

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DELAWARE STATE HOUSING :
AUTHORITY/CLARK'S CORNER, : C.A. No. 07A-11-004 WLW
:
Petitioner, :
:
v. :
:
JUSTICE OF THE PEACE COURT :
16 and ANGEL FANNIN, :
:
Respondents. :

Submitted: April 11, 2008

Decided: August 8, 2008

ORDER

Upon Petition for Writ of Certiorari.
Writ is Granted.
Decision of Lower Court is Reversed.

Jeffrey J. Clark, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Petitioner.

James G. McGiffin, Jr., Esquire, Community Legal Aid Society, Inc., Dover, Delaware; attorneys for the Respondent Fannin.

Ralph K. Durstein, III, Esquire, Department of Justice, Wilmington, Delaware; attorneys for Respondent J.P. Court 16.

WITHAM, R.J.

Before the Court is the Delaware State Housing Authority/Clark's Corner's ("Petitioner" or "DSHA") petition for a certiorari review of the Justice of the Peace Court No. 16's October 26, 2007 Order, asserting clear legal error that is manifest on the face of the record.¹ The lower tribunal found that the lease provision at issue conflicts with the *Delaware Code* and is therefore unenforceable. The Court *grants* the writ.

Upon review, the Court finds that the lower tribunal used the incorrect provision of the *Code* to determine that the lease provision conflicts with the *Delaware Code* and is therefore unenforceable. Applying the appropriate statutory provision, the Court finds that it is partly preempted by Federal law in the specific context of federally-subsidized housing. However, the lease provision at issue mirrors Federal law rather than the statutory language found in the *Code*. As a result, the Court finds that it accords with the Federal law and therefore, because it is preempted in the context of federally-subsidized housing, it also accords with Delaware law. Therefore, the Justice of the Peace Court's ("JP Court" or "the Panel") decision is *reversed*.

Procedural History

This case was initially held before a Justice of the Peace. Then it was appealed to a three-Justice of the Peace Panel. Next, on certiorari, it came before this Court. The Court reversed and remanded the matter back to a three-Justice of the Peace Panel. Now, it is before this Court again on its second petition for a writ of certiorari.

¹ Petition for Subsequent *Writ of Certiorari* Pursuant to 10 *Del.C.* §562; ¶5.

Petitioner is an agency of the State of Delaware that owns and manages a federally-subsidized housing project at Clark's Corner in Harrington, Delaware. DSHA filed a complaint in JP Court seeking summary possession of the unit occupied by their tenant, Fannin, whom DSHA asserted had paid her rent late three times, in violation of paragraph 14(a)(3) of the DSHA Residential Dwelling Lease. Fannin filed a Motion to Dismiss, challenging DSHA's claim on one of the three payments. JP Court dismissed the complaint without prejudice because the parties disagreed as to the definition of a "late" payment, and found in favor of Fannin's definition of "late."² Therefore, they found that rent was due on the first business day of the month, and that rent was not late until it was not received by the "fourth" day of the month, based on DSHA's practice.

DSHA appealed to a three-Justices of the Peace Panel. On the October 31, 2006 *de novo* review, the Panel determined that DSHA failed to comply with 25 *Delaware Code* § 5708(2) and (3), requiring specificity in the Complaint.³ It found

² Due to an administrative error, the transcripts for this case have been destroyed. Therefore the historical recitation is based upon what the Court is able to glean from the remaining documents. This necessitated a delay in resolving this matter.

³ 25 *Delaware Code* § 5708 requires that the Complaint must

(2) Allege with specificity the facts constituting a breach of the rule or provision of the rental agreement and that notice or warning as required by law was given to the tenant; [and]

(3) Set forth the facts constituting a continued or recurrent violation of the rule or provision of the rental agreement. . . .

