LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Sept. 13, 2019 Case No. 19CV198539

5411 PEARL ROAD, INC., *ET AL.*
Plaintiffs

Ali Mustafa
Plaintiff's Attorney

VS

MARENA 4142, INC., *ET AL.*
Defendants

Christopher Mulvaney
Defendant's Attorney

This matter is before the Court for contested, first-cause hearing. Hearing had on September 10, 2019.[1]

Based upon the pleadings, motions, affidavits, testimony, and other evidence submitted, the Court hereby issues the following orders:

1) Judgment of restitution is hereby granted in favor of Plaintiffs and against Defendants; the requirements of R.C. 1923.01 *et seq.*, are applicable; and Plaintiffs are entitled to restoration of The Premises.

2) Writ of Restitution to issue forthwith. However, no physical put-out of Defendants shall occur until October 11, 2019 at 5:00 p.m.

[1] A previous hearing was had before the Court's Magistrate (Magistrate Blaszak) on August 6, 2019. That hearing was adjourned by the Magistrate and no Magistrate's Decision was filed. Accordingly, pursuant to Civ. R. 53(D)(4)(b), which reads, in pertinent part, ". . . A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate . . .", the matter was heard *de novo* by the Court.

See Judgment Entry.

IT IS SO ORDERED.

JUDGE D. CHRIS COOK

cc: Mustafa, Esq.
Mulvaney, Esq.

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Based upon the pleadings, motions, affidavits, testimony, and other evidence submitted, the Court makes the following findings of fact, conclusions of law, and orders.

I. FINDINGS OF FACT

The testimony, exhibits, and evidence adduced at trial established the following:

1. The property at issue is located at 5411 Pearl Ave., Lorain, Ohio (hereinafter, "The Premises");

2. Plaintiff 5411 Pearl Road, Inc., is the owner/landlord of The Premises;

3. Plaintiff entered into a written contract to lease The Premises to Defendants in April, 2009;

4. The Premises was leased for use as a gas station;

5. The Premises was leased for one, five-year term terminating on January 31, 2014;

6. At the conclusion of the lease term Defendants held-over, remained in possession of The Premises, and continued to pay rent through March, 2019;

7. The parties stipulate that as of February, 2014, the lease was a month-to-month, oral agreement and that other than the lease-term, all other conditions of the (expired) written lease remained in full force and effect;

8. Sometime in 2017, problems occurred with the operation of the premium-grade and mid-grade fuel delivery systems such that Defendant could vend only regular-grade gasoline;

9. The inability to vend mid-grade and premium-grade gasoline negatively impacted Defendants' business;

10. Sometime during this time-period, Defendants upgraded the fuel pumps;

11. Regardless, as a result of Defendants inability to vend mid-grade and premium-grade gasoline, they refused to pay rent for the months of April, 2019, to the present;

12. Due to the non-payment of rent, on April 13, 2019, Plaintiff, 5411 Pearl Road, Inc., served Defendants with a conforming statutory 3-Day Notice to Vacate;

13. On May 9, 2019, Plaintiffs filed an action in F.E.D.

Plaintiffs submitted a copy of the Notice To Vacate into evidence; Defendants submitted a copy of a number of text messages between the parties; the parties

stipulated to the authenticity of the lease attached to Plaintiffs' complaint, the "Commercial Lease Agreement."

II. CONCLUSIONS OF LAW

ANALYSIS

In the case at bar, Plaintiff, 5411 Pearl Road, Inc., and Defendants entered into a written contract for the lease of commercial real property for a five-year term beginning in April, 2009, and ending on January 31, 2014, for the operation of a gas station.

At the conclusion of the lease-term, the Defendants held-over and the parties continued their landlord/tenant relationship on an oral, month-to-month basis and further agreed that the written terms of the lease (except its original term) would remain in effect.

Sometime in 2017, problems arose with operation of the mid-grade and premium-grade fuel systems and Defendants could no longer vend these products. This development caused a loss of sales for Defendant's operation.

Around this time, Defendants installed new gas pumps at The Premises at their expense. The fair market value of these improvements to The Premises is approximately $8,000.00.

