

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

**The Housing Authority of the City
of Winter Park**, d/b/a Tuscany at
Aloma Apartments,

CASE NO.: 2015-CV-128-A-O
Lower Court Case No.:
2015-CC-9244-O

Appellant,

v.

**Twanishia Pound and
Taqueorin Pound**,

Appellees.

Appeal from the County Court,
for Orange County, Florida,
Andrew L. Cameron, County Judge.

Suzanne J. DeCopain, Esq., and
Rhonda E. Stringer, Esq., for Appellant.

No appearance for Appellees.

Before HARRIS, DAWSON, and WHITE, J.J.

PER CURIAM.

Appellant, The Housing Authority of the City of Winter Park, seeks review of the trial court's judgment for Twanishia Pound and Taqueorin Pound on Count I of the Housing Authority's complaint for eviction. We have jurisdiction. § 26.012(1), Fla. Stat. (2015); Fla. R. App. P. 9.030(c)(1)(A). Because there was no authority for the trial court to reinstate the lease upon the late payment of rent, and the failure to timely pay the rent was a material breach of the lease, we reverse.¹

¹ As these issues are dispositive, we decline to address the other argument set forth in the Initial Brief.

The Pounds rented an apartment from the Housing Authority, with the lease term starting on April 1, 2015. The lease stated that rent was due on the first, but late penalties would not apply if the rent was received within three days. It provided that the Housing Authority would give the Pounds three days' notice to pay the rent or vacate the apartment if they failed to do so. The lease also stated that the Pounds' "right of possession and all of [the Housing Authority's] obligations are expressly contingent on prompt payment of rent and use of the premises by [the Pounds] is obtained only on the condition that rent is paid on time." (R. 8.)

The Pounds were late in paying the July rent, and the Housing Authority filed a complaint against them seeking eviction, damages, costs, and attorney's fees. The Pounds then deposited the late July and August rents into the court registry. In September, October, and November, the Pounds timely paid the rent, also into the court registry.

At the final hearing in November, the judge found that the failure to timely pay the July rent was a breach of the lease, but not a material one. He denied Count I for eviction, but found for the Housing Authority on Count II for damages. The judge also stated at the final hearing that if the Pounds did not timely pay the rent, then the Housing Authority could ask the trial court for a final judgment of eviction and writ of possession without notice, but if the rent was timely paid for the rest of the lease, then the eviction count would be dismissed. The Housing Authority only appeals the trial judge's ruling on the eviction count.

"The interpretation of a lease agreement is a question of law[,] and the applicable standard of review is *de novo*." *Covelli Family, L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 752 (Fla. 4th DCA 2008). In reviewing the findings of fact from a bench trial, the findings are presumed correct and the appellant must demonstrate that they are clearly erroneous. *Id.* "The issue of whether an alleged breach is vital or material is reviewed as a question of fact." *Id.*

The Housing Authority argues that the failure to timely pay rent for July and August was a material breach of the lease. It also argues that the trial court did not have authority to reinstate the lease after the past due rent was paid when the Housing Authority gave proper notice of termination. The Housing Authority relies on *Wenboy Limited Partnership v. Rockledge Bar-B-Q, Inc.*, 619 So. 2d 414 (Fla. 5th DCA 1993), for this argument.

In *Wenboy*, the commercial tenant failed to pay rent until after the lessor properly served it with notice that it was terminating the lease and demanding possession of the premises. *Id.* at 415. The tenant paid the rent into the court registry after the lessor filed suit for eviction. *Id.* at 415-16. The tenant did not timely answer the complaint, and thus the trial court ruled that the tenant had no defenses. *Id.* at 416. Rather than ordering an immediate eviction, the trial court gave the tenant time to pay the past-due amounts and ordered an eviction only if the tenant failed to make the payments by a certain date. *Id.* The lessor “argue[d] that the trial court erred in reinstating the lease upon payment of the past due rent” *Id.* The lessor properly terminated the lease, and thus the Fifth District ruled that the trial court did not have authority “to order reinstatement if the tenant later makes up the delinquent payments.” *Id.* at 418.