According to the JP Court Docket entry made on October 31, 2006, JP Court found that the issue in the pretrial motion to dismiss was whether Fannin was indeed late in paying rent three times

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that the basis of DSHA's summary possession action was that Fannin paid rent late three times in a twelve-month period in violation of paragraph 14(a) of the lease agreement,⁴ that it is undisputed that Fannin paid rent late in October 2005 and January 2006, but DSHA failed to specify when Fannin actually made the third late payment, constituting a material fact of the alleged breach. (They also found that late notices were sent on October 13, 2005, January 12, 2006, respectively.⁵) Therefore, they dismissed the Complaint for lack of specificity.

DSHA petitioned for a Writ of Certiorari in this Court. On August 17, 2007, the Court found that the Complaint "did not lack the statutorily required specificity and the lower court incorrectly dismissed the Plaintiff's Complaint for Summary Possession as a matter of law."⁶ The Court reasoned that since the Panel found that Fannin's third late payment occurred in June 2006, that DSHA sent a late notice on June 16, 2006, and that the June 2006 payment had not been made "as of June 9, 2006", the specificity requirement is met. As a result, the Court reversed and remanded the matter.

After the October 26, 2007 remand hearing, the three-Justice of the Peace Panel granted again Fannin's Motion to Dismiss the Plaintiff's Petition.⁷ The Panel

in twelve months. They concluded that the third payment may not have been late and that the Plaintiff failed to specify in their response when the third payment was made. Therefore they could not bring a summary possession proceeding and the case was dismissed.

⁴ DSHA Residential Dwelling Lease, paragraph 14(a)(3).

⁵ The late notices each stated that "Since your payment is due on the first of every month, you are considered a delinquent tenant and in violation of your lease."

⁶ *DSHA v. JP Court 16 & Fannin*, C.A. No. 06A-11-001 WLW, 2007 WL 3105915 (Del. Super. Ct. Aug. 17, 2007.).

⁷ *DSHA v. JP Court 16 & Fannin*, Del. J.P., C.A. J0609029516 (Oct. 26, 2007).

determined that in addition to the first two late payments, the third late payment was paid on June 12, 2006.⁸ They also found that Fannin signed a Post Lease Check List on July 18, 2005 that states in part that “[she] understand[s] that rent is due on the first of every month.” Additionally, on August 29, 2006, Fannin signed a Post Lease Check List and received a Reservation of Rights letter dated August 23, 2006.⁹ Fannin received a 60-day notice on June 20, 2006 that terminated the lease agreement in accordance with 25 *Delaware Code* § 5106(c).

The Panel found that the lease holds conflicting requirements. Paragraph 2(a) of the agreement states “Thereafter, monthly rent . . . shall be due on or before the first *day* of each month”¹⁰ and paragraph 2(g) states “All rent due and owing from the first (1st) *working day* of the month that is not paid by 4:00 p.m. on the seventh (7th) work day of the month is subject to imposition of a late fee . . .”¹¹ The Panel correctly stated that “[w]hen a conflict exist [sic] within a contract, the most favorable interpretation is given to the non-[drafting] party, therefore the Court determines the Defendant’s rent is due on the first working day of the month pursuant to paragraph

⁸ The JP Court recognized that there were several additional times when Fannin was late with her rent and was not charged a late fee or sent a late notice, constituting a total of eight late payments. Fannin argued that she reasonably relied on the inconsistent application of the late payment of rent notice, which was sent only on three of the late payment occasions. For public policy reasons, including that DSHA should not be punished for being flexible, the Court is not persuaded by this argument.

⁹ The exhibits admitted during the *de novo* trial are absent from the Court’s record. The JP Court opinion states that the Post Lease Check List and Reservation of Rights letter was admitted as Plaintiff’s exhibit #11.

¹⁰*DSHA v. JP Court 16 & Fannin*, Del. J.P., C.A. J0609029516, *5 (emphasis added) (*citing* DSHA Residential Dwelling Agreement ¶2(a)).

¹¹*Id.* (emphasis added) (*citing* DSHA Residential Dwelling Agreement ¶2(g)).