Ultimately, in April, 2019, Defendants refused to pay the $5,200.00 monthly rent, and have failed to pay or escrow any rent through the present. Defendants are currently in arrears a total of $31,200.00.

As a result of the non-payment of rent, Plaintiffs initiated this action and seek restitution of The Premises and damages.

Defendants have counter-claimed alleging that they are entitled to remain in possession of The Premises as they have suffered damages due to the failure of the two fuel delivery systems.

Both parties rely upon the (expired) lease to support their position.

PLAINTIFFS' ARGUMENT

Clearly, Plaintiffs have established a *prima facie* case for restitution of the demised premises. No rent has been paid or escrowed for six-months, Defendants remain in possession, the notice to vacate is conforming and was properly served[2], and the complaint was timely filed.

Accordingly, the burden shifts to the Defendants to demonstrate some legal or equitable justification for the non-payment (or non-escrow) of rent.

DEFENDANTS' ARGUMENT

Defendants initially challenge the F.E.D. hearing had on September 10, 2019, on the basis that there already was a hearing (on August 6, 2019) before the Magistrate and that the second hearing improperly provides for Plaintiffs to get a "second bite at the apple."

This argument lacks merit.

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[2] Contrary to Plaintiff's assertion, no 30-Day Notice or other notice was required to be served, whether under common law or based upon the terms of the lease, due to Defendants' non-payment of rent.

As noted *supra,* the original hearing was adjourned prior to conclusion, no magistrate's decision was ever filed, and Civ. R. 53(D)(4)(b) allows for a court to ". . . hear a previously-referred matter . . ." Moreover, even if the magistrate had issued a magistrate's decision, this Court was not bound to accept its findings and could have ". . . rejected the magistrate's decision, in whole or in part, with or without modification." *Id.*

Next, Defendants argue that Plaintiffs had no right to serve a three-day notice to vacate and thus, the Court lacks jurisdiction to hear the action.

The gravamen of this argument is that the lease contains a provision (unnumbered) captioned "Default" that provides Defendants with the right to cure any default within 30 days ". . . after receipt of written notice thereof . . ." As no written notice of default (except the statutory three-day notice) was ever served, the cure period never commenced and Plaintiffs had no right to serve the three-day notice to vacate or to file their complaint.

This argument also fails.

The provision at issue reads as follows:

Default.

> In the event of a default made by Tenant **in the payment of rent** when due to Landlord, Tenant shall have ten (10) days grace period after which the rental shell [sic] be increased by 360.00 dollars. In the event of a default made by Tenant **in any of the other covenants or conditions** to be kept, observed and preformed by Tenant, Tenant shall have thirty (30) days after receipt of written notice thereof to cure such default. (Emphasis added.)

By the clear language of the parties' agreement, in the event of default, the 30-day written notice provision does not apply to a default in the obligation to pay rent, but only to ". . . any of the other covenants or conditions . . ." Because the default at issue is solely non-payment of rent, no written notice (other than a statutory three-day notice) was required to be served upon Defendants.

Defendants next argue that the statutory three-day notice is non-conforming because it is only direct to Defendant, Marena 4142, Inc., and that R.C. 1923.04(A) mandates that notice be sent to all adverse parties in possession.

This argument is wholly misplaced.

First, while R.C. 1923.04(A) does require that ". . . party desiring to commence an action under this chapter shall notify the adverse party to leave the premises . . ." the notice in this case does.

It reads, in pertinent part,

To Marena 4142, Inc., **also known as Saini Gas, Inc., and or all** other tenants or occupiers. (Emphasis added.)

Second, even if the notice had failed to identify all adverse parties, the remedy is not to invalidate the entire notice but instead, hold that an action may only be instituted against the named adverse parties.

Defendants' final argument, which really goes to the merit of the non-payment of rent, is predicated upon the Defendants' reliance upon and interpretation of the (unnumbered) "Damage and Destruction" clause contained in the lease.

The relevant provisions read as follows:

Damages and Destruction.

