IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MATTHEW P. ALTMAN,	:	APPEAL NO. C-200406 TRIAL NO. 19CV-20574
MATTHEW FREDERICKSON,	:	
ANDREW STEPHENSON,	:	*O P I N I O N.*
and	:	
ANDREW WELLER,	:	
Plaintiffs-Appellants,	:	
vs.	:	
KARDOUS BAYARRI PROPERTIES, LLC,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 15, 2021

Matthew P. Altman, Matthew Frederickson, Andrew Stephenson and *Andrew Weller,* pro se*,*

Christopher R. Heekin Co., LLC, and *Christopher R. Heekin*, for Defendant-Appellee.

BERGERON, Presiding Judge.

{¶1} Four incoming medical students in search of housing near the University of Cincinnati signed a lease several months in advance, relying on the landlord's promise that they could move in a few days before the school term started. But when they arrived at the property on move-in day, they found it in an alarming state of disrepair and eventually opted to cancel the lease. The landlord insisted—and the trial court agreed—that the tenants could not claim constructive eviction because their tenancy had not yet begun. We disagree with the premise, holding that the tenancy began when the tenants took possession on August 1. We accordingly reverse the trial court's judgment and remand for further proceedings with this new threshold determination in mind.

I.

{¶2} Prospective tenants (now appellants) first toured the rental property in June 2019. During this scouting mission, nothing seemed amiss, and a leasing agent for the landlord-appellee—Kardous Bayarri Properties (KBP)—informed the tenants that the lease could begin on August 1, 2019. This start date worked well for the tenants, who wanted to move in and get settled in the house before their medical school activities began on August 5. KBP sent over a draft copy of a lease with a start date of August 1, and cautioned the tenants that another group seemed poised to sign a lease for the house (context indicates that both sides—the tenants and KBP—sought to keep their options open).

{¶3} Eager to secure the property in time for the upcoming school year, the tenants agreed to sign. But when KBP sent them the finalized lease, a key term was changed: the start date. Instead of the August 1 start date that the parties had

discussed, the lease now purported to run "for a period of 12 months, commencing August 5th, 2019, and ending July 31st, 2020." Surprised by the last-minute change, the tenants reached out to KBP's agent via text, asking:

> [W]hen we toured you mentioned a move in date on August 1st. The lease lists it as the 5th, which is the same date we start medical school. Can this be changed to the 1st?

The agent responded:

> [The owner]'s wanting to start having the lease start on the 5th to be sure that his cleaning and maintenance crew have enough time to thoroughly go through before the new tenants come in. He says it's alright if you start moving your stuff in by the 1st but that there would be people coming in for those first few days to update/repair the property.

Just before signing, the tenants messaged KBP's agent a second time, asking: "So just to make sure, is [the owner] cool with giving us the keys on the 1st?" The agent responded, assuring the tenants: "Yes, you can start moving your stuff in on th[e] first." Finally, on June 30, 2019, the tenants signed the lease and paid a security deposit of $1,800. They later paid the full August rent of $1,800.

{¶4} The tenants picked up their keys on August 1, as planned. But when they arrived at the property, they were flabbergasted. Fist-sized growths of blue and green mold climbed the walls and ceiling in the basement, which was brimming with trash, debris, and standing water. The basement HVAC system pulsed a strong odor of mold throughout the house, and the tenants complained of stinging eyes and noses. Water damage continued onto the upper floors, including two of the house's bedrooms. Further investigation revealed mouse droppings in the pantry shelving,

unknown (but larger) animal feces in the basement, a broken ground floor window, and broken basement-plumbing fixtures. In the mailbox, tenants found a letter from the Cincinnati Health Department, citing the property for mold and broken plumbing. Dated July 10, 2019, the letter ordered KBP to remedy the conditions within five days.

{¶5} Dismayed by the property's condition and the looming start of the school year, the tenants evaluated their options. The next morning, on August 2, 2019, they sent KBP's leasing agent a text message that described the myriad problems and the city's notice before declaring themselves constructively evicted and demanding a refund of the $3600 that they had tendered.