2(g) of the lease agreement.”¹² The Panel disagreed with Fannin’s position that paragraph 2(g) provides that rent is not late until the seventh working day and found that “if rent has not been paid by the seventh work day, [Fannin’s] rent is subject to the imposition of a late fee.”¹³ They concluded that paragraph 2(g), standing alone, accords with *25 Delaware Code* § 5501(d).¹⁴ The Panel then found that Fannin had been late eight times from October 2005 to September 2006.

Fannin argued that *25 Delaware Code* § 5513(a) requires a material breach and late payment of rent is not a material breach. The Panel agreed, holding that *25 Delaware Code* § 5513(a) requires a material breach in order to terminate a lease,¹⁵

¹² *Id.*.

¹³ *Id.*

¹⁴ Title *25 Delaware Code* § 5501 provides:

(d) Where the rental agreement provides for a late charge payable to the landlord for rent not paid at the agreed time, such late charge shall not exceed 5 percent of the monthly rent. A late charge is considered as additional rent for the purposes of this Code. The late charge shall not be imposed within 5 days of the agreed time for payment of rent. The landlord shall, in the county in which the rental unit is located, maintain an office or other permanent place for receipt of payments, where rent may be timely paid. Failure to maintain such an office, or other permanent place of payment where rent may be timely paid, shall extend the agreed on time for payment of rent by 3 days beyond the due date.

25 DelC. § 5501(d).

¹⁵ Title *25 Delaware Code* § 5513 provides

(a) If the tenant breaches any rule or covenant which is material to the rental agreement, the landlord shall notify the tenant of such breach in writing, and shall allow at least 7 days after such notice for remedy or correction of the breach. This section shall not apply to late payment of rent which is covered under § 5502 of this title.

that the JP Court does not find three late payments of rent to constitute such a breach, and therefore the lease agreement's paragraph 14(a), permitting termination upon three late payments within a 12-month period, is unenforceable.¹⁶

Since there is no right to appeal the Panel's decision, DSHA petitioned for a writ of certiorari review in this Court, claiming that the Panel's decision committed an error of law. DSHA argued that Federal law provides DSHA with discretion to define repeated late payments of rent as a material breach of the lease, rendering paragraph 14(a)(3) of its lease agreement valid.

Standard

On certiorari, the Court's review is on the record and it may not weigh evidence or review the lower tribunal's factual findings.¹⁷ Rather, the reviewing court considers the record before the lower tribunal to determine whether it: (I) exceeded its jurisdiction; (ii) committed errors of law; or (iii) 'proceeded irregularly.'¹⁸ In these situations, the decision of a lower tribunal will be reversed: (I) for exceeding the tribunal's jurisdiction only if the record fails to show that the matter was within the lower tribunal's personal and subject matter jurisdiction; (ii) for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has "proceeded illegally or manifestly contrary to law;" and (iii) for

25 *Del.C.* § 5513.

¹⁶ 25 *Delaware Code* § 5101(a) requires that any conflict between the lease agreement and any provision of the Landlord Tenant Code be unenforceable, and that the Landlord Tenant Code would, in that circumstance, prevail.

¹⁷ *Reise v. Board of Bldg. Appeals of City of Newark*, 746 A.2d 271, 274 (Del.2000).

¹⁸ *Reise v. Board of Building Appeals of the City of Newark*, 746 A.2d 271, 274 (Del. 2000) (citing *Butler*, 609 A.2d at 1081-82).

irregularities of proceedings if the lower tribunal failed to create an adequate record for review.¹⁹

Discussion

I. The Decision of the three-Justice of the Peace Panel on the Trial *de Novo* Remand from the Superior Court Constitutes Legal Error

The Panel below declared Residential Dwelling Lease agreement paragraph 14(a) unenforceable because it conflicts with 25 *Delaware Code* § 5513(a). This Court finds that provision inapplicable and therefore there is no conflict. Paragraph 14(a) allows termination of the lease agreement in the event of three late payments in a twelve-month period. Although the Panel found that Fannin had “clearly” paid her rent late on eight occasions within a twelve-month period, it was persuaded by Fannin’s argument that 25 *Delaware Code* § 5513(a) precludes late payments to be a material breach and only material breaches suffice for the purpose of termination.²⁰ Title 25 *Delaware Code* § 5513 clearly states that it does not apply to late payment of rent, and directs attention to § 5502.²¹ Nonetheless, the Panel invoked 25

¹⁹ *Christiana Town Center, LLC v. New Castle County*, 865 A.2d 521 (Table), 2004 WL 2921830, *2 (Del. Dec. 16, 2004) (citations omitted).

