IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JERRY MUELLER,	)	
	)	
Appellant/Defendant Below,	)	C.A. No. 03-07-110
	)	
	)	
vs.	)	
HAROLD MARVEL,	)	
	)	
Appellee/Plaintiff Below.	)	

Submitted October 26, 2004
Decided December 8, 2004

Jerry Mueller, *Pro Se*, Appellant/Defendant
James C. Reed, Esquire, counsel for Appellee/Plaintiff

DECISION AFTER TRIAL

On October 9, 2004 a trial *de novo* was held in the above-captioned matter, on appeal from the Justice of the Peace Court. This is the Court's findings and decision.

FACTS

At all times relevant to this matter, Appellant-Defendant Jerry Mueller ("Defendant") owned real property in this County improved by a two-story chicken house no longer used to grow chickens. Appellee-Plaintiff Harold Marvel ("Plaintiff") is a farmer who grew hay and straw. The parties entered into a one-year, oral contract sometime in the late spring of 2000, for Plaintiff's use of the two-story chicken house to store hay and straw, which Plaintiff offered for

sale to his customers. The annual rent for use of the building was $1,000.00. Plaintiff began storing hay and straw in the chicken house in the late spring of 2000. He paid the annual rent for the 2000-2001 year on January 27, 2001.

The Defendant allowed the Plaintiff to continue storing and selling hay and straw at the chicken house the following year, through the summer of 2001. The Plaintiff paid the rent for the 2001-2002 year on April 8, 2002.

The Plaintiff continued to store and sell hay and straw at the chicken house through the summer of 2002. As of August 26, 2002, the Plaintiff had not yet paid his annual rent for the 2002-2003 year.

In July 2002 the structure of the chicken house began to significantly lean and collapse in parts. The sides buckled and caved in between floors. In the center of the building the roof collapsed and was resting on the hay and straw stored on the second floor. The Defendant became concerned with the safety of the structure, since Plaintiff continued to send his customers, unescorted, into the building to retrieve purchased product. In July and early August, the Defendant spoke to Plaintiff at least twice and expressed his concerns, and requested that Plaintiff remove his product from the building and cease sending customers into the building to purchase hay and straw. Plaintiff did not remove the product, and continued to send customers into the building. In early to mid August the Defendant placed yellow tape and a "No Trespassers" sign at the entrance of the chicken house.

On August 26, 2002, the Defendant hand-delivered a letter to the Plaintiff's wife and to the Plaintiff's residential mailbox. It stated that the lease agreement was terminated and that the building would be demolished on August 27, 2002.

The letter gave Plaintiff permission to remove his hay and straw from the premises on August 27th "upon payment of the rent due." On the same day, the Plaintiff hired a demolition crew to tear down the chicken house. On August 27, 2002 the demolition began.

Plaintiff did not remove the product prior to the commencement of the demolition. Defendant testified it was his intention to continue storing the product on his property during and after the demolition to enable Plaintiff to retrieve the hay and straw, and that the demolition was planned in such a way to permit the Plaintiff to remove the material. After the first day of demolition work, however, and after many months of drought, it rained non-stop for the next eight days. Some of the hay and straw was damaged by water. After the rains, Plaintiff removed less than half of the hay and straw, and claims that the balance was unusable. Plaintiff claims he lost 3,753 bales of hay, at $4.00 per bale, and 3,554 bales of straw, at $2.50 per bale. Plaintiff filed suit against Defendant for damages, claiming Defendant breached the rental agreement by unilaterally terminating the lease and demolishing the building. Defendant counterclaimed for damages, claiming, *inter alia,* that Plaintiff's negligence and misuse of the structure caused it to collapse, creating an immediate danger to Defendant and Plaintiff's employees and customers.

DISCUSSION

Applicable Law

The facts establish that in mid-2000 the parties entered into an oral, annual commercial lease, as defined in 25 ***Del. C.*** § 6102(1).The Residential Landlord Tenant Code is not applicable in this case. ***See, Lloyd Walsh, Inc. v.***

M.C. Holdings Co., 2001 WL 1555960, *3 (Del. Com. Pl. 2001). Under the provisions of the Landlord-Tenant Code in effect at the time the subject lease was entered into, a rental agreement for a commercial rental unit is excluded from the Code. 25 ***Del. C.*** § 5101(b). The statute also provides that all legal rights and remedies related to a commercial rental unit are governed by general contract principles. Id. Therefore, the questions before this Court will be decided under Delaware contract law. To be successful under general contract law, the Plaintiff has the burden of proving that the Defendant breached the contract by a preponderance of the evidence. ***Guthridge v. Pen-Mod, Inc.,*** 239 A.2d 709, 713 (Del. Super. 1967).