{¶6} KBP's leasing agent responded to this termination-text with a series of semi-contradictory statements. On the one hand, he maintained that the "previous tenants didn't disclose a lot of issues that happened during their time at the property." But he acknowledged that the previous tenants had complained of mold, insisting that "a cleaning crew and maintenance crew both refuted those claims." The agent further claimed that "everything was taken care of and repairs and cleaning have already been done. We have receipts and invoices. * * * The health department approved it 2 weeks ago." He urged the tenants to sit tight until he provided them with these invoices and documentation, which he believed "should make you guys feel much better." Unpersuaded, the tenants responded: "We are still canceling the lease."

{¶7} A few hours later, in the afternoon of August 2, the Cincinnati Health Department inspector who had previously cited the property visited the house for the second time. She confirmed that the first citation had never been resolved or approved (a troubling contrast to the agent's claims). She also issued a second

citation, this time for five violations: 1) "broken, obstructed, or defective plumbing"; 2) "junk, litter, debris, [and garbage]"; 3) maintenance of the premises in "dirty, filthy, neglected condition such that the health of the occupant * * * is endangered"; 4) "infestation of mice"; and 5) "visible mold." Critically, the health inspector expressed to KBP's agent her opinion "that the property is definitely not in a condition that would be considered habitable for new tenants."

{¶8} Nevertheless, KBP's agent implored the tenants to wait to cancel the lease, arguing that the landlord had until August 5 to complete repairs. But the tenants stood by their termination: they returned the keys to KBP, demanded a refund of their security deposit and first month's rent, and rented another property. When KBP did not return the prepaid rent or deposit, the tenants filed a complaint against KBP in small claims court, seeking $6,000 in damages. KBP counterclaimed, alleging that the tenants breached the lease and caused KBP to suffer damages. The matter was ultimately tried to a magistrate, who awarded the tenants $3,600 in damages for their wrongfully withheld security deposit, but declined to award August rent because she found that the tenants had anticipatorily repudiated the lease. Both parties objected and the matter was retried to the trial court. The trial court ruled for KBP on all claims and awarded KBP $3,600 in damages (in addition to the $3,600 that tenants had paid as a security deposit and August rent). The tenants now appeal, asserting six assignments of error.

II.

{¶9} In their first assignment of error, the tenants contend that the trial court erred by finding the lease's start date to be August 5, when the tenancy actually commenced on August 1. This start date is crucial to their subsequent assignments of error and requires us to consider two subsidiary issues: 1) whether the text of the

lease is ambiguous, thereby allowing consideration of parol evidence; and 2) if parol evidence is allowed, whether it supports a start date of August 1 or August 5. We address these two issues in turn and conclude that the lease began on August 1.

A.

{¶10} "The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' " *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000), quoting 11 Williston on Contracts, Section 33:4 at 569-570 (4th Ed.1999). Here, the tenants maintain that the text of the lease unambiguously supports an August 1 start date. In the alternative, they contend that the lease is ambiguous due to contradictions in its terms, and that parol evidence supports an August 1 start date. KBP counters that the lease unambiguously supports an August 5 start date, or, alternatively, that parol evidence establishes an August 5 start date.

{¶11} The trial court in this case offered no legal determination as to whether parol evidence could be considered. Generally, "[t]he construction of a written contract is a matter of law that we review de novo." *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 9. However, if a contract is deemed ambiguous, the meaning of specific terms within the contract poses "a question of fact and will not be overturned on appeal absent a showing that the trial court abused its discretion." *Ohio Historical Soc. v. Gen. Maintenance & Eng. Co.*, 65 Ohio App.3d 139, 147, 583 N.E.2d 340 (10th Dist.1989). *See Kelly Dewatering & Constr. Co. v. R.E. Holland Excavating, Inc.*, 1st Dist. Hamilton No. C-030019, 2003-Ohio-5670, ¶ 21.

{¶12} To divine the true start date of this lease, we must first assess any ambiguity in the text of the lease. A lease will be considered "ambiguous if its terms cannot be clearly determined from a reading of the entire contract or if its terms are susceptible to more than one reasonable interpretation." *Kelly Dewatering* at ¶ 21. *See City of Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 52 Ohio St.3d 174, 177, 556 N.E.2d 1186 (1990) (contract terms reasonably susceptible to more than one interpretation are ambiguous). The relevant passages of this lease state:

> The within premises are hereby rented for a period of 12 months, commencing August 5th, 2019, and ending July 31st, 2020. There will be no proration of rent for the month of August. Energy (Duke) and water (GCWW) utilities MUST be transferred to a tenant's name by the last business day in July prior to move-in.
>
> * * *
>
> Rent is due on the first (1st) of every month. IF the rent is not received by the THIRD (3rd) of the month, a late charge of 10% (ten percent) of one month's rent must also be paid.