²⁰ Title 25 *Delaware Code* § 5513(a) provides:

If the tenant breaches any rule or covenant which is material to the rental agreement, the landlord shall notify the tenant of such breach in writing, and shall allow at least 7 days after such notice for remedy or correction of the breach. This section shall not apply to late payment of rent which is covered under § 5502 of this title.

25 *Del.C.* § 5513(a).

²¹ Title 25 *Delaware Code* § 5502(a) provides:

Delaware Code § 5101(a), which declares that any conflicts between the *Code* and the lease agreement to be unenforceable. The Panel concluded that because of the alleged “conflict,” paragraph 14(a) was unenforceable because three late payments in a twelve-month period is not a material breach of the lease agreement and not a basis for termination. Since § 5513(a) does not pertain to late-payment of rent, the Panel’s application of that provision is incorrect.²²

A landlord . . . may, any time after rent is due . . . , demand payment thereof and notify the tenant in writing that unless payment is made within a time mentioned in such notice, to be not less than 5 days after the date notice was given or sent, the rental agreement shall be terminated. . . .

25 *Del.C.* § 5502(a).

Fannin argues that this case involves *late* payment of rent, not *nonpayment* of rent, and therefore §5513 controls. Upon reading the plain language of the provision, it is clear to the Court that § 5502 does apply, since it addresses the procedure required upon the payment of rent in § 5502(c) and (d).

²²Fannin argues that the Court should ignore the JP Court’s finding of fact that she paid rent late on eight occasions. The Court cannot review findings of fact on certiorari. The Court does note that 25 *Delaware Code* § 5501(d) requires a three day extension from the agreed-to due date “[w]here the rental agreement provides for a late charge payable to the landlord for rent not paid at the agreed time” when the landlord does not maintain an office in the “county in which the rental unit is located.” Here, Fannin was mailing her checks to an office in New Jersey, therefore it appears the three-day extension applies. Even so, her payments were late.

Regarding the three late payments addressed in this opinion, Fannin received late notices that were mailed on October 13, 2005, January 12, 2006, and June 16, 2006. The record expressly states that the June payment was received on June 12. Assuming, *arguendo* that these notices were sent a day after payment was received (the notices themselves state that payment has not yet been received), her payments are still late. Given that Delaware acknowledges payment on receipt, not at the time the check was placed in the mail (*Dickens v. State*, 683 A.2d 58 (Table), 1996 WL 539804, 1 (Del.Supr. Sep. 16, 1996)), Fannin’s payments still arrived well after their due dates. For example, her October rent, due on the first working day of the month, was due on October 3, but with the three-day extension, was due on October 6; her January rent, due on January 2, with the extension was due on January

II. Paragraph 14(a)(3) is not Preempted by Federal Law

Petitioner advances that Federal law preempts Delaware law and gives DSHA discretion in defining whether late payment of rent constitutes a material breach, and to render paragraph 14(a)(3) of its Residential Dwelling Lease agreement valid.²³ As discussed in Section I above, the applicable provision of the *Delaware Code* is 25 *Delaware Code* § 5502(a), which permits the landlord to terminate a lease upon late payment of rent. The issue is whether the *Delaware Code* is preempted by Federal law, in the context of federal subsidized housing.

Federal preemption can occur only in three circumstances: (a) expressly where Congress explicitly preempts state law; (b) implicitly because Congress has occupied the entire field; or (c) expressly where there is an actual conflict between federal and state law.²⁴ Title 42 U.S.C. § 1437 to § 1437z-7 covers the Low-Income Housing General Program of Assisted Housing.²⁵ This statute does not expressly preempt state

5; and her June rent, due on June 1, with the extension, was due on June 5. Each of these payments are without doubt, late.

