specific pleading is granted. All other preliminary objections are dismissed.

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of this date.

Exceptions are granted the plaintiffs and defendants.

MARKOWITZ v. ROTZ, C.P. Franklin County Branch, A.D. 1981 - 135

Landlord-Tenant - Termination of Lease - Security Deposit

1. What constitutes a termination in one case may not do so in another and the question of whether there has been a termination is a question for the jury.

2. A landlord is not required to return an escrow fund, with interest, where there has been a nonpayment of rent or any other breach of condition.

Edward I. Steckel, Esq., Attorney for Plaintiff

Rudolf M. Wertime, Esq., Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., October 16, 1981:

Michael Markowitz sued his landlords, Norman and Anna Rotz for double his security deposit of $500, plus interest and costs of suit. Defendants Answered with New Matter and Counter-claims both in assumpsit and trespass. Plaintiff demurred to defendant's pleading, arguing that the landlords have failed to state a cause of action. The argument is based on the terms of the Landlord and Tenant Act of 1951, P.L. 69, art. V, as amended, 68 P.S. Sec. 250.512 and on a claim that he sent defendants a "termination notice" and that they failed to provide him with a written list of damages to the leased property for which he is allegedly liable.

The Landlord and Tenant Act of 1951, supra, provides, in part:

> (a) Every landlord shall within thirty days of termination of a lease or upon surrender and acceptance of the leased premises, whichever first occurs, provide a tenant with a written list of any damages to the leasehold premises for which the landlord claims the tenant is liable....
>
> (b) Any landlord who fails to provide a written list within thirty days . . . shall forfeit all rights to withhold any portion of sums held in escrow, including any unpaid interest thereon, or to bring suit against the tenant for damages to the leasehold premises.

In his Complaint, the tenant alleges he informed the landlords that he was terminating the lease. Actually what the letter said was that he was leaving the rented house on a specific date, that he requested his security deposit and interest and notified the landlord of his new address. The landlords admit they received the letter but deny the effect was to terminate the lease.

What constitutes a termination in one case may not do so in another; the term is not easily defined exactly and all circumstances should be considered. Whether there has been a termination is a question for the jury. *See, e.g., Straw v. Sands*, 15 Chester 248, appeal quashed 426 Pa. 81, 231 A.2d 144 (1966) (existence of termination to be decided by jury on oral and written words and conduct of parties).

The landlords' pleading questions the contention that a termination occurred here. In ruling on a demurrer, we are required, at this point, to construe all doubts in favor of the landlords. *Strock v. York Bank & Trust Co.*, 94 York L.R. 105 (C.P., 1980). The landlord alleges that the tenant did not return possession of the leased premises, that he retained the key to the house, and left a washing machine, dog box and a telephone listed under his name there, facts which we believe are sufficient to preclude our granting the demurrer here. A demurrer should only be sustained in clear cases where it is certain there can be no recovery. 2 Goodrich-Amram 2d Sec. 1017(b):11; *Pike Co. Hotels Corp. v. Kiefer*, 262 Pa. Super. 126, 396 A.2d 677 (1978).

Under the Landlord and Tenant Act of 1951, supra, Sec. 250.512(a), 68 P.S. Sec. 250.512(a), a landlord is not required to return an escrow fund, with interest, for nonpayment of rent or any other breach or condition of the lease. The Landlords allege at least one breach of the lease: that there was an additional tenant on the premises for whom rent was due and also argued that the tenant's complaint says nothing about the term of the lease, which could be three years. In that event the tenant's "termination" would be a breach.

We conclude that we cannot sustain the demurrer; that the defendants are entitled to their day in court and we will not dismiss the counterclaim. We believe that landlords' counterclaim in assumpsit could not be dismissed under any event. The Landlord and Tenant Act of 1951, Sec. 250.512 (b), supra, states only that a landlord who fails to provide a tenant with a list of damages forfeits his rights to damages to withhold the sum held in escrow or sue for damages to the leasehold premises.

ORDER OF COURT

October 16, 1981, Plaintiff's preliminary objection in the nature of a demurrer is overruled. The plaintiff is granted twenty (20) days from this date to file a responsive pleading.

BRINDLE ESTATE, C.P. Franklin County Branch, No. 142 of 1980

Orphans' Court - Appeal from Probate - Undue Influence - Confidential Relationship

1. Opponents attacking a will on the grounds of undue influence must show by clear and convincing evidence that the testator was of weakened intellect when the will was executed and that a person in a confidential relationship to the testatrix received a substantial benefit under the will.

2. Dependence does not always produce a confidential relationship.

3. The fact that a wills proponent performed business services for the decedent does not in itself establish a confidential relationship.

4. Care and attention do not amount to undue influence.

5. Old age and its attendant physical infirmities do not alone establish weakened intellect.

6. The fact that the children were not treated equally does not establish or raise presumption of undue influence.

Thomas H. Humelsine, Esq., Attorney for Respondent

Richard S. Wilt, Esq., Attorney for Exceptants

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