STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH FAMILY IRREVOCABLE TRUST,

Plaintiff-Appellant,

v

S.E. MICHIGAN LAW ASSOCIATES, P.L.L.C., CHRISTOPHER S. C. WEBBER and DAVID S. DELBOCCIO,

Defendants-Appellees.

UNPUBLISHED
January 15, 2009

No. 279994
Wayne Circuit Court
LC No. 04-422513-CK

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this landlord-tenant action arising from a commercial lease, plaintiff appeals as of right from a circuit court order dismissing the case. We affirm.

I. Underlying Facts and Proceedings

On February 3, 2004, the parties entered into a one-year lease of Grosse Pointe office space owned by plaintiff Dietrich Family Irrevocable Trust. Defendants are two attorneys, Christopher Webber and David DelBoccio, and their law firm, SE Michigan Law Associates, P.L.L.C. Thirteen days after the parties signed the lease, plaintiff's agent, Edgar Dietrich, barred defendants from the premises and confiscated their legal files and personal belongings. Dietrich claimed that he locked out defendants because they had defaulted on the lease by failing to make the first payment, due on February 3, 2004. Defendants immediately filed suit against plaintiff in the municipal court, and obtained a temporary restraining order prohibiting their eviction, providing them with full access to their offices, and restraining plaintiff and its agents from interfering with defendants' quiet enjoyment of the premises.

On July 22, 2004, plaintiff filed this lawsuit in the circuit court, alleging that defendants breached the lease agreement and owed damages including $42,000 for the year's rent. The circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(6) and (8), finding that (1) res judicata barred the action, (2) the damages sought did not satisfy its jurisdictional threshold, (3) Webber and DelBoccio had no personal liability under the terms of the lease, and (4) plaintiff failed to provide notice of defendants' default or pursue an eviction action.

On appeal, this Court reversed the circuit court's dismissal of plaintiff's breach of contract claim and remanded for further proceedings. *Dietrich Family Irrevocable Trust v SE Michigan Law Assoc, PLLC*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006 (Docket No. 261238), lv den 475 Mich 873 (2006). In the prior opinion, the Court held that the circuit court possessed subject-matter jurisdiction and that Webber and DelBoccio could face personal liability under the plain language of the lease. *Id*., slip op at 4-6. This Court further determined that because the parties had not litigated the issue of outstanding rental payments in the municipal court, the circuit court had erred by applying the res judicata doctrine to preclude plaintiff's suit. *Id*. at 4-5. In the prior opinion, the Court also addressed the circuit court's finding that plaintiff failed to provide the requisite notice of a default before barring defendants from the premises. We observed in a footnote that the circuit court's order granting summary disposition did not refer to the absence of notice, rendering this issue unreviewable. *Id*. at 6, n 3. This Court further observed, however,

> Even if these issues were reviewable, the record indicates that the evidentiary support for the trial court's findings was lacking. Regarding the notice issue, the notice provision in the lease is a general provision stating that "(a)ny notices required under this lease shall be in writing . . . ." *However, the default provision does not contain a notice requirement*. Therefore, the plain language of the lease does not require plaintiff to give notice to defendants before barring them from the property. Regarding the alleged set-off agreement, defendants' unsigned letter does not indicate that the parties agreed to a set-off arrangement nor can it be used as evidence to modify the terms of a clear and unambiguous contract. Therefore, if the grant of summary disposition was based on these facts, it was improper. [Emphasis added.]

On remand to the circuit court, defendants filed a new motion for summary disposition under MCR 2.116(C)(8) and (10). Defendants challenged the enforceability of the lease's "time period" provision, and argued that plaintiff did not supply defendants with the notice required by MCL 554.134.[1] The motion further asserted that plaintiff "forcibly ejected the Defendants from the premises subject to the lease and confiscated their legal files and all personal belongings in direct violation of the Anti-Lockout Statute, MCL 600.2918." Plaintiff countered with its own motion for summary disposition under MCR 2.116(C)(10), arguing that as a matter of law the lease was enforceable and defendants had breached it.

The circuit court denied defendants' motion and granted plaintiff's motion, opining from the bench, "The lease is clear and unambiguous. The members of the law firm personally guaranteed, and the only issue is one of damages. We may need to have a short evidentiary hearing with respect to the issue of damages."

---

[1] MCL 554.134(2) provides, "If a tenant neglects or refuses to pay rent on a lease at will or otherwise, the landlord may terminate the tenancy by giving the tenant a written 7-day notice to quit."

In contemplation of the evidentiary hearing, defendants filed a motion in limine to preclude plaintiff from introducing any evidence regarding damages. According to defendants, in *Deroshia v Union Terminal Piers*, 151 Mich App 715; 391 NW2d 458 (1986), this Court held that a landlord who violated the anti-lockout statutes could not recover future lease payments. Defendants also requested damages representing increased rent at new office space and attorney fees. Plaintiff then filed a motion in limine seeking to prohibit defendants from introducing any evidence of their damages, insisting that defendants' failure to file a counterclaim barred their request for damages.

The circuit court entered an order granting plaintiff's motion in limine and additionally provided, "Defendants are free to move for reconsideration of this order to present authority that a party is entitled to damages despite the absence of a pleading requesting such relief." Plaintiff then moved for an evidentiary hearing regarding damages for the rent due under the lease, and defendants filed another motion in limine seeking to preclude plaintiff's claim for damages, relying in part on the anti-lockout statute. On July 13, 2007, the circuit court heard argument on both motions, and ruled from the bench as follows: "I think the only rational application of the Anti-Lockout Statute is that if one locks out a tenant, especially in this case after ten days of occupancy, and confiscates their belongings as well, that that person or entity, the landlord, the owner, is not entitled to damages. That's my ruling." On July 26, 2007, the circuit court entered an order stating that "Plaintiff's [sic] are not entitled to damages for reasons stated on the record and this closes the case." Plaintiff now appeals.

II. Analysis

Plaintiff contends that the circuit court erroneously interpreted MCL 600.2918 as precluding damages for rents accruing after a landlord locks out a tenant. We review de novo issues of statutory construction. *Perry v Golling Chrysler Plymouth Jeep, Inc*, 477 Mich 62, 65; 729 NW2d 500 (2007). The anti-lockout statute, MCL 600.2918, provides as follows:

> (1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or $200.00, whichever is greater, in addition to recovering possession.
>
> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or $200.00, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:
>
> (a) The use of force or threat of force.
>
> (b) The removal, retention, or destruction of personal property of the possessor.

(c) A change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession.

(d) The boarding of the premises which prevents or deters entry.

(e) The removal of doors, windows, or locks.

(f) Causing, by action or omission, the termination or interruption of a service procured by the tenant or which the landlord is under an existing duty to furnish, which service is so essential that its termination or interruption would constitute constructive eviction, including heat, running water, hot water, electric, or gas service.

(g) Introduction of noise, odor or other nuisance.

(3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:

(a) Acted pursuant to court order or

(b) Interfered temporarily with possession only as necessary to make needed repairs or inspection and only as provided by law or

(c) Believed in good faith the tenant had abandoned the premises, and after diligent inquiry had reason to believe the tenant does not intend to return, and current rent is not paid.

(4) A person who has lost possession or whose possessory interest has been unlawfully interfered with may, if that person does not peacefully regain possession, bring an action for possession pursuant to section 5714(1)(d) of this act or bring a claim for injunctive relief in the appropriate circuit court. A claim for damages pursuant to this section may be joined with the claims for possession and for injunctive relief or may be brought in a separate action.

(5) The provisions of this section may not be waived.

(6) An action to regain possession of the premises under this section shall be commenced within 90 days from the time the cause of action arises or becomes known to the plaintiff. An action for damages under this section shall be commenced within 1 year from the time the cause of action arises or becomes known to the plaintiff.[2]

---

[2] Plaintiff claims on appeal that it did not violate the anti-lockout law. However, plaintiff failed to present evidence in the circuit court contradicting defendants' affidavits attesting that plaintiff

(continued…)

Plaintiff correctly asserts that in the event of a lockout, MCL 600.2918 does not explicitly preclude a landlord's recovery of damages for future rents. Rather, basic contract and property law principles compel the conclusion that a tenant dispossessed of the use of leased property is discharged from the responsibility to pay rent.

A lease provides a tenant with exclusive use or possession of the leased property. *Macke Laundry Service Co v Overgaard*, 173 Mich App 250, 253; 433 NW2d 813 (1988). In *Grinnell Bros v Asiuliewicz*, 241 Mich 186, 188; 216 NW 388 (1927), our Supreme Court explained,

> There goes with every rental of premises the right of beneficial enjoyment by the tenant for the purpose for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease. Such enjoyment the landlord may not destroy or seriously interfere with, in use by himself or permitted use by others, of any part of the premises occupied in conjunction therewith.

"Continued enjoyment of possession is a condition . . . of the tenant's duty to pay rent." 8 Corbin, Contracts, § 33A.13, p 235. "Eviction from possession of any substantial part of the premises conveyed goes to the essence and operates as a discharge of the tenant's duty." *Id*. An eviction arises "upon the wrongful act of the landlord and those acting with his permission, and which results in an interference with the beneficial enjoyment of the use the tenant pays him for." *Lawrence v Rapaport*, 213 Mich 358, 361-362; 181 NW 1011 (1921). "An actual eviction of the tenant is a physical exclusion of the tenant from access to the leased premises, for example, by locking the tenant out of the premises." 2 Powell, Real Property, § 16B.02[2][a], p 16B-20. In *Kuschinsky v Flanigan*, 170 Mich 245, 248; 136 NW 362 (1912), our Supreme Court favorably cited the following language from *Royce v Guggenheim*, 106 Mass 201 (1870): "The eviction of a tenant from the demised premises, either by the landlord or by title paramount, is a bar to any demand for rent, because it deprives him of the whole consideration for which rent was to be paid."

In *Deroshia*, *supra* at 717, this Court held that "under the antilockout law self-help is generally not available to dispossess a tenant who is wrongfully in possession and has not abandoned or voluntarily surrendered the premises. Rather, a landlord must resort to judicial process to recover possession." Here, the circuit court properly relied on MCL 600.2918 and *Deroshia* to conclude that plaintiff acted unlawfully when it prohibited defendants from entering their leased premises and confiscated their possessions. Furthermore, the circuit court also correctly concluded that plaintiff's unlawful conduct constituted a breach of the lease's covenant of quiet enjoyment, and that this breach precluded plaintiff from recovering damages for rents owed after the date of the lockout.

We find further support for our holding in *Olin v Goehler*, 39 Wash App 688; 694 P2d 1129 (1985). In *Olin*, the defendants claimed that the plaintiff landlord unlawfully evicted them from the premises. The Washington Court of Appeals held that the defendant's unlawful lockout

---

(…continued)

changed the office's locks and ordered maintenance personnel to physically bar defendants from entering.

constituted a breach of the implied covenant of quiet enjoyment because the defendants had not abandoned the premises. *Id.* at 692-693. Here, like in *Olin*, defendants lawfully possessed the premises when plaintiff unlawfully resorted to self-help to lock them out. As in *Olin*, by violating MCL 600.2918, plaintiff evicted defendants and breached the lease agreement. This conduct precluded plaintiff from recovering rents owed under the remainder of the lease. Accordingly, the circuit court did not err in ruling that a "rational application" of the anti-lockout statute precluded plaintiff's breach of contract claim.[3]

Plaintiff next contends that the circuit court erroneously granted defendants' motion in limine because the motion qualified as dispositive and the court failed to afford it adequate time to respond. However, plaintiff 's counsel filed a response to the motion without indicating in the response that she needed more time. Furthermore, although plaintiff asserts on appeal that it did not have sufficient time to gather the evidence necessary to properly respond to defendants' motion, it fails to explain what evidence it could not produce. Under these circumstances, any error qualifies as harmless because plaintiff has failed to show that the error affected its substantial rights. MCR 2.613(A).

Plaintiff also argues that defense counsel failed to timely serve it with a copy of the final order. Although plaintiff suggests that in failing to timely serve it with a copy of the final order defendants intended to prevent it from timely filing an appeal by right, plaintiff undisputedly received a copy of the final order and timely filed a claim of appeal. Plaintiff does not allege any other prejudice arising from this alleged procedural error. Consequently, our refusal to disturb the final order does not qualify as inconsistent with substantial justice and, therefore, any error in failing to timely serve the final order also constitutes harmless error. MCR 2.613(A).

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher

[3] Although plaintiff also argues that the circuit court's ruling is not supported by the clean hands doctrine, nothing in the record indicates that the court relied on that doctrine as a basis for its decision. Thus, we find no error in this regard.