²³ Title 25 *Delaware Code* § 5106(e) specifically provides for Federal preemption when there is a conflict between the *Delaware Code* and Federal law in the context of federally-subsidized housing:

With regard to a tenant occupying a federally-subsidized housing unit, in the event of any conflict between the terms of this Code and the terms of any federal law, regulations or guidelines, the terms of the federal law, regulations or guidelines shall control.

²⁵ *Del.C.* § 5106(e).

²⁴ *Gulko v. General Motors Corp.*, 710 A.2d 213, 215 (Del.Super.1997) (citing *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)).

²⁵ 42 U.S.C. §1437(a)(1)(C) declares that the policy of the United States is

law and case law does not indicate that the entire field has been occupied. Therefore, only where there is a direct conflict of law will preemption occur.

Upon comparing the relevant provisions of the federal low-incoming housing statute, the *Delaware Code* and paragraph 14(a)(3) of the DSHA lease agreement, the Court finds that Federal law preempts 25 *Delaware Code* § 5502(a) in the context of public housing, but that DSHA’s paragraph 14(a)(3) of its lease agreement is still valid. To explain, § 1437d controls federally-subsidized housing lease provisions and requirements. Section 1437d(l)(2) provides that the lease cannot contain “unreasonable terms and conditions.”²⁶ Moreover, § 1437d(l)(5)

require[s] that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause²⁷

(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter—

(C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public

42 U.S.C. § 1437(a)(1)(C) (Oct. 1, 1999).

²⁶42 U.S.C. § 1437d(1)(2) (Aug. 12, 2006). Requiring timely payment of rent for a rental unit seems reasonable.

²⁷ 42 U.S.C. § 1437d(1)(5) (Aug. 12, 2006). The Delaware Code recognizes that any conflict between it and the Federal statute results in a preemption by Federal law:

With regard to a tenant occupying a federally-subsidized housing unit, in the event of any conflict between the terms of this Code and the terms of any federal law, regulations or guidelines, the terms of the federal law, regulations or guidelines shall control.

To determine whether three late payments of rent in a twelve-month period constitutes a “repeated violation of the terms or conditions of the lease or for other good cause” for the purpose of termination, the Court delved into the regulations. Title 24 C.F.R. § 966.4(1)(2)(I) specifically provides for this situation. It states that a lease may be terminated or a tenant may be evicted when there is a “[s]erious or repeated violation of material terms of the lease, *such as . . . [f]ailure to make payments due under the lease.*”²⁸ Moreover, 24 C.F.R. §966.6, which lists lease provisions that are prohibited in state housing leases, does not prohibit terminating a lease because of late payments.²⁹ Since Federal law supports termination for repeatedly paying rent late and clearly does not prohibit it, the Court finds that DSHA may terminate a lease for repeatedly paying rent late.³⁰

There is a conflict between the State and Federal laws, requiring preemption by Federal law. Title 25 *Delaware Code* § 5502(a), which provides for termination in the event of late payment of rent, does not require *repeated* late payments in order to terminate, as required by 24 C.F.R. § 966.4(1)(2)(I). Instead, it provides that a summary possession proceeding can occur anytime after payment is due, indicating that State law permits termination in the event of a single late payment. Since Federal

25 Del.C. § 5106(e).

²⁸ 24 C.F.R. § 966.4(1)(2)(I) (emphasis added).

²⁹ Listed items largely pertain to rights that cannot be waived by the tenant, such as the waiver of a jury trial by tenant.

