BARCLAY VILLAGE LTD, Plaintiff v. SUSAN CARBAUGH, Defendant, C. P. Franklin County Branch, Civil Action-Law, No. A.D. 11999-20402, Landlord and Tenant Proceeding

Barclay Village v. Carbaugh

Code of Federal Regulations promulgated by the Department of Housing and Urban Development; Landlord-Tenant Act of 1951; subject matter jurisdiction under federal and state law.

1) Federal regulations governing federally-subsidized housing allow landlord to terminate a tenancy for any drug-related criminal activity on or near the premises by a resident or her guest.

2) Landlord must give tenant written notice of any proposed termination of tenancy, stating the grounds and that the tenancy is terminated on a specified date and advising tenant she has the opportunity to discuss the proposed termination with the landlord; the notice must state the ground for termination with enough detail for the tenant to defend herself during the discussion with the landlord.

3) Where a lease in a federally-subsidized housing complex defines drug-related criminal activity to include the possessing of a controlled substance, and the manager's complaint for possession alleges that police found 64 bags of marijuana under the tenant's kitchen sink, and the termination notice informed the tenant her lease was being terminated as of a specific date because she engaged in drug-related criminal activity and also informed the tenant she had the right to discuss the proposed termination with the manager within ten days, the court of common pleas has subject matter jurisdiction over the manager's complaint for possession under federal law because the notice advised the tenant of the legal and factual grounds for termination with sufficient detail under federal regulations to allow her to defend herself at the manager's meeting.

4) Failure to comply with the notice provisions of the Landlord-Tenant Act deprives the court of common pleas of jurisdiction over a landlord's action for possession; case law has interpreted the Act to require notices to quit to be clear, unequivocal and unconditional.

5) Where a tenant asserts the notice to quit was deficient because it sent two contradictory messages - first, that the tenancy was terminated and she must vacate by a specific date, but second, that the termination is merely *proposed* because it awaits the outcome of discussion with the manager, but the court reads the notice in a common sense, non-technical manner to mean that unless the tenant asks for a conference with the manager within ten days and can convince him why termination is unwarranted, she must vacate by a specific

date, the complaint for possession will not be dismissed for lack of subject matter jurisdiction under state law.

6) Where a tenant demurs to a complaint for possession based on her assertion that the mere presence of drugs in her home does not constitute drug-related activity without proof of her intent to engage in such activity, the demurrer will be denied insofar as intent may be proven by constructive possession in situations where contraband is not found directly on the tenant's person but is found in areas of equal access and joint control, and the lease specifically states that actual *conviction* is not a precondition for the termination of the tenancy.

Robert E. Graham, Jr., Esquire, Counsel for Plaintiff
Mahesh K. Rao, Esquire, Counsel for Defendant

OPINION AND ORDER

HERMAN, J., April 10, 2000:

INTRODUCTION

Before the court are the defendant's amended preliminary objections to a complaint filed by the plaintiff. The plaintiff is Barclay Village, Ltd., the manager of a federally subsidized housing complex in the Borough of Chambersburg. The defendant, Susan Carbaugh, is a tenant in the complex, having signed a lease agreement on April 1, 1998. The lease gives the plaintiff the right to terminate a tenancy for "any drug-related criminal activity on or near [the] premises, engaged in by a tenant, any member of the tenant's household, or any guest or other person under the tenant's control." "Drug-related criminal activity" was defined as "the illegal manufacture, sale, distribution, use, or possession of a controlled substance..." (Paragraphs 23 and 13(c), exhibit 1 attached to the complaint).

According to the complaint, on or about May 26, 1999, police searched the defendant's rental unit for a guest who had stayed there during the previous two days and found 64 bags of marijuana under the kitchen sink. On June 1, 1999, the plaintiff served a notice dated that same day entitled "Termination of Lease" on the defendant. The notice stated:

To: Susan Carbaugh

> Your lease has been terminated. You are hereby notified to quit, remove from and deliver up possession of the premises located at 663 Heintzelman Ave., Chambersburg, Pa. 17201, which you occupy as a tenant of the undersigned by virtue of the RESIDENTIAL LEASE AGREEMENT dated 4-1-98. You are notified to quit, remove from and deliver up possession of the said premises no later than July 1, 1999. You are notified to quit, remove from and deliver up possession of the said premises for breach of the conditions of the lease: Engaging in unlawful activity, including drug-related criminal activity. You have ten (10) days, no later than June 10, 1999 within which to discuss the proposed termination of tenancy with the Manager at 604 Heintzelman Ave., Chambersburg, Pa. 17201. You have the right to defend this action in Court.

(Exhibit 2 attached to the complaint). The defendant informed the plaintiff by letter dated June 7, 1999 of her desire to discuss the proposed termination. A meeting was set for June 16, 1999 at the manager's office. (Exhibit A attached to the plaintiff's answer to amended preliminary objections). Whether the meeting occurred and what happened at the meeting is not part of the current record.

