NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LYDA PROPERTIES, LLC Appellee v. KEVIN COOLIDGE T/D/B/A FROM MY SHELF BOOKS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1366 MDA 2013

Appeal from the Judgment entered July 24, 2013
In the Court of Common Pleas of Tioga County
Civil Division at No: 1037-CV-2012

BEFORE: GANTMAN, P.J., DONOHUE and STABILE, JJ.

MEMORANDUM BY STABILE, J.: **FILED JUNE 24, 2014**

Appellant, Kevin Coolidge, leased commercial space in a building owned by Appellee LYDA Properties LLC (LYDA). Appellant became embroiled in a series of disputes with LYDA and a co-tenant, and LYDA began eviction proceedings. After a bench trial, the trial court found in favor of LYDA. Because LYDA failed to prove that Appellant materially breached the lease, we vacate and remand.

Appellant has a three-year commercial lease from LYDA that began on March 1, 2012. Appellant runs a bookstore, and his co-tenants operate "Pop's Culture," a gaming business. Appellant failed to keep his garbage in designated areas and failed to pay his utilities bills on time. The parties amended the lease twice, and LYDA sent Appellant a notice to cure the alleged breaches.

Problems continued nonetheless. Appellant's store manager took fruit snacks valued at $1.00 from Pop's Culture, and police prosecuted her for theft. After that incident, Appellant bumped into a partition (a two-by-four stud-wall unanchored to the ceiling) erected by Pop's Culture that separated their designated areas. The bumping knocked Pop's Culture's merchandise off of some shelves and onto the floor, causing $238.00 in damage. The police forwent criminal prosecution after Appellant agreed to pay restitution.

LYDA issued Appellant a notice to quit on October 23, 2012, and instituted eviction proceedings. LYDA won a judgment in the magisterial district court, and Appellant appealed to the trial court for a trial *de novo*. After a non-jury trial, the trial court entered a decision with findings of fact and conclusions of law in favor of LYDA. The trial court rejected Appellant's argument that his actions were too trivial to amount to a material breach of the lease:

> It is arguable that [Appellant's] alleged violations of the Lease as it pertains [sic] to the late payment of the utility bill and the delay in providing [LYDA] with proof of insurance are trivial; however, there has been a pattern of continual harassment by [Appellant] toward his Co-tenant. This behavior is supported by the dividing wall erected by [Appellant's] Co-tenant and the subsequent incident whereby [Appellant] caused merchandise to fall from the Co-tenant's shelves. Although the [c]ourt agrees that the minor theft committed by [Appellant's store manager] cannot be imputed to [Appellant] by the terms of the [L]ease, the [L]ease also states that the [p]remises shall not be used for any immoral, hazardous, or disreputable purpose.
>
> On July 27, 2012, [LYDA] served a Notice to Cure on [Appellant]. One enumerated violation listed on this notice is the violation of Article 5, Paragraph 3 which provides that the premises shall not be used for any unlawful, immoral, hazardous, or disreputable

> purpose. [LYDA's owner] testified that shortly after entering into the lease agreement, a pattern of behavior was exhibited by [Appellant] toward his Co-tenant On September 11, 2012, more than thirty days after receiving the Notice to Cure, [Appellant] "bumped" into a wall erected by his Co-Tennant [sic] hard enough to damage merchandise. Not coincidentally, this incident occurred the day after [Appellant's] employee had been caught stealing merchandise.
>
> It is clear to the [c]ourt that [LYDA] has an interest in utilizing the property leased in a lawful and reputable manner and said interest has been explicitly stated in the Lease.

Trial Court Opinion, 3/25/13, at 9-10.[1] Appellant filed post-trial motions, which the trial court denied on July 3, 2013. This appeal followed.[2]

Appellant raises one issue for our review:

> Did the trial court err in finding that Appellant materially breached the lease for his bookstore when the only finding in support of material breach is that Appellant "bumped" a wall dividing his bookstore space from a co-tenant's gaming space, causing several of co-tenant's games to be knocked off a shelf?

Appellant's Brief at 4.

> Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of fact of the trial judge must be given the same weight and effect on appeal as the verdict of a jury. We consider the evidence in a

---

[1] The trial court's decision is mistakenly titled "Opinion and Order on Defendant's Preliminary Objections."