³⁰ This conclusion is supported by holdings from other jurisdictions. *See, i.e., Housing Authority of Norwalk v. Whitaker*, 1995 WL 611711 (Conn.Super.Ct. Sep. 7, 1995) (where defendant’s late payment of rent was characterized as a nonpayment of rent that fell under 24 C.F.R. 966.4(1)(2)); *Dayton Metropolitan Housing Authority v. McKee*, 524 N.E.2d 180 (Ohio App. 1987) (addressing retroactive payment of past-due rent).

law requires a repeated late payment in the context of federally-subsidized housing, State law is preempted. There must be a finding of *repeated* late payments of rent, in accordance with 25 *Delaware Code* § 5106(e). The remaining provisions of § 5502, in the context of public housing, do not conflict with Federal law and are therefore enforceable.

In contrast to the *Code*, the language of DSHA lease agreement's paragraph 14(a)(3) mirrors that of the Federal law:

a. Management shall not terminate . . . this lease other than for good cause or for other serious or repeated violation of material terms of the lease, including but not limited to: . . .

(3) The making of three (3) late payments during any twelve (12) month period. . .³¹

The paragraph is therefore not preempted by Federal law and is enforceable. The Court holds that three late payments constitute repeated late payments, in accordance with 24 C.F.R. § 966.4(1)(2)(I).

III. Application of Delaware Law

To determine whether DHSA validly initiated and continued the summary possession proceeding against Fannin, the Court looks to the procedure laid out by Title 25 *Delaware Code* § 5502(c) and (d), which specifically addresses late payment of rent in the context of a summary possession action. There are two possible circumstances: one in which the tenant pays all rent due before the landlord initiates

³¹ Compare with 42 U.S.C. § 1437d(1)(5) and 24 C.F.R. § 966.4(1)(2)(I). *Cf.* 25 *Del.C.* § 5502(a) (permitting termination anytime after rent payment is due).

a summary possession action, and one in which he pays after one has been initiated:

(c) If a tenant pays all rent due before the landlord has initiated an action against the tenant and the landlord accepts such payment without a written reservation of rights, the landlord may not then initiate an action for summary possession or for failure to pay rent.

(d) If a tenant pays all rent due after the landlord has initiated an action for nonpayment or late payment of rent against the tenant and the landlord accepts such payment without a written reservation of rights, then the landlord may not maintain that action for past due rent.³²

The Panel found that Fannin paid rent late repeatedly³³ and the record indicates that Fannin signed DSHA's reservation of rights on August 20, 2006, as required to initiate or continue a summary possession proceeding in the event that the public housing authority accepts all amounts due from the tenant.³⁴ The summary judgment proceeding is therefore lawful.³⁵

Conclusion

The JP Court found that the DSHA Residential Dwelling Lease agreement, paragraph 14(a)(3), conflicted with the *Delaware Code*. The Court finds the lower tribunal incorrectly applied 25 *Delaware Code* § 5513 when making its

³² 25 *Del.C.* § 5502(c), (d).

³³ The Court notes again that the Panel found Fannin to have paid her rent late eight times.

³⁴ 25 *Del.C.* § 5502(c), (d). In Delaware, late fees are considered rent. *See* 25 *Del.C.* § 5501(d).

³⁵ The Court recognizes “[t]he difficulty that people of lower economic means in this country have in obtaining adequate housing” (*Hill v. Richardson*, 740 F.Supp. 1393, 1393 (S.D.Ind.,1990)). Paragraph 2(g) of DSHA's lease agreement alleviates some of this concern by giving the tenant an opportunity to have the late fee suspended if he arranges late payment of rent with the landlord in advance of the seventh day of late payment of rent.

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determination. In the course of applying the appropriate provision, 25 *Delaware Code* § 5502(a), the Court found that the federally-subsidized housing statutory provisions and regulations, 42 U.S.C. § 1437d(1)(2) and (5), and 24 C.F.R. §§ 966.4(1)(2)(I) and 966.6, preempt 25 *Delaware Code* § 5502(a). This preemption is limited to the context of federally-subsidized housing. Upon applying the relevant provision by preemption, paragraph 14(a)(3) is valid under Federal law, and therefore enforceable under Delaware law. Wherefore, the Court upon certiorari review finds that the Justice of the Peace Court decision must be *reversed*.

IT IS SO ORDERED.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution