

11 Fla. L. Weekly Supp. 797a

Landlord-tenant -- Contracts -- Leases -- Commercial -- Repair of premises -- Appeal of judgment finding landlord liable for cost of air handler tenant had installed in premises -- Landlord's motion for sanctions against tenant for failing to file answer brief is denied as appellate rules permit, but do not require, answer briefs -- Although argument that landlord had no duty to repair air handler in commercial leasehold would have been well-taken if raised before trial court, court did not commit reversible error in finding lease made landlord liable to keep air conditioning functioning where landlord invited error by advising court that it was her responsibility to maintain air conditioner -- Waiver -- No error in finding waiver of lease provision requiring written notice where issue was tried by consent, and there is sufficient record evidence to support findings on issue -- Lease provision waiving tenant's right to make repairs at landlord's expense which refers to "structural portions of building" and "exterior walls and roof" implies air handler equipment in interior of building is excluded from waiver -- Damages -- Landlord has not met burden of showing that trial court did not have sufficient evidence to make finding that \$300 was appropriate measure of damages for converted air handler where owner of company that installed air handler testified to cost of new unit, and amount awarded was based on credibility of testimony as to value of air handler as well as age and condition of unit -- Expert witnesses -- Error to permit experts to testify as to meaning of building code and code's requirements, as it was duty of trial court to interpret code and requirements -- Where appellate record does not contain ordinance that allegedly required permit prior to installation of air handler, appellate court cannot review whether permit was required -- Further, where landlord asked for equitable relief requiring permit to be obtained, she will not be heard to complain that trial court gave her what she asked for

EILEEN MANNO, Appellant, vs. RELIABLE RADIOGRAPHIC SERVICES, INC. and MULLEN'S REFRIGERATION & AIR CONDITIONING, INC., Appellees. Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 02-17582 (11). Re: 01-11585 COWE 81. June 10, 2004. Barry E. Goldstein, Judge.

OPINION

The Appellant, Eileen Manno, seeks review of a final judgment of the trial court finding her liable for the cost of an air handler that her tenant had installed in the premises it leased from her. She also appeals the portion of the order granting her \$300.00 from the company that installed the air handler for the conversion of her old unit. The review of this appeal is hampered by the Appellees' failure to file an answer brief, supporting the ruling of the trial court, to assist this Court.

The Appellant seeks sanctions for the Appellees' failure to file an answer brief. However, "Fla.R.App.P. 9.210, which governs briefs in appellate proceedings, does not *require* an appellee to file an answer brief, it simply *permits* such a brief to be filed." *Board of Optometry v. Florida Society of Ophthalmology*, 538 So.2d 878 (Fla. 1st DCA 1989).

If the Appellant had raised her first point on review to the trial court, it would have been well taken. She had no duty to repair the air handler. In a commercial leasehold context, without a special agreement to repair the leased premises, a landlord is not under a duty to make repairs.¹ *City of St. Petersburg v. Competition Sails, Inc.*, 449 So.2d 852 (Fla. 2nd DCA 1984). There is no express assumption of the duty to make air conditioner repairs in the lease in question and "a lessor's duty to repair cannot be raised by implication from a provision which exonerates the lessee from making the same repair." *Competition Sails, Inc.*, 449 at 854. The specific elimination of the lessee's obligation to repair the air conditioning

did not shift the obligation to the lessor; it “simply served to exonerate the lessee from any common law obligation it might have had to repair the [air conditioner] in the absence of an agreement.” *Competition Sails, Inc.*, 449 at 854. However, instead of raising that point to the trial court, Appellant's counsel told the court that: “it is not the tenant's responsibility to maintain that air conditioner. It is our responsibility to do so.” Therefore, the Appellant invited the error² and the trial court did not err reversibly in finding that the lease made the Appellant liable to keep the air conditioning functioning.

The issue of waiver of the lease provision requiring written notice was tried by consent, since there was no objection to the testimony on that issue. There is sufficient record evidence to support the trial court's findings of waiver and the reasonableness of the period of time that Appellee Radiographic waited prior to replacing the air handler.