The defendant did not vacate the premises, prompting the plaintiff to file an action for possession with the District Justice. The District Justice ruled in the plaintiff's favor and granted possession of the rental unit on July 20, 1999. The defendant filed an appeal and the plaintiff filed the instant complaint seeking possession and other relief. Argument was held on the defendant's amended preliminary objections and the matter is ready for decision.[1]

[1]The complaint was filed on August 4, 1999. The defendant filed preliminary objections on August 19, 1999 which the plaintiff timely answered. With the consent of the plaintiff and leave of court, the defendant then filed amended preliminary objections on October 13, 1999 which were answered on November 1, 1999.

DISCUSSION

The defendant objects to the complaint on the following grounds: (1) the court lacks subject matter jurisdiction, (2) the complaint is so ambiguous that it prevents the defendant from making a defense, (3) even if the ambiguities are cured, the complaint is legally insufficient, and 4) the complaint contains scandalous and impertinent matter.

Lack of subject matter jurisdiction: federal law

The defendant argues this court lacks subject matter jurisdiction because the notice of termination did not conform with federal law requiring such a notice to state the grounds for termination with enough detail to allow the tenant to prepare a defense. The pertinent regulations governing federally subsidized housing promulgated by the Department of Housing and Urban Development (HUD) appear at 24 CFR 880.607. An owner has the right under section 607(b)(iii) to terminate a tenancy for

> "any drug-related criminal activity on or near [the] premises, engaged in by a resident, any member of the resident's household, or any guest or other person under the resident's control..."

The owner must give the tenant

>]"a written notice of any proposed termination of tenancy, stating the grounds and that the tenancy is terminated on a specified date and advising the [tenant] that it has an opportunity to respond to the owner."

Section 607(c).

Section 4-20 of the HUD Handbook 4350.3, which has the force of law pursuant to *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), requires the notice to

> "state the ground for termination with enough detail for the tenant to prepare a defense...and advise the tenant that he/she has 10 days within which to discuss the proposed termination with the owner..."

Neither the regulations nor the Handbook provide the court with any guidance as to what degree of factual specificity is required in a notice of termination.

The defendant contends the notice must state both legal and factual grounds for the termination so that a tenant knows in advance not just the grounds for termination in general terms but also the specific nature of the evidence underlying a cited ground for termination to enable her to rebut such evidence at the 10-day discussion with the manager in an effort to salvage the tenancy. She cites Congressional Legislative History, S. Rep. No. 316, 101st Congress, 2d Session, at 127 in support. The court does not have ready access to this legislative history and there are no binding precedents addressing this issue. Even accepting the defendant's account of the legislative history does not persuade us the instant notice is insufficient, however.

The federal regulations specifically indicate drug-related criminal activity is a valid ground for termination. The plaintiff's notice was based on that very ground and we find it was factually specific enough to allow the defendant to present a defense at the conference. This is so because the notice did not merely state "we are terminating your tenancy because of your illegal or criminal acts" or "we are terminating your tenancy because you violated the terms of the lease" or "we are terminating your tenancy because of your anti-social conduct." Such statements would indeed be too general because they give a tenant no information whatsoever about the factual basis for the notice. By contrast, the instant notice specifies *criminal drug* activity, the nature of which should be readily understandable to the average citizen and is clearly defined in the lease. To adopt the defendant's approach would impose on

owners and managers a burdensome, over-technical requirement as to the wording of leases. We cannot agree this notice was so lacking under federal law as to deprive this court of jurisdiction over the case.

Lack of subject matter jurisdiction: state law

The defendant next argues the notice to quit is deficient under state law which requires such a notice to be clear, unequivocal and unconditional. *Brown v. Brown*, 64 A.2d 506 (Pa. Super. 1949). The defendant asserts the instant notice sends two contradictory messages - first, the tenancy is terminated and she must vacate by July 1, 1999, but second, the termination is merely *proposed* because its finality awaits the outcome of discussion with the manager.

We agree with the defendant there is authority for the general proposition that failure to comply with the notice provisions of the Landlord Tenant Act of 1951, as amended, 68 P.S. section 250.501 deprives the court of jurisdiction over an action by a landlord for possession. *Fulton Terrace Ltd. Partnership v. Riley*, 4 D & C 4th 149 (1989) (Court of Common Pleas, 39th Judicial District). The court in *Fulton Terrace* dismissed the complaint because the owner did not give the tenant 90 days' notice as specifically required by section 501. The issue of whether the notice's language was clear, unconditional and unequivocal was not before the court, however, and therefore *Fulton Terrace* does not advance the defendant's argument that the instant notice is unclear, conditional or equivocal, requiring the dismissal of the plaintiff's complaint.

