

EXHIBIT L

LEXSEE 1979 OHIO APP LEXIS 8786

TIE BAR, INC., PLAINTIFF-APPELLANT v. BUFFALO MALL, INC., ET AL, DEFENDANT-APPELLEE

Case Nos. 78 CA 95 to 78 CA 100

Court of Appeals of Ohio, Seventh Appellate District, Mahoning County

1979 Ohio App. LEXIS 8786

April 30, 1979

NOTICE: PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS AND EXCEPTIONS.

DISPOSITION: [*1]

Judgment Affirmed

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant lessee challenged judgments of the Court of Common Pleas, Mahoning County (Ohio), which granted motions for summary judgment dismissing the complaints filed by the lessee against appellee lessors and ruled for the lessors on their counterclaims. The trial court held the lessee liable for the rent that it owed to the lessors on premises that it had leased at various malls.

OVERVIEW: The lessee entered into commercial lease agreements with the lessors at various malls. The leases gave the lessors the immediate right to cancel the leases and re-enter and remove all persons and property from leased premises if the lessee did not pay the rent. The lessee owed back rent varying in amounts from \$ 668 to \$ 1,488. In each case the lessors gave the lessee notice that the lease would terminate after 10 days if the lessee did not pay the amount of rent in arrears. The lessee did not pay the rent as required. The lessors terminated the lease and took possession of the premises by locking the lessee out. The lessors returned the lessee's merchandise a short

time later. In none of the cases was there a physical confrontation when the lessee was locked out. The lessee had alleged that it incurred damages because the lessors kept its personal property. The court affirmed the judgment of the trial court. The court held that: (1) the lessors were well within their legal rights when they terminated the lease because of nonpayment of rent; (2) the evidence disclosed that the lessors returned the lessee's property; and (3) the lessee was liable for the rent due.

OUTCOME: The court affirmed the judgment of the trial court.

LexisNexis(R) Headnotes

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

[HN1] United States Constitution, Article I, § 10, reads as follows: No state shall pass any law impairing the obligation of contracts.

Contracts Law > Breach > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > General Overview

[HN2] By common law and *Ohio Rev. Code Ann. § 5321.01*, a lessor is permitted to lock out a defaulting

lessee of commercial premises. *Ohio Rev. Code Ann. § 5321.15* only prohibits a "landlord of residential premises" from locking out a tenant in order to recover possession of the residential premises. This possession by a commercial landlord can only be obtained if he can do so without a breach of the peace.

COUNSEL:

Michael A. Gallo, for Plaintiff-Appellant

James L. Blomstrom, for Defendant-Appellees

JUDGES:

DONOFRIO, P.J., O'Neill, J., Concur. Lynch, J., Concur in part and Dissents in part.

OPINION BY:

DONOFRIO

OPINION:

OPINION.

DONOFRIO, P.J.

Appeal from the Court of Common Pleas, Mahoning County, Ohio.

Various cases were consolidated in the trial court since they arose out of similar fact situations between the plaintiff and various defendants. In all cases a motion for summary judgment was granted in favor of the defendants and plaintiff appeals. There is no dispute as to the facts involved. The only dispute is the legality of defendants' actions in "locking out" the plaintiff from leased commercial premises because of plaintiff's nonpayment of rent.

In the above cases the plaintiff, Tie Bar Inc., entered into commercial lease agreements with the defendants. In all the cases the plaintiff owed back rent in varying amounts ranging from \$ 668.08 owed to Great Lakes Mall, Inc. to \$ 1,488.21 owed to H-Castleton. In each case the defendants gave plaintiff notice that the lease would terminate after ten days if plaintiff did not pay the amount due. Plaintiff failed to [*2] make payment within the required time. Defendants then terminated the lease and took possession of the premises by locking plaintiff out. Plaintiff's merchandise initially remained

within the locked premises but was returned a short time later. In none of the cases was there a physical confrontation when plaintiff was locked out.

The same lease agreement was signed by all the parties in the above cases. Article 22 of the lease agreement between Tie Bar and Buffalo Mall provides:

"In the event of any failure of Lessee to pay any rental due here under, or any failure to perform any other of the terms, conditions or covenant of this lease to be observed or performed by Lessee for more than ten (10) days after written notice of such default shall have been given to Lessee, . . . then Lessor besides other rights or remedies it may have, shall have the immediate right to cancel this lease and re-enter and remove all persons and property from leased premises, and such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of Lessee, all without service of notice or resort to legal process and without being deemed guilty of trespass [*3] or becoming liable for any loss or damage which may be occasioned thereby."