Validity of the Lease Agreement in August 2002

The parties agree that the lease agreement was valid for the 2000-2001 and 2001-2002 years. However, Defendant contends that the agreement was no longer in effect in August, 2002, because the Plaintiff had not paid the 2002-2003 annual rent by August. In the late spring of 2000, the Plaintiff orally agreed to pay $1,000.00 per year to the Defendant for use of the chicken house. No exact beginning date of this oral lease was established at trial, but the Plaintiff testified that he had the chicken house cleaned out just prior to storing hay and straw in the structure. The cleaning invoice indicates that occurred on June 8 – 9, 2000. Thus, the Court infers that the agreement took effect shortly before June 8, 2000. According to the testimony of both the Plaintiff and the Defendant, the Plaintiff stored hay and straw in the building continuously until the chicken house was destroyed on August 26, 2002. Copies of two checks in the amount of $1,000.00 from the Plaintiff to the Defendant were admitted in evidence. The Plaintiff

testified that the first check, dated January 27, 2001, represented payment for the 2000-2001 lease period. He also testified that the second check, dated April 8, 2002, represented payment for the 2001-2002 year.

The facts before the Court indicate that the parties engaged in an oral, bare-bones agreement. The parties agreed only on an annual rental price and the purpose for which the chicken house would be used. They did not specify when or how the rent would be paid. Because the agreement itself is void of a payment date, this Court must look to the parties' course of conduct to determine when the 2002-2003 rent became due.

The only consistent characteristic of the payments received for the 2000-2001 and 2001-2002 years is that the payments were not made at the beginning of the lease period; rather they were made near the end of the lease term, and prior to the harvesting and storage of the next crop. The Defendant accepted these payments both years. The course of conduct between the parties establishes that rent payable at the end of each lease period. Since the rent was not past due on August 26, 2002, the lease had not terminated for non-payment of rent.

Breach of Contract

The Defendant testified that he became increasingly concerned about the condition of the chicken house through the month of August 2002. After his requests that Plaintiff remove the product from the collapsed building went unheeded, Defendant delivered a letter to the Plaintiff unilaterally terminating the lease agreement on August 26, 2002.

A unilateral attempt to terminate a contract is a repudiation. ***Rochdale Village, Inc. v. Public Service Employees Union***, 605 F.2d 1290, 1297 (2nd Cir.

1979). If the contract does not provide a right to unilaterally terminate the contract then the repudiation does not terminate the contract, it breaches the contract. *Id*. The agreement at issue did not provide any right for either party to unilaterally terminate the contract. Therefore, the Defendant's repudiation on August 26, 2002 constituted a breach of the contract.

The Court finds, however, that Plaintiff has failed to meet his burden of proof as to the amount of damages with sufficient specificity. Plaintiff was unable to establish by a preponderance of the evidence the amount of hay and straw remaining in the chicken house as of August 27, 2002. It is clear from the evidence that Plaintiff permitted his customers to come, unescorted, to the chicken house and remove hay and straw, and that such activity had occurred all summer. Further, the Court is not convinced by the testimony and evidence as to the amount of straw and hay Plaintiff removed after the demolition of the chicken house, or the amount of hay and straw rendered unusable, if any. Finally, Plaintiff gave conflicting evidence regarding the price he sold his product for at the end of August, 2002. In order to prevail upon his claim, Plaintiff must meet his burden of proof as to the amount of his damages. He has failed to do so; the Court may not speculate as to Plaintiff's damages. The Court cannot reasonably infer or approximate the amount of Plaintiff's damages with any degree of certainty from the evidence presented. ***Pioneer Hi-Bred Int'l. v. Holden Found. Seeds,*** 35 F.3d 1226, 1245 (8th Cir. 1994); ***Del. Express Shuttle v.*** Older, 2002 Del. Ch. LEXIS 124, at 59-60. Plaintiff's claim therefore must be denied.

Impossibility Defense

Even if Plaintiff had sufficiently proven the amount of his damages, the Court finds that Defendant was excused from further performance under the contract. Defendant's allegations of the collapse and unsafe condition of the chicken house raised in his pleadings amount to an asserted defense of impossibility. A promisor is released from liability for breach of contract when further performance is impossible. Under Delaware law, this defense is applicable only when the impossibility of performance is caused by a fortuitous event and not by an act of the promisor's own volition. ***Martin v. Star Publishing Co.***, 126 A.2d 238, 242 (Del. 1956). The Restatement defines "impossibility" as something that is impracticable because of extreme and unreasonable difficulty, expense, injury or loss. ***Restatement Contracts*** § 454 (1932).