> If the Leased Premises or any part thereof or any appurtenance thereto **is so damaged by fire, casualty or structural defects**...that the same cannot be used for Tenant's purposes, **then Tenant shall have the right within ninety (90) days following damage to elect by notice to Landlord to terminate this Lease** as of the date of such damage. In the event of minor damage to any part of the Leased Premises, and if such damage does not render the Leased Premises unusable for Tenant's purposes, Landlord shall promptly repair such damage at the cost of the Landlord... Tenant shall be relieved from paying rent and other charges during any portion of the Lease term that the Leased Premises are **inoperable or unfit for occupancy, or use, in whole or in part**, for Tenant's purposes. (Emphasis added.)

This reliance, however, is also misplaced.

First, this provision contemplates damages and destruction occasioned by ". . . fire, casualty or structural defects." Obviously, this means damage to the physical structure itself, the gas station, the bricks and mortar.

No such damage occurred to The Premise or it appurtenances. The damage occurred to the fuel delivery system – a mechanical apparatus.

Moreover, even damage to the fuel delivery system is contemplated by this provision, Defendants' remedy is to, within 90 days of the damage, terminate the lease. Defendants did not terminate the lease, but remained in possession of The Premises for two additional years.

The next provision addresses "minor damage" and contemplates repairs ". . . at the cost of the Landlord." But again, this provision applies to the physical structures appurtenant to The Premises – not mechanical implements.

Finally, there is a provision that relieves the tenant from paying rent if The Premises are ". . . inoperable or unfit for occupancy, or use, in whole or in part." But similarly to the above-analysis, this provision applies to the physical structure – the gas station itself, not its mechanical accoutrements.

As urged by Plaintiffs, this conclusion and interpretation of the "Damages and Destruction" clause is bolstered by reading the "Repairs" clause *in pari materia*.

The "Repairs" clause reads *in toto* as follows:

> Repairs.
>
> During the Lease term, Tenant shall make, at Tenant's expense, all necessary repairs to the Leased Premises. Repairs shall include such items as routine repairs of floors, walls, ceilings, **mechanical systems,** and the roof. (Emphasis added.)

Clearly, the fuel pumps, fuel lines, and fuel delivery apparatus qualify as "mechanical systems." This conclusion is supported by the fact that Defendants, at their own expense, replaced the actual fuel pumps because the old ones were no longer functioning properly.

It follows logically that if Defendants were obligated to replace the fuel pumps themselves, they were also obligated to repair the fuel delivery lines or tanks that failed and prevented the dispensation of mid-grade or premium-grade fuel.

Based upon the forgoing, a writ shall issue for the restitution of The Premises in favor of Plaintiffs, subject to the following orders.

IT IS THEREFORE ORDERED:

1) Judgment of restitution is hereby granted in favor of Plaintiffs and against Defendants; the requirements of R.C. 1923.01 *et seq.*, are applicable; and Plaintiffs are entitled to restoration of The Premises.

2) Writ of Restitution to issue forthwith. However, no physical put-out of Defendants shall occur until October 11, 2019 at 5:00 p.m.

3) In the event Defendants escrow rent in the amount of $23,200.00 with the Lorain County Clerk of Court on or before October 11, 2019, the writ shall be vacated and the restitution order shall be stayed.

4) With regard to the parties' second cause action and counter-claims, the Court makes the following orders;

A) Discovery cut-off is December 20, 2019;

B) Dispositive Motion deadline is January 17, 2020;

C) Dispositive Motion reply[3] deadline is February 14, 2020;

D) Final pre-trial is set for March 12, 2020 @ 1:30 p.m. All parties with authority are ordered to attend;

E) Bench trial is March 31, 2020 @ 8:30 a.m.

[3] No rebuttal or sur-reply briefs may be filed.

5) Defendants are granted leave to brief the issue of removal of the gas pumps and POS systems on or before September 20, 2019.

6) Plaintiffs reply brief due on or before October 1, 2019.[4]

IT IS SO ORDERED.

JUDGE D. CHRIS COOK

[4] No rebuttal or sur-reply briefs may be filed.