The plaintiff contends, however, that the lease should not have been terminated since the defendants had accepted late payment from plaintiff in the past without terminating the lease. However, each of the leases contains a non-waiver provision numbered either Article 23 or 24 which provides:

"No waiver of any covenant or condition or of the breach of any covenant or condition of the lease shall be taken to constitute a waiver of any subsequent breach of such covenant or condition nor to justify or authorize the nonobservance on any other occasion of the same or of any other covenant or condition hereof, nor shall the acceptance of rent by Lessor at any time when Lessee is in default under any covenant or condition hereof, be construed as a waiver of such default or of Lessor's right to terminate this lease on account of such default, nor shall any waiver or indulgence granted by Lessor to Lessee be taken as an estoppel against Lessor, it being expressly understood that if at any time Lessee shall be in default in any of its covenants or conditions hereunder an acceptance by Lessor of rental during the [*4] continuance of such default or the failure on the part of Lessor promptly to avail itself of such other rights or remedies as Lessor may have, shall not be construed as a waiver of such default, but Lessor may at any time thereafter if such default continues, terminate this lease

on account of such default in the manner hereinbefore provided."

By stipulation of the parties the motion for summary judgment was applied to all the cases. The judge granted the motion dismissing plaintiff's complaint and ruled in favor of the defendants in the counterclaim for the rent due. From these proceedings the plaintiff appeals.

Appellant's first assignment of error states:

"The lower court erred in granting summary judgment upon plaintiff's second count wherein plaintiff prays for damages resulting from defendant's actions in depriving plaintiff of its personal property."

Tie Bar claims that the lower court erred in granting summary judgment with respect to Count Two of its complaint which claims in substance that Buffalo Mall converted the property of Tie Bar which was in Tie Bar's storeroom on or about June 12, 1976 when Buffalo Mall retook possession of the storeroom. The record shows [*5] and the lower court found that these items remained in the storeroom and were later turned over by Buffalo Mall to Tie Bar in accordance with an agreement between the parties. In its brief, on page 3, Tie Bar claims that there was a demand made for the return of these items which was met by Buffalo Mall's refusal. This statement is merely an assertion and is not based on anything in the record before the lower court. The record does not show either a date or manner of the demand by Tie Bar, or a refusal by Buffalo Mall to turn over the goods. What the record does show is that the goods were turned over by Buffalo Mall to Tie Bar.

Tie Bar cites 33A Ohio Jurisprudence 2d, Landlord and Tenant, Section 557, as authority for its position that Buffalo Mall converted the goods of Tie Bar. A close reading of the quotation appearing in Tie Bar's brief shows that there are a number of qualifications to this statement. For purposes of this appeal, the most important qualification is that the landlord must refuse, after demand, to deliver the property to the tenant.

The case of *Gillepsie v. McCulley & Holland*, 2 *Ohio App. 116 (1914)*, cited by Tie Bar is distinguishable from the facts of [*6] this case. First of all, the issue which Tie Bar had with Buffalo Mall and obviously to which Tie Bar agreed, permitted Buffalo Mall to go so far as to remove Tie Bar's property from the storeroom and store it at Tie Bar's expense. In fact, the property was not

removed and no storage was charged to Tie Bar. However, in the *Gillepsie* case, there was no such contractual provision. Moreover, the record in this case reflects that the property was returned to Tie Bar and does not reflect any assertion by Buffalo Mall of the right to retain possession of the inventory and merchandise until its claim for unpaid back rent was satisfied.

Appellant's first assignment of error is overruled.

In the remaining four assignments of error, the issue therein is essentially that the leases were not properly terminated and defendants used improper techniques by locking plaintiff out of the listed premises.

A reading of the opinion of the trial court indicates that the trial court found that there was a valid contractual agreement between the parties, that there was no provision in such agreement leases which violates the Constitution of the United States or states in which these malls were located, [*7] nor were they in any way violative of the public policies of the states involved.

The trial court cited [HN1] United States Constitution, Article I, Section 10, as follows:

"No state shall * * * pass any * * * law impairing the obligation of contracts."

A reading of the record amply demonstrates that the fact situations covered in the instant cases were contracted to by provisions in the lease. The defendants acted according to these leases and were well within their legal rights when they terminated the lease because of nonpayment of rent. In each case the plaintiff received the required ten-day notice prior to termination.

