IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN W. GILLESPIE	)	CIVIL ACTION NUMBER
	)	
Appellant	)	09A-05-009-JOH
v.	)	
	)	
CHELSEA ON THE SQUARE APARTMENTS	)	
	)	
	)	
Appellee	)	

Submitted: April 14, 2010
Decided: July 30, 2010

MEMORANDUM OPINION

*Upon Appeal from a Decision of the Court of Common Pleas - **AFFIRMED***

Appearances:

John W. Gillespie, 3702 Winterhaven Drive, Newark, Delaware, 19702, Appellant

Joseph J. Bellew, Esquire, of Cozen O'Connor, Wilmington, Delaware, Attorney for Appellee

HERLIHY, Judge

Procedural History

John Gillespie appeals the decision of the Court of Common Pleas dismissing his claim for invasion of his right of privacy. He is a hold-over tenant in the Chelsea on the Square apartment complex ("Chelsea"). He claims his privacy was violated because Chelsea's notice of a pending inspection did not meet the requirements of the Landlord-Tenant Code. The court below determined the notice was proper and/or he had actual notice.

The undisputed record-below manifests that Gillespie had actual notice of pending inspections. There was, therefore, no violation of the Code. The well-reasoned decision of the Court of Common Pleas is **AFFIRMED**.

Factual Background[1]

Gillespie rents a residential unit from Chelsea. On June 2, 2008, Chelsea distributed unsigned notices to its tenants of Chelsea's intention to enter the residential units starting on June 4, 2008 between the hours of 8:00 a.m. and 9:00 p.m. to conduct routine inspections.[2] In his complaint, Gillespie states that on June 5, 2008, he contacted someone in Chelsea's leasing office. He did this because there was no inspection on June 4th, and he wanted to know when the next inspection would occur. He was told it was scheduled for June 10th.[3]

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[1] The factual background is derived primarily from the lower court's opinion. *Gillespie v. Chelsea on the Square*, 2009 WL 1262864 (Del. Comm. Pl.).

[2] Compl. Ex. 1.

[3] Compl. at ¶ 5.

On June 6, 2008, Gillespie sent a letter to the General Manager at Chelsea regarding the pending entry into the residential units.[4] He asserted that the June 2 notices were "unsigned and improperly delivered" and, thus in violation under § 5113 of the Delaware Landlord-Tenant Code.

On June 10, 2008, Gillespie received two copies of a letter from Terris Bagwell, the Assistant Manager at Chelsea, to inform him that his letter was received, that the notices were proper, and that Chelsea had the right to perform inspections under the Landlord-Tenant Code.[5]

Gillespie filed suit against Chelsea in June, 2008. His complaint stated that he had previously been awarded damages for Chelsea's invasion of privacy by entering his property.[6] The gravamen of his complaint is that the notices violated the Landlord-Tenenat Code. These alone violated his privacy, but he couples his latest complaint with repeated references to the prior damage award.

Gillespie moved for summary judgment and Chelsea cross-moved for summary judgment. Neither side presented any affidavits but, instead, relied on their pleadings and motions, and some minimal, insubstantial discovery. In his motion, Gillespie stated the "only dispute is in the question of the law involved."[7] And further in the

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[4] Compl. at ¶ 7, Ex. 2.

[5]Compl. Ex. 3. One copy of the letter was sent to Gillespie by standard mail, while the other was delivered under the door of his rental unit. This same letter was allegedly copied to all Chelsea's residents of Buildings 34-38.

[6] Compl. at ¶ 13, Exhibit 4. The exhibit is a letter fro Gillespie to Chelsea's assistant manager in which he notes the prior case. His letter is the only record in the case of what was invoked in the prior case.

[7] Gillespie summary judgment motion, p. 1.

body of the motion, Gillespie's argument relates solely to his claim that one or more of the notices for an inspection was or were inadequate under the Landlord-Tenant Code.

There are several key parts to the procedural posture of this case in the Court of Common Pleas. Gillespie's complaint did not allege there was an actual entry into his apartment. In none of the papers he filed, motions, responses, discovery responses, or otherwise did he say there was an entry or, importantly, did he ever present evidence he would use at a trial that this had been an entry. There was no affidavit or sworn testimony about an actual entry into his apartment. Chelsea, of course, never said in the court below that there had been an entry into Gillespie's apartment on June 4th or 10th.

In his complaint Gillespie says a Chelsea representative told him on June 5th that the next inspection was now scheduled for June 10th. His complaint also says he received one or more letters or notices of the pending June 10th inspection.

In sum, there was no factual dispute that there was no entry and no factual dispute that Gillespie had notice of the proposed June 4th and June 10th inspections.

Decision Below

Based on the record and motions submitted by both parties, particularly Gillespie, the Court of Common Pleas had only a legal decision to make. The court acknowledged that in its opening recitation of the facts. Gillespie contended that the various motions Chelsea gave did not conform to 25 *Del. C.* § 5113 of the Landlord-Tenant Code.