The Appellant's third issue on appeal is that, pursuant to Paragraph 11(b) of the lease, the tenant expressly waived any right to make repairs at the Landlord's expense. However, a close reading of that paragraph reveals that it only refers to the “structural portions of the Building.” Under the doctrine of *expressio unius est exclusio alterius*,³ the mention of one thing implies the exclusion of another, the paragraph's mention of “the exterior walls and roof” implies that the air handler (a piece of equipment which is in the interior of the building) is excluded.

The Appellant also argues that the trial court erred in awarding her the wholesale price of an air handler as damages for her converted one. The appropriate measure of damages for conversion is the fair market value of the property at the time of conversion. *Cutler v. Pelletier*, 507 So.2d 676 (Fla. 4th DCA 1987). The court received testimony from both defendant Manno and third party Mullen as to the value of the air handler. Contrary to Manno's argument and the trial court's finding, for which Manno again invited error, Mr. Mullen did not testify that \$300.00 was his wholesale cost, he merely testified to the “cost of a brand new” unit. The amount determined was a finding of fact, based on the credibility of the testimony as to the value of the property in question, as well as the age and condition of the unit. The Appellant has not carried its burden of showing that the trial court did not have sufficient evidence to make this finding of fact.

Finally, the legal effect of a building code presents a question of law for the court. *Lindsey v. Bill Arflin Bonding Agency Inc.*, 645 So.2d 565 (Fla. 1st DCA 1994). *Accord Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Association, Inc.*, 573 So.2d 889 (Fla. 2nd DCA 1990). Permitting experts to testify as to the meaning of the building code and its requirements is erroneous. *Id.* It was the duty of the trial court to interpret the building code and its permit requirements. *Bayport Beach and Tennis Club Association, Inc.* However, as in *City of Hollywood v. Coley*, 258 So.2d 828 (Fla. 4th DCA 1971):

The building code in question was not introduced into evidence at trial, and is nowhere to be found in the record on appeal. The rule in Florida is that municipal ordinances will not be judicially noticed, and we are therefore precluded from considering the specific provisions of this building code dealing with [replacement of air handlers], if such indeed exist.

Since the appellate record does not contain the municipal ordinance that allegedly requires the permit prior to installation of the air handler, this court cannot review whether or not a permit was required. Further, the Appellant asked for equitable relief requiring a permit to be obtained for the unit. The trial court gave the Appellant what it asked for and the Appellant will not now be heard to complain that it received what it asked for.

Accordingly, the Order under review is hereby AFFIRMED. It is further ORDERED AND ADJUDGED that: Appellant's Motion for Sanctions is Hereby DENIED. The Appellant's Motion for Appellate Attorneys Fees is also DENIED.

¹Section 83.201, Florida Statutes, which provides nonresidential tenants with remedies for the landlords' failure to repair, is premised on the lease "affirmatively and expressly plac[ing] the obligation" for the repair on the landlord. The lease in question does not contain such an affirmative and express obligation of the Appellant lessor to repair the air conditioning.

²See *Dicus v. District Board of Trustees for Valencia*, 734 So.2d 563, 564 (Fla. 5th DCA 1999) ("A party is also bound by factual concessions made by that party's attorney before a judge in a legal proceeding."); *Muina v. Canning*, 717 So.2d 550 (Fla. 1st DCA 1998) (Trial court's error was caused and induced by appellant's counsel's argument; therefore, invited error rule barred reversal.); and *Hunter v. Employers Mutual Liability Insurance Company of Wisconsin*, 427 So.2d 199 (Fla. 2nd DCA 1982) (Appellant's stipulation of facts relieved the appellee of carrying its burden of proving a genuine issue of material fact, thereby inviting the court's error, if any, in granting summary judgment against the Appellant, applying the law to the facts as it found them.

³Therefore, doctrine of invited error precluded relief for Appellant). See *Mulligan v. City of Hollywood*, 28 Fla. L. Weekly D2265 (Fla. 4th DCA. Oct 01, 2003) rehearing denied (May 12, 2004).

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