Like *Wenboy*, the Pounds did not pay the July and August rent until after the Housing Authority terminated the lease and sued them for eviction. Also like *Wenboy*, the trial judge did not order an immediate eviction; instead he permitted the Pounds to remain in the apartment. Because *Wenboy* held that the trial court did not have authority to reinstate the lease once rental payments were untimely, the trial court here did not have authority to deny the Housing Authority’s eviction claim after the Pounds paid their rent late.

Additionally, the trial court’s finding that the late rental payment was not a material breach of the lease was clearly erroneous. In *Sublime, Inc. v. Boardman’s Inc.*, 849 So. 2d 470, 470 (Fla.

4th DCA 2003), the parties' settlement agreement did not contain the phrase, "time is of the essence." The parties agreed that the defendant would make payments by the fifth of the month, and if he defaulted on any of the payments, then the total amount would be due immediately. *Id.* at 471. When the defendant defaulted, the plaintiff sued for the total amount and rejected the tendered late payment. *Id.* The trial court prohibited the plaintiff from recovering the total amount because the settlement agreement did not include the phrase "time is of the essence." *Id.* In reversing the trial court, the Fourth District stated, "To constitute a vital or material breach, a defendant's non-performance must be such as to go to the essence of the contract." *Id.* at 470-71. Even if the contract does not state that time is of the essence, it will be considered to be so when "notice has been given to the defaulting party requiring that the contract be performed within a stated time, which must be a reasonable time according to the circumstances." *Id.* Because the settlement agreement contained a grace period and specifically stated that the entire amount would be due immediately upon default, this gave the defendant notice that a late payment "would result in a default and trigger the acceleration provision." *Id.* Including a grace period before total default puts "the defaulter on notice that payment on the specified date was an essential part of the bargain." *Id.* at 472. Because this commercial contract contained a grace period to make the payments before the debt would be accelerated, a late payment was a material breach. *Id.* at 473.

Here, the lease states that rent was due on the first, but no late penalties would apply if rent was received within three days. Additionally, the lease gave the Pounds three days' notice to pay or vacate the premises if the rent was late. This time period is the same as that in Florida Statute section 83.56(3) for the landlord to demand payment or possession when the tenant fails to pay the rent when due. The lease also stated, "Resident's right of possession and all of Owner's obligations

are expressly contingent on *prompt* payment of rent and use of the premises by Resident is obtained only on the condition that *rent is paid on time.*” (R. 8 (emphasis added).)

The settlement agreement in *Sublime* and the lease in this case both provided grace periods for late payments. The grace period in the lease here is reasonable under the circumstances because it is the same grace period before eviction that the Florida Statute provides. Both agreements also allowed complete relief if the other party defaulted—in *Sublime*, the total amount became due, and in this case the Housing Authority is entitled to immediate possession. Because the lease contains both a grace period and immediate possession upon default, under *Sublime*, time was of the essence under the lease, even though it did not contain that phrase. Because time was of the essence, when the Pounds failed to timely pay their rent for July, that breach of the lease was a material breach, just as the late payments were a material breach in *Sublime*. *Sublime* renders the trial court’s determination otherwise clearly erroneous.

Under *Wenboy*, the trial court did not have authority to reinstate the lease upon the late rental payments, and under *Sublime*, its determination that the late rental payments were not a material breach of the lease was clearly erroneous. These binding precedents require reversal.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the “Order on Count I Possession, Count II Damages and Release of Funds to Plaintiff,” entered on December 4, 2015, is **REVERSED** and this matter is **REMANDED** to the trial court for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 7th day of June, 2016.

/S/

JENIFER M. HARRIS
Presiding Circuit Judge

DAWSON and WHITE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Andrew L. Cameron, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Suzanne J. DeCopain, Esq., and Rhonda E. Stringer, Esq.**, Saxon Gilmore & Carraway P.A., 201 E. Kennedy Blvd., Suite 600, Tampa, FL 33602; and **Twanishia Pound and Taqueorin Pound**, P.O. Box 582, Winter Park, FL 32790, on this 7th day of June, 2016.

/S/ _____
Judicial Assistant