The Delaware Supreme Court has noted different classes of impossibility or frustration. One class is, "impossibility due to fortuitous destruction or change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance." ***Martin*** at 242. Although the *Martin* court did not find that the stated class applied, in dicta, the court acknowledged the validity of the class. ***Id.***

Section 460(2) of the Restatement of Contracts explains the class of impossibility that relates to the fortuitous destruction of something that is material to the contract. The Restatement provides that where the existence of a specific thing is necessary for performance of a promise in the bargain, and that thing is materially deteriorated, the parties are discharged from their duty to perform. ***Id.*** The Restatement explains that when the essential thing is

materially deteriorated, the promisor is discharged from his obligation to perform, unless the promisee remains ready and willing to render in full the agreed exchange for that part of the performance that remains possible. ***Id.*** However, even if the promisee remains willing to perform, the promisor may still be discharged from his obligation if the deterioration would make performance by him materially more burdensome. ***Id.***

To determine whether the defense of impossibility applies to this case, the Court will consider three elements: first, whether the chicken house was necessary for the performance of the promise between the Defendant and the Plaintiff; second, whether the chicken house was materially deteriorated; and third, whether fortuitous circumstances rendered the chicken house materially deteriorated.

As the actual object of the lease, the chicken house obviously was necessary for the performance of the contract. The chicken house had materially deteriorated, to the point of collapse, at the time of the breach. Pictures submitted by the Defendant, dated August 26, 2002, provide the Court with a visual image of the structure's severe dilapidation. Defendant testified that the building had collapsed some time in July 2002, and over a short period of time. Plaintiff testified that the building had become so unstable that it collapsed in the center portion, and that he would be unable to remove approximately one half of the hay and straw stored in the structure due to its condition. Finally, it is clear from the testimony and evidence that Plaintiff continued to send customers to retrieve straw and hay from the building, despite Defendant's warnings about the unsafe condition of the building. The Court is not in need of expert testimony to

find the building was unsafe for invitees to enter. A two-story building with buckled and caved-in sides and a collapsed roof held up only by the straw and hay stored inside it is clearly unsafe for continued use and occupation. Although Plaintiff may have wished to continue using the collapsed building, such use would have made Defendant's continued performance under the contract materially more burdensome due to his potential liability for personal injury damages to Plaintiff's customers. Consequently, the Court finds that the second element of the impossibility defense is satisfied.

The final element requires the Court to consider whether the material deterioration was the result of a fortuitous circumstance. The evidence supports a finding that it was fortuitous circumstances, and no action or inaction of Defendant, that caused the structure's collapse. Evidence submitted by both parties indicates the building was old, and at the end of its useful life, and in fact was being used by Plaintiff for a use other than that for which it was designed. The evidence indicates the building collapsed suddenly due to its age and the Plaintiff's contracted use of the building. Thus, fortuitous circumstances caused the material deterioration of the chicken house. The Court finds that further performance under the lease by Defendant, *i.e.*, the provision of the rented building for storage of Platinff's product and retrieval of that product by Plaintiff's customers, was rendered impossible by the collapse of the building.

Counterclaim

In his counterclaim, Defendant alleges that Plaintiff's negligence and "misuse" of the building caused its collapse. Defendant seeks $9,907.00 in damages as his costs in demolishing the building, as well as damages for "pain

and suffering of mental anguish and duress." After review of the evidence, the Court finds that Defendant failed to meet his burden of proof as to any element of his counterclaim. Although the building may have collapsed from Plaintiff's use of the building in storing thousands of bales of straw and hay on both floors, that is exactly the use the parties anticipated in their contract. Plaintiff failed to establish any other "misuse" or negligence on the part of Plaintiff, or any related causation as to the collapse of the building. Plaintiff's counterclaim is denied.

CONCLUSION

The lease contract between the parties was valid and effective as of August 26, 2002. The Defendant's termination letter dated that same day constituted a repudiation of the contract between the parties. Thus, the Defendant breached the contract. However, Plaintiff has failed to prove its damages with specificity. Further, the Defendant is excused from any liability stemming from the breach because further performance was rendered impossible by the prior collapse and unsafe condition of the building. Therefore, judgment is entered in favor of Defendant, and against Plaintiff on Plaintiff's claim. Defendant failed to meet his burden of proof as to his counterclaim. Therefore, judgment on the counterclaim in entered in favor of Plaintiff, and against Defendant. Each party shall bear his own costs.

IT IS SO ORDERED.

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Kenneth S. Clark, Jr.