Although we agree with the general principle that a notice to quit must be clear, unequivocal and unconditional, *Brown*, supra, that case is highly distinguishable. The notice in *Brown* initially gave unequivocal notice of termination but its postscript assured the tenant not to worry because the notice was simply a "legal requirement." The court found the

postscript undercut the clarity and decisiveness of the notice and rendered the notice meaningless. By contrast, the instant offer of a 10-day conference with the manager did not render the notice meaningless nor did it "[negate] every intention of the plaintiff to compel the defendant to vacate the premises..." *Id.* at 507. Read in a common sense, non-technical manner, the plain wording of the notice clearly indicates what is to happen and when. Unless the defendant asks for an informal conference with the manager within 10 days and can convince him why termination is unwarranted, she must vacate the premises by July 1, 1999. We could locate no authority which precludes a landlord from using this type of language in a notice to quit and therefore the complaint will not be dismissed on that basis.[2]

The complaint is factually insufficient

The defendant focuses in this objection on paragraphs 5-7 which aver:

> 5. On May 26, 1999, the Pennsylvania State Police conducted a search of Defendant's rental unit looking for a guest who had stayed there for the previous two days.
>
> 6. During said search, 64 small bags of marijuana were discovered under the kitchen sink.
>
> 7. **Plaintiff is advised** that Defendant confessed to knowledge that the contraband was in her residence.

[2]According to the defendant, the plaintiff must provide two notices in order to comply fully with both state and federal law. The first notice must inform the tenant of her right to discuss the proposed termination with the owner within 10 days pursuant to 24 CFR section 880.607(c) and HUD Handbook 4350.3, section 4-20. The second notice, sent only if the tenant does not ask to meet with the owner or manager or the meeting is unfruitful, must be a notice to quit which clearly, unconditionally and unequivocally terminates the tenancy as of a set date as required by state law. We do not need to address this argument, however, because we have found plaintiff's notice to quit was in fact clear, unambiguous and unequivocal.

(Emphasis supplied). She argues paragraph 7 in particular is so ambiguous and unspecific as to deprive her of her right to present a defense. We agree. If the defendant made statements that she knew the drugs were in her residence, the plaintiff should simply state this and should also state when the defendant made those statements and to whom. The defendant is entitled to a clearer pleading to which she can reasonably respond. We will therefore grant this preliminary objection and direct the plaintiff to file a more specific pleading.

Demurrer

The defendant argues the plaintiff cannot obtain the relief it seeks (the termination of the defendant's tenancy and possession) even if it cures the ambiguity and the averments in the pleadings are deemed true because the mere presence of drugs in her home does not constitute drug-related criminal activity without proof of her intent to engage in such activity. We disagree.

Paragraph 13(c) of the lease defines drug-related criminal activity as: "the illegal manufacture, sale, distribution, use or **possession** of a controlled substance as defined in section 102 of the United States Controlled Substances Act , 21 U.S. Code 802. Criminal conviction under federal, state or local law shall not be a precondition for the termination of tenancy." (Emphasis supplied). While it is true that an element of the charge of possession is that the defendant possess the controlled substance in an intentional manner, where the substance is not found directly on the defendant's person, intent may be proven by constructive possession which is "the ability to exercise a conscious dominion over the illegal substance; the power to control the contraband and the intent to exercise that control." *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa.1983). The intent to exercise a conscious dominion may be inferred from the totality of the circumstances and constructive possession may be established by

circumstantial evidence. Constructive possession has been found where a residence is occupied by two persons and contraband is found in areas of equal access and joint control. Id. The fact the drugs were not found on the defendant's person does not mean she was unaware the drugs were under her kitchen sink. In light of paragraph 13(c) of the lease which states "criminal conviction...shall not be a precondition for the termination of tenancy" for possession of a controlled substance, the plaintiff's action would remain viable and the complaint would survive a demurrer if the plaintiff is able to amend paragraph 7 to aver the defendant confessed to knowing the drugs were in her apartment.

The complaint contains scandalous and impertinent matter

Finally the defendant contends paragraph 7 is scandalous because it implies she confessed to police or was charged with or convicted of a crime without actually so averring and as such relies on innuendo to cast aspersions on her character. We agree paragraph 7 is scandalous as currently worded and should be stricken but the plaintiff will have an opportunity to replead as discussed above. We also find paragraph 7 as currently pled should be stricken because it unreasonably requires the defendant to admit or deny whether "the plaintiff was advised" of her confession. If possible, that paragraph should be repled to simply aver that the defendant had knowledge of the drugs because this will allow her to either admit or deny such an averment.

An appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 10th day of April, 2000, the defendant's amended preliminary objections to the plaintiff's complaint are hereby ruled as follows:

Lack of subject matter jurisdiction: overruled;

Insufficient specificity of pleading (paragraph 7 of the complaint): sustained. The plaintiff is directed to file an amended pleading in conformity with the attached Opinion within twenty 20 days of receipt of this Order;

Legal insufficiency of pleading: overruled;

Scandalous and impertinent matter: sustained. Paragraph 7 as currently pled is stricken and the plaintiff is directed to file an amended pleading as indicated above.