[2] Appellant purports to appeal from the July 3, 2013 order denying his post-trial motions. An order denying post-trial motions, however, is interlocutory, and the appeal lies from the entry of judgment. ***Hall v. Jackson***, 788 A.2d 390, 395 n.1 (Pa. Super. 2001). Judgment was entered by praecipe in the trial court, so our jurisdiction is not affected.

> light most favorable to the verdict winner. We will reverse the trial court only if its findings of fact are not supported by competent evidence in the record or if its findings are premised on an error of law.

McEwing v. Lititz Mut. Ins. Co., 77 A.3d 639, 646 (Pa. Super. 2013) (quotation omitted).

A landlord-tenant agreement is a contract. ***Sw. Energy Prod. Co. v. Forest Resources, LLC***, 83 A.3d 177, 186-87 (Pa. Super. 2013); ***see also Hutchinson v. Sunbeam Coal Corp.***, 519 A.2d 385, 389 (Pa. 1986). As such, a breach by one party to the lease entitles the other party to rescind the contract. A lease can be rescinded, however, only for material breaches. ***Int'l Diamond Imps., Ltd. v. Singularity Clark, L.P.***, 40 A.3d 1261, 1270-71 (Pa. Super. 2012). "Thus, if 'the breach is an immaterial failure of performance, and the contract was substantially performed, the contract remains effective. . . . In other words, the non-breaching party does not have a right to suspend performance if the breach is not material.'" ***Id.*** at 1271 (quoting ***Widmer Eng'g, Inc. v. Dufalla***, 837 A.2d 459, 468-69 (Pa. Super. 2003)).

In determining whether a breach is material, Pennsylvania courts follow the Restatement (Second) of Contracts, which sets forth the following factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for that part of the benefit of which he will be deprived;

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and]
>
> (e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS § 241, *quoted in* ***Int'l Diamond Imps.***, 40 A.3d at 1271, *and* ***Widmer Eng'g***, 837 A.2d at 468. Materiality is generally a question of fact. ***Int'l Diamond Imps.***, 40 A.3d at 1272.

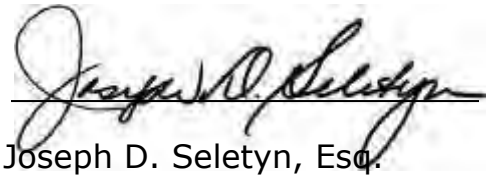
The trial court recognized that neither the late payment of utilities bills nor the failure to timely provide LYDA with proof of insurance were material breaches of the lease. ***See Gorzelsky v. Leckey***, 586 A.2d 952, 956 (Pa. Super. 1991) (noting that, where a contract lacks a time-is-of-the-essence clause, the failure to perform on the date mentioned in the contract is not a material breach). The trial court further found that the $1.00 theft by Appellant's store manager could not be imputed to Appellant. Finally, the trial court concluded that Appellant did not breach Pop's Culture's implied covenant of quiet enjoyment, because that duty flows from landlords to tenants, not between co-tenants. Therefore, the trial court based its finding of a material breach solely on Appellant's "harassment" of the owners of Pop's Culture. We agree with Appellant that the trial court erred in finding a material breach of the lease.

Instantly, the only findings of fact that support the trial court's conclusion are the partition-bumping incident, and several allegations that Appellant trespassed onto the Pop's Culture area of the property. We disagree with LYDA's contention that Appellant committed "criminal conduct" against a co-tenant. Though Appellant agreed to pay restitution—a bargain which he evidently honored—he did not admit to criminal liability, no court ever entered such a finding against him, and the trial court entered no factual finding that Appellant was guilty of criminal conduct. Finally, the trial court failed to state how Appellant's harassment of his co-tenants applied to **any** of the Restatement factors for analyzing a material breach. Indeed, it appears that any minor breach has been cured. Appellant compensated his co-tenants for the damage caused by the partition-bump, he paid the late utilities bills, and he provided LYDA with proof of insurance. The disputes in this case are petty, and are legally insufficient to allow LYDA to evict Appellant.

For the foregoing reasons, the trial court erred as a matter of law in finding that LYDA met its burden of proving that Appellant materially breached the lease. Therefore, we vacate the judgment entered in LYDA's favor and remand for the entry of judgment in favor of Appellant.

Judgment vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014