty *Namur*, 294 Ill. App. 3d at 1009. The defendant contended that the complaint should be dismissed on the basis that it was not filed within the two-year statute of limitations contained in section 13-202 of the Code for actions for damages “for a statutory penalty” *Namur*, 294 Ill App. 3d at 1009, quoting 735 ILCS 5/13-202 (West 1996). The trial court denied the motion to dismiss. *Namur*, 294 Ill App. 3d at 1009.

The issue addressed on appeal in *Namur* was whether plaintiffs' action sought a "statutory penalty" within the meaning of the two-year statute of limitations provided for in section 13-202 of the Code. *Namur*, 294 Ill. App. 3d at 1008, citing 735 ILCS 5/13-202 (West 1996). Initially, the *Namur* court observed that:

"A statute is penal if it imposes automatic liability for a violation of its terms and if the amount of liability is predetermined by the statute and imposed without actual damages suffered by the plaintiff [Citation]. A statute is remedial where it imposes liability only for actual damages resulting from a violation." *Namur*, 294 Ill. App. 3d at 1010-11.

The *Namur* court recognized that some portions of the RLTO are remedial because they permit recovery of actual damages. *Namur*, 294 Ill. App. 3d at 1011. However, the *Namur* court concluded that section 5-12-080(f) of the RLTO is penal because it specifies either the amount of damages that can be awarded for violations or the formula by which the amount of damages is to be calculated. *Namur*, 294 Ill. App. 3d at 1011.

Next, the *Namur* court addressed whether the plaintiffs' complaint, which sought penalties imposed by a municipal ordinance, sought a "statutory" penalty within the meaning of section 13-202 of the Code. *Namur*, 294 Ill. App. 3d at 1011. The *Namur* court observed that "an ordinance is a legislative act and is the equivalent of a municipal statute." *Namur*, 294 Ill. App. 3d at 1013. The court concluded that section 13-202's two-year statute of limitations on actions for a "statutory penalty" applied to the plaintiffs' action because the term "statutory" was broad enough to cover

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municipal ordinances. *Namur*, 294 Ill. App. 3d at 1013.

We agree with defendants that *Namur* is dispositive of the issues presented in the instant case. Consistent with the reasoning and holdings of *Namur*, we find that plaintiffs' complaint, which sought damages pursuant to section 5-12-080(f) of the RLTO, is subject to the two-year statute of limitations for actions for a "statutory penalty" contained in section 13-202 of the Code of Civil Procedure. 735 ILCS 5/13-202 (West 2004). First, the term "statutory," as used in section 13-202 of the Code, applies to municipal ordinances. *Namur*, 294 Ill. App. 3d at 1013; *Sternic v. Hunter Properties, Inc.*, 344 Ill. App. 3d 915, 918 (2003). Second, the damages available for violations of subsections (c) and (d) of section 5-12-080 of the RLTO are imposed without any showing of actual damages suffered by the tenant. As observed in *Namur*, section 5-12-080(f) of the RLTO specifies the formula by which the amount of damages is to be calculated. *Namur*, 294 Ill. App. 3d at 1011. Under section 5-12-080(f) of the RLTO, if a landlord fails to timely return a security deposit or timely pay interest on the security deposit, the tenant "shall be awarded damages in an amount equal to two times the security deposit plus interest at five percent." Chicago Municipal Code § 5-12-080(f) (amended November 6, 1991). The tenant will receive double the security deposit no matter the number of days, weeks, or months the landlord is late in returning the security deposit or in paying interest. Thus, damages are calculated regardless of any actual loss suffered by the tenant. We conclude that section 5-12-080(f) imposes liability on landlords for violations of subsections (c) and (d) independent of tenants' actual loss. Therefore, as in *Namur*, we find that section 5-12-080(f) is penal.

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Given our determination that the two-year statute of limitations contained in section 13-202 of the Code applies to the claims in plaintiffs' complaint, we need not address plaintiffs' contentions that the appropriate statute of limitations is either the five-year limit contained in section 13-205 of the Code or the ten-year limit contained in section 13-206 of the Code. See 735 ILCS 5/13-202, 205, 206 (West 2004).

In the instant case, plaintiffs vacated the apartment on November 16, 2001. Under section 5-12-080(d) of the RLTO, defendants were required to return the security deposit 45 days later, and under section 5-12-080(c) of the RLTO, interest was due "within 30 days after the end of each 12-month rental period." Plaintiffs filed their complaint on April 25, 2006, well over two years after defendants' alleged violations of sections 5-12-080(c) and (d). In these circumstances, the trial court's decision to grant defendants' motion to dismiss was proper.

For the reasons explained above, we affirm the judgment of the circuit court.

Affirmed

O'MARA FROSSARD, J., with TULLY and GALLAGHER, JJ, concurring.