Based on the record presented, as set out in that opinion and repeated in this opinion, the court below determined that it did not have to make that determination. Instead it held that the undisputed facts of the case showed Gillespie had actual notice of botth pending inspections. As such, this actual notice met the requirements of 25 *Del. C.* § 5114.[8]

Parties' Contentions

Gillespie argues that the Court of Common Pleas erred in deciding this case as an issue of entry into a residential unit, rather than the filed complaint concerning proper notice of intent to enter.

Second, he argues that the court erred when it did not apply §5113 of the Landlord/Tenant Code to the notice of entry required under 25 *Del. C.* §5509 to be given by the landlord to the tenant into an occupied residential rental unit. He contends that the court erred by (1) determining that the June 2nd notice, which was left unsigned and in a common hallway, to be notice of intent to enter under §5509; and, (2) that such notice caused Gillespie to become a person with actual knowledge under §5114 of Chelsea's planned entry on the date in question.

Furthermore, Gillespie asserts that the lower court wrongly assumed that he had prior knowledge of the date the inspection was rescheduled to occur, as neither

[8] A person has notice of a fact if:

(1) The person has actual knowledge of it;

(2) The person has received a notice pursuant to the provisions of this Code; or

(3) From all the facts and circumstances known at the time in question, such person has reason to know that it exists.

evidence nor proof of Gillespie's alleged prior knowledge was ever presented. Rather the evidence presented included a letter dated June 10, 2008 from the landlord regarding the pending inspection which failed to provide the date of the rescheduled inspection.

Finally, he argues that the lower court erred in deciding this matter with facts which were never presented in evidence and more importantly which the evidence presented refutes.

In response, Chelsea argues that § 5509 is inapplicable to § 5113 notice as the latter only governs service of process and pleadings. Furthermore, Chelsea argues, that it is irrelevant in this case whether § 5113 applies to the notice required under § 5509, as Gillespie, by his own admission—had actual knowledge of the planned inspections. Additionally, such notice was provided 48 hours before the planned inspections. Finally, for these reasons set forth above, Chelsea requests this Court to affirm the decision of the Court of Common Pleas.

Standard of Review

The reviewing court's standard of review on appeal from a grant of summary judgment is *de novo*.[9] While the reviewing court on appeal from cross-motions for summary judgment, will "review and draw its own conclusions with respect to the facts if the findings below are clearly wrong and if justice requires."[10] In such procedural

[9] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[10] *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982) (appellate review from a grant of summary judgment in the face of the non-movant's claim that factual disputes exist, no such deference is warranted and the court if free to determine *de novo* whether the record reflects the existence of material factual disputes).

posture, "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions."[11] However, even when opposing parties make cross-motions for summary judgment, neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[12] Summary judgment is proper only when the ultimate fact finder has nothing to decide, as the "function of the judge in passing on a motion for summary judgment is not to weigh the evidence."[13]

The moving party is entitled to judgment as a matter of law, where the plaintiff fails to make "a sufficient showing" or "a complete failure" to prove an element for which he has the burden.[14]

Discussion

As noted, the Court of Common Pleas did not reach the issue of whether Chelsea's June 2nd notice to Gillespie and other tenants did or did not comply with 25 *Del. C.* § 5113. It relied instead on the actual notice provision in § 5114. This Court on appeal sees no reason to decide the § 5113 issue, in part because it is not clear the issue is properly before it.

The issue is narrow: did the Court of Common Pleas err when it decided Gillespie had actual notice of the proposed June 4th and June 10th inspections. The court

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[11] *Merril*, 606 A.2d at 100.

[12] *Empire of America v. Commercial Credit*, 551 A.2d 433, 435 (Del. 1988).

[13] *Id.*

[14] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986)).

below had undisputed facts, namely most importantly, Gillespie's own admission that he had notice of the June 4th inspection and that was told on June 5th of the planned June 10th inspection. He admitted actual notice in his complaint. Any effort on appeal to deny or back away from that is out of order and will not be considered. Gillespie did not make an issue or fact in the court below of that June 5th communication or his knowledge of the proposed June 4th inspection.

The undisputed record below was that Gillespie had actual notice of both possible inspections. That met the statutory requirement of notice found in § 5114. There was no error in the Court of Common Pleas. That actual notice superseded any possible notice issues arising from § 5113.

This Court is compelled to say several things. First, it was not argued below and this Court is not affirming the decision below on this point, but without an entry, there is, at best, serious doubt of the efficacy of an invasion of privacy claim if not that there is a claim at all. Gillespie's complaint recites only alleged inadequacies of Chelsea's notices of pending inspections. He utterly fails to show or offer any basis for how his privacy was invaded as there was no entry into his apartment. This Court could, therefore, affirm the Court of Common Pleas' decision on different grounds, failure to state a claim upon which relief can be granted but chooses not to.[15]

Second, this Court in *Metrodev Newark, LLC v. Justice of the Peace Court 13*[16] detailed a long, contentious history between Gillespie and Chelsea. This appeal,

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[15] *Unitrin, Inc. v. American Gen'l Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[16] 2010 WL 939800 (Del. Super.)

represents yet another chapter in this saga which has unnecessarily, most of the time wasted a limited and stretched judicial system. This Court's prior opinion points the way out.

Conclusion

For the reasons stated herein, the well reasoned decision of the Court of Common Pleas is **AFFIMED**.

IT IS SO ORDERED.

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J.