{¶13} Given this text, we readily reject the tenants' argument that the lease unambiguously establishes a start date of August 1. But KBP's proclamation that the identification of August 5 in the lease ends the analysis requires further scrutiny. To establish ambiguity, the tenants counter that four distinct features of the lease point to an August 1 transfer of possession: 1) the lease term of "12 months * * * ending July 31st, 2020"; 2) the requirement that the tenants pay rent by August 1 (or incur a late fee on August 3); 3) the lack of proration for August; and 4) the requirement that the tenants transfer utilities "by the last business day in July prior to move-in."

{¶14} Upon review, we agree with the tenants that ambiguity in the text of this lease justifies consideration of parol evidence. The four lease terms featured by the tenants strongly point to an August 1 transfer of possession, rendering the start-date of the tenancy "susceptible to more than one reasonable interpretation." *Kelly Dewatering*, 1st Dist. Hamilton No. C-030019, 2003-Ohio-5670, at ¶ 21. *See Kanistros v. Holeman*, 2d Dist. Montgomery No. 20528, 2005-Ohio-660, ¶ 15 ("A tenancy is possession or occupancy of land by right or title * * * ."); *Lithograph Building Co. v. Watt*, 96 Ohio St. 74, 117 N.E. 25 (1917), paragraph six of the syllabus ("Possession taken and rents paid under a defectively executed lease creates a tenancy * * * .").

{¶15} The lease's requirement that the tenants transfer utilities July 31 explicitly contemplates an August 1 move-in (after all, why would a tenant pay for utilities without possession?). The provision requiring them to pay August rent in full before August 1 (or incur a late fee on August 3) can be viewed as an exchange of consideration for possession on August 1. Finally, and most importantly, the text of the lease contains directly contradictory descriptions of its length: a term of "12 months" versus a term "commencing August 5th, 2019, and ending July 31st, 2020" (11 months and 26 days). KBP urges us to dismiss this last contradiction as inconsequential, insisting that the lease is a mere "four days short of a full calendar year." But in a residential lease—as this case so poignantly illustrates—timing is everything. KBP, as the drafter, could have easily avoided all of these problems through more attentive drafting. Because we find the timing of this lease to be ambiguous, we must next review whether parol evidence points to an August 1 or August 5 start date.

B.

{¶16} KBP insists that even if we do consider parol evidence in this case, its pre-signing communications with the tenants established, at most, a gratuitous agreement to grant early access for the tenants to bring in their things. The tenants counter that KBP effectively promised to—and later did—turn over possession of the house on August 1, knowing that the tenants would move in and begin living full-time at the property on that date. The trial court made a key factual finding as to the nature of KBP's promise, determining that "Plaintiffs were granted permission to move in on August 1, 2019," with no limitations on their use of the property other than that they allow KBP access for "minor cleaning and repairs that would not be completed prior to August 5, 2019." We will not overturn this finding "absent a showing that the trial court abused its discretion." *Ohio Historical Soc.,* 65 Ohio App.3d at 147, 583 N.E.2d 340.

{¶17} "A tenancy is possession or occupancy of land by right or title, especially under a lease, which is a contract by which an owner or rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually rent." *Kanistros,* 2d Dist. Montgomery No. 20528, 2005-Ohio-660, at ¶ 15. The parties agree that the tenants paid the full August rent prior to August 1, and that KBP turned over the keys to the property on that date. The question is whether the tenants thereby obtained the "right to use and occupy the property" effective August 1 (i.e., a tenancy), or merely a right of access to the building to drop off their things (not a tenancy).