The issue of "locking out" was resolved in favor of the defendants. [HN2] By common law and Ohio statute section 5321.01, a lessor is permitted to lock out a defaulting lessee of commercial premises. *Ohio Revised Code Section 5321.15* only prohibits a "landlord of residential premises" from locking out a tenant in order to recover possession of the residential premises. This possession by a commercial landlord can only be obtained if he can do so without a breach of the peace. Aside from the legal authorities on this issue, a provision of the lease giving the [*8] landlord that right simply makes the right less subject to attack when the conditions occur that are covered in the lease agreement. We do not find that these provisions violated any public policy as set

forth by appellants. The trial court correctly ruled in favor of defendants.

Tie Bar contends that the lower court erred in determining that the lease between Buffalo Mall and Tie Bar was terminated. Tie Bar admitted in paragraph one of its reply to Buffalo Mall's counterclaim that the lease was indeed terminated on or about June 3, 1976.

Tie Bar also argues that Buffalo Mall waived its right to declare a default as a result of late payment of rent because it had accepted overdue payments in the past. The lease agreements between Tie Bar and the various appellees, including Buffalo Mall, contain a non-waiver provision, cited hereinbefore.

This provision to which Tie Bar agreed means that acceptance by Buffalo Mall or the other appellees of late rental payments does not constitute a waiver of the requirement in the lease that the Lessee pay minimal rental on the first day of every calendar month in advance.

Tie Bar contends that the lower court erred in finding that re-entry [*9] and repossession of the leased premises was made without a breach of the peace (opinion, p. 4).

The facts and circumstances surrounding the re-entry and repossession of the premises located at the various malls are each described in affidavits submitted in support of the various motions for summary judgment.

We do not find that the trial court erred and for the foregoing reasons, we overrule the last four assignments of error and affirm the judgment of the trial court.

CONCUR BY:

LYNCH (In Part)

DISSENT BY:

LYNCH (In Part)

DISSENT:

LYNCH, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur with the majority opinion as to all assignments of error except plaintiff's first assignment of error which is that the trial court erred in granting

judgment upon plaintiff's second count wherein plaintiff's prayer for damages resulting from defendant's action is depriving plaintiff of its personal property.

In plaintiff's second count it alleges that subsequent to plaintiff's padlocking the premises which defendant had rented to plaintiff, plaintiff made demand for return of its personal property which defendant failed and refused to do.

The affidavit of Dale E. Bricker, Assistant Secretary of defendant, [*10] dated November 11, 1977, states in pertinent part as follows:

"On or about August 25, 1976, Great Lakes Mall, Inc. and Tie Bar, Inc. entered into an agreement, a copy of which is attached to this affidavit, whereby Great Lakes Mall, Inc. agreed to surrender control of the inventory and merchandise of Tie Bar located at number 532, Great Lakes Mall, and Tie Bar agreed to remove such merchandise from the aforesaid premises."

The contents of the attached agreement is as follows:

"WHEREAS, Tie Bar, Inc. has heretofore filed an action in the Common Pleas Court of Mahoning County, Ohio against Great Lakes Mall, Inc., included in which action is a claim for unlawfully depriving Tie Bar, Inc. of the enjoyment and usage of certain inventory and merchandise located at No. 532 Great Lakes Mall, 7850 Mentor Avenue, Mentor, Ohio.

"WHEREAS, Great Lakes Mall, Inc. has now agreed to surrender control of such inventory and merchandise to Tie Bar, Inc. and Tie Bar, Inc. has agreed to remove such merchandise from said premises.

"NOW THEREFORE, in consideration of the mutual promises herein, it is agreed by and between Tie Bar, Inc. and Great Lakes Mall, Inc., that such surrender [*11] and removal of inventory and merchandise is done and shall be without prejudice to the issues as set forth in the aforesaid litigation, nor shall same be deemed a waiver, release, accord or satisfaction of any past, present or future claim, right, demand or defense which each may assert against the other."

In my opinion the factual issue of whether defendant wrongfully deprived plaintiff of its personal property during the period from the time that defendant padlocked subject premises until finally released by defendant

pursuant to the above agreement is still an unresolved issue in this case.

33A Ohio Jurisprudence 2d 505, Landlord and Tenant, Section 557 states as follows:

"As a general rule, the refusal, on demand, by a landlord, who has no lien on or right to property of the tenant, to surrender or deliver such property to the latter or to permit him to go on the premises and remove the

property, or the retention or use or disposal of the tenant's property by the landlord or other exercise of dominion over it to the exclusion of the rights of the tenant, amounts to a conversion."

In my opinion, the plaintiff's first assignment of error has merit. Therefore, in my opinion, [*12] the trial court committed error in sustaining defendant's motion for summary judgment.