THIRD DIVISION
ELLINGTON, P. J.,
DILLARD and RICKMAN, JJ.

February 10, 2016

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A15A2089. THINK WISER, INC. et al. v. BOWEN et al.

DILLARD, Judge.

In this civil action, Megan and Stephen Bowen filed suit against their landlord, Napoleon Harris, and the company he exclusively owned, Think Wiser, Inc. (collectively "Harris"), seeking to recover a rental security deposit, which they claim Harris unlawfully withheld after they terminated the lease for his rental home. Following a bench trial, the trial court ruled in favor of the Bowens and awarded them treble damages under OCGA § 44-7-35. On appeal, Harris contends that the trial court erred in finding that his retention of the Bowens' security deposit was unlawful and that OCGA § 44-7-36 did not exempt him from a treble damages award regardless of whether he unlawfully retained the security deposit. For the reasons set forth *infra*, we affirm.

At the outset, we note that while we apply a *de novo* standard of review to any questions of law decided by the trial court, "factual findings made after a bench trial shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."[1] Indeed, because the clearly erroneous test in effect employs the same standard as the any evidence rule, "appellate courts will not disturb fact findings of a trial court if there is any evidence to sustain them."[2]

With these guiding principles in mind, the record shows that in January 2012, Megan Bowen happened to drive by a home located at 3279 Campbell Road in Smyrna and saw a sign indicating that the home was for rent. Bowen stopped and informed the owner, Harris, that she was interested in renting the home. Harris responded that the home was indeed available and told her to contact Atlanta Rental Services ("ARS"), which was the listing agency on the rental sign. Bowen did so, and on January 20, 2012, she and her husband, Stephen, met with an ARS representative at the company's office and signed a one-year lease agreement, which designated

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[1] *Washington v. Harrison*, 299 Ga. App. 335, 336 (682 SE2d 679) (2009) (punctuation omitted); *see* OCGA § 9-11-52 (a).

[2] *Washington*, 299 Ga. App. at 336 (punctuation omitted).

Think Wiser, Inc. (Harris's solely-owned corporation) as the landlord but which Harris signed in his personal capacity. At the same time, the Bowens wrote a check for $1,185 to ARS as a security deposit for the property. And approximately one year later, the Bowens signed a renewal lease, which contained nearly identical terms.

However, prior to the renewal lease's expiration, the Bowens decided that they no longer wanted to live in the home and, thus, they paid an early termination fee to end the lease. Thereafter, while preparing to vacate the home, the Bowens met with Harris, who informed them that he intended to hold them financially responsible and withhold their security deposit, under terms in the lease, for damage to the home, including a hole in a wall near the door to the garage and scratches on the hardwood floor in one of the bedrooms used by the Bowens' children. The Bowens countered that the scratches on the floor constituted nothing more than normal wear and tear, but they agreed to repair the hole in the wall and did so prior to the move-out inspection. At the move-out inspection, which was conducted on December 31, 2013, the Bowens met with a friend of Harris, who Harris asked to conduct the inspection in his stead in order to avoid a repeat of the testiness that allegedly occurred during the earlier meeting. At the conclusion of the inspection, the Bowens again disputed the claim that the scratches to the hardwood floor were anything other than normal

wear and tear, and they refused to agree that Harris could lawfully withhold their security deposit as partial compensation for the damages.

On March 28, 2014, the Bowens filed a lawsuit against Harris and Think Wiser, Inc. in the Magistrate Court of Cobb County, alleging that Harris unlawfully withheld their security deposit and, therefore, was liable for treble damages and attorney fees. Harris filed an answer and a counterclaim, alleging that the Bowens had damaged the home and seeking $5,188.75 in compensation for such damage. On August 13, 2014, the magistrate court rendered a judgment in favor of the Bowens, which Harris appealed to the Superior Court of Cobb County. The superior court then conducted a bench trial, during which it heard testimony from Megan Bowen, Harris, and Harris's friend who conducted the move-out inspection. And on February 16, 2015, the superior court issued an order and judgment in favor of the Bowens, awarding them treble damages and attorney fees.

Shortly thereafter, Harris filed a motion for reconsideration and to vacate and set aside judgment, arguing that the superior court erred in finding that he unlawfully withheld the Bowens' security deposit and in failing to find that, regardless of whether he unlawfully retained the deposit, he was statutorily exempted from an award of treble damages for such action. The Bowens filed a response, and the trial

court ultimately denied Harris's motion. Harris then filed an application for discretionary appeal with this Court, which we granted. This appeal follows.

1. Harris contends that the trial court erred in finding that he unlawfully withheld the Bowens' security deposit. We disagree.

Under OCGA § 44-7-34 (a), "[n]o security deposit shall be retained to cover ordinary wear and tear which occurred as a result of the use of the premises for the purposes for which the premises were intended, provided that there was no negligence, carelessness, accident, or abuse of the premises by the tenant or members of his household or their invitees or guests." Obviously cognizant of this statutory directive, the lease in this matter, under the section titled "Tenant's Maintenance, Cleanliness and Sanitation Responsibilities," provides: "Tenant will keep the premises clean, sanitary and in good condition and, upon termination of the tenancy, return the premises to Landlord in a condition identical to that which existed when Tenant took occupancy, except for ordinary wear and tear and any additions or alterations authorized by Landlord." And in another paragraph within the same section, the lease further provides: "The Tenant shall be held responsible for any direct and or consequent damage to the premises and for the cost of such repair

caused by any negligence either by action or lack of action on the part of the Tenant . . . ."

During the bench trial, Megan Bowen testified that the scratches on the hardwood floor in one of the bedrooms constituted normal wear and tear and further testified that she and her husband had repaired the hole in the wall near the door to the garage. Harris countered that these damages constituted negligent damage to the premises, for which the Bowens were liable. And both parties introduced photographs of the disputed damages into evidence. Based on this evidence, the trial court found in favor of the Bowens on their claim that Harris unlawfully withheld their security deposit, and given these particular circumstances, we cannot say that the court's findings were clearly erroneous.[3] Accordingly, the trial court was authorized to enter judgment in favor of the Bowens.[4]

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[3] *See Washington*, 299 Ga. App. at 336 (noting that "factual findings made after a bench trial shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses" (punctuation omitted)).

[4] *See Cannon v. Wesley Plantation Apartments*, 256 Ga. App. 244, 247 (2) (568 SE2d 137) (2002) (holding that trial court was authorized to find that landlord lawfully withheld tenant's security deposit even though there was conflicting evidence of whether damage to the apartment was beyond normal wear and tear).

2. Harris also contends that the trial court erred in awarding the Bowens treble damages under OCGA § 44-7-35 (c) because he was exempt under OCGA § 44-7-36 from such an award regardless of whether he unlawfully retained their security deposit. Again, we disagree.

OCGA § 44-7-35 (c) provides that "[a]ny landlord who fails to return any part of a security deposit which is required to be returned to a tenant pursuant to this article shall be liable to the tenant in the amount of three times the sum improperly withheld plus reasonable attorney's fees . . . ." But as an exemption to this statute, OCGA § 44-7-36 provides that OCGA § 44-7-35

> shall not apply to rental units which are owned by a natural person if such natural person, his or her spouse, and his or her minor children collectively own ten or fewer rental units; provided, however, that this exemption does not apply to units for which management, including rent collection, is performed by third persons, natural or otherwise, for a fee.

On appeal, Harris argues that the evidence at trial showed that the rental home at issue is the only rental property he owns and that he—rather than ARS which is merely a listing company—manages the property. Thus, he is exempt from an award of treble damages under OCGA § 44-7-35 (c). However, although there was evidence at trial indicating that Harris managed the property and that it was the only rental

home he owned, a review of the trial transcript shows that Harris never explicitly argued that OCGA § 44-7-35 (c) did not apply to him. Indeed, it is only during his counsel's opening remarks that exemption is mentioned. But OCGA § 44-7-36 is never specifically cited at any point during the bench trial, and, other than the passing reference during opening remarks, Harris makes no explicit argument with supporting authority for an exemption. In fact, Harris only specifically asserted the argument that he was exempt from treble damages under OCGA § 44-7-36 for the first time in his motion for reconsideration, which was filed *after* the trial court's final order and judgment. And the decision of whether to permit a party to raise a new argument on motion for reconsideration filed after judgment is "within the discretion of the trial court."[5] Accordingly, the issue of exemption under OCGA § 44-7-36 was not

[5] *Neely v. City of Riverdale*, 298 Ga. App. 884, 888 (3) (681 SE2d 677) (2009); *see also ESI, Inc. of Tenn. v. Westpoint Stevens, Inc.*, 254 Ga. App. 332, 334-35 (5) (562 SE2d 198) (2002) (holding that an argument raised for the first time in a motion for reconsideration is an improper means by which to preserve the issue for appeal).

adequately presented to the trial court,[6] and thus, the court's ruling that Harris was liable for treble damages did not constitute error.

Judgment affirmed. Ellington, P. J., and Rickman, J., concur.

[6] *See Barzey v. City of Cuthbert*, 295 Ga. 641, 643 (2) (763 SE2d 447) (2014) (holding that appellant's passing reference to argument in her pleadings did properly present the issue for appellate review given that appellant made no cogent argument supported by authority regarding the issue and that the trial court's ruling made no mention of the issue).