{¶18} The record establishes that the tenants intended to create a tenancy effective August 1, not August 5. All four tenants testified that they would not have

signed the lease unless they could begin living at the property on August 1, and that they agreed to pay non-prorated August rent and utilities on the understanding that they could do so. And their understanding that the house was available for an August 1 move-in was based directly on KBP's assurances: KBP's agent told them during their tour that the lease would begin on August 1, sent them a draft lease with an August 1 start date, and encouraged them to sign the revised lease by repeatedly promising that they could move their possessions in on August 1. The tenants' belief that they would have full use and enjoyment of the premises on August 1 was also supported by the lease: the tenants paid non-prorated August rent prior to August 1 and were responsible for utilities costs for August 1-4. Although KBP insists that its acknowledgement that the tenants could move their possessions into the home did not equate to an agreement that they could *live* at the property, it never explained this distinction to the tenants, nor did it place any restrictions on their ability to use and enjoy the property upon handing over the keys. *See McNelly v. Conde,* 2021-Ohio-146, 166 N.E.3d 697, ¶ 20-21 (2d Dist.) (modern landlord may transfer possession of a rental property by " 'delivery of the key to the door of a rental apartment,' " and tenant may accept delivery of possession by " 'unlocking the door to go inside.' "), quoting *Kanistros* at ¶ 22. Moreover, the tenants' agreement to allow KBP repairmen and cleaning staff to access the property in no way impaired their right of possession; a tenant is generally obligated to allow their landlord reasonable access to make repairs. *See* R.C. 5321.05(B) ("The tenant shall not unreasonably withhold consent for the landlord to enter into the dwelling unit in order to inspect the premises, [and] make ordinary, necessary, or agreed repairs * * * .").

{¶19} In light of this evidence, the trial court's conclusion that the tenants were entitled to move *themselves* (not just their possessions) into the house on August 1 does not constitute an abuse of discretion. We agree with and defer to this factual finding. *See Ohio Historical Soc.*, 65 Ohio App.3d at 146-147, 583 N.E.2d 340. When it came time to apply the parol evidence rule and the legal definition of a tenancy to these facts, however, the trial court committed an error of law. *See Saunders*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, at ¶ 9. Evidently finding the lease to be unambiguous, the trial court reasoned that the tenancy commenced on August 5. It never addressed the legal impact of the agreed-upon August 1 move-in. But because we find that the lease *is* ambiguous, we must consider it in conjunction with KBP's pre-signing promise (as interpreted by the trial court) that the tenants could begin living at the property on August 1. We must then deduce what this timeline means for the start date of the tenancy, strictly construing all ambiguities in the lease against KBP as the drafter of the lease. *See Kelly Dewatering*, 1st Dist. Hamilton No. C-030019, 2003-Ohio-5670, at ¶ 26 ("It is well established that where there is ambiguity in the contract, it must be strictly construed against the party who prepared it."), citing *McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 80, 228 N.E.2d 304 (1967).

{¶20} Ultimately, we conclude that KBP agreed to transfer the "right to use and occupy the property" to the tenants on August 1, "in exchange for consideration" of full August rent paid before that date. *See Kanistros*, 2d Dist. Montgomery No. 20528, 2005-Ohio-660 at ¶ 15. Far from a gratuitous gesture, this is the very definition of a tenancy. *See id.* KBP cannot have it both ways: it cannot promise to transfer the full rights and responsibilities of possession to the tenants on August 1—thereby inducing the tenants to make a full August rent payment—while

simultaneously avoiding its own rights and responsibilities as a landlord until August 5. For all the reasons explained above, we conclude that the tenancy in this case began on August 1, and we sustain the tenants' first assignment of error.

III.

{¶21} The tenants' remaining assignments of error allege that KBP, not the tenants, breached the lease under statutory and common law theories. The tenants also dispute the trial court's calculation of damages, which KBP concedes, in part. In any case, these assignments of error raise factual issues that were either not considered below or were approached from an incorrect premise based upon the trial court's threshold determination on the commencement date of the lease.

{¶22} We conclude that the best course is to remand for the trial court to apply the correct lease commencement date to address these remaining arguments, many of which pose factual questions that we are ill-positioned to resolve in the first instance. Moreover, because the trial judge no longer serves on the Municipal Court, "[r]ecognizing that a new trial judge will hear this matter, the court in its discretion can request new evidence or testimony * * * or it may decide the matter on the state of the existing record." *Danopulos v. Am. Trading II, LLC*, 1st Dist. Hamilton No. C-200350, 2021-Ohio-2196, ¶ 26.

* * *

{¶23} The tenants' first assignment of error is sustained and we reverse the trial court's judgment and vacate the damages award. At this juncture, we find that their second, third, fourth, fifth, and sixth assignments of error are premature and therefore moot. We remand to the trial court for further proceedings consistent with this opinion.

Judgment accordingly.

CROUSE and **BOCK, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.