STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 30, 2014)

LESLIE PARRILLO and LESPAR, INC. d/b/a THE WHOLE SCOOP	:	
V.	:	**C.A. No. PC 08-6875**
CHARLES LOMBARDI	:	

DECISION

K. RODGERS, J. This case arises out of a commercial tenancy between Plaintiffs Leslie Parrillo (Parrillo or Plaintiff) and Lespar, Inc., d/b/a The Whole Scoop (Lespar)[1], as tenants, and Defendant Charles Lombardi (Lombardi or Defendant), as landlord. Plaintiff's Complaint seeks monetary damages from what they contend was an unlawful eviction from Lombardi's property by way of self help. Defendant filed a Counterclaim seeking the unpaid rent that was due prior to Plaintiff's alleged abandonment of the property.

Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Findings of Fact

Having reviewed the evidence presented by both parties, the Court makes the following findings of fact.

[1] The Certificate of Incorporation for Lespar was revoked by the Rhode Island Secretary of State on September 22, 1999. As Lespar is defunct and no longer a proper party before this Court, this Court will refer only to Parrillo as Plaintiff herein.

Since at least 1999, Defendant has owned commercial property located at 604 Smithfield Avenue in Pawtucket, Rhode Island (the Premises). Defendant owns another commercial building in the same plaza, identified as 610-612 Smithfield Avenue in Lincoln, Rhode Island, in which he operates a cleaning business known as Luxury Cleaners and from which he operates most of his personal and commercial business.

Parrillo is the sole shareholder of Lespar. In 1999, Lespar purchased the assets of Aaron's Ice Cream, a business that had been operating in the Premises as an ice cream shop, for $9000. The purchase included all of the furniture, fixtures, and equipment owned by Aaron's Ice Cream. Parrillo intended to reopen as a new ice cream shop known as The Whole Scoop in the same location.

Parrillo and Lombardi had enjoyed a relationship as lifelong family friends. At or about the time Plaintiff purchased the assets from Aaron's Ice Cream, Parrillo and Lombardi entered into an oral agreement whereby Plaintiff would lease the Premises for $600 per month, the same monthly rent that had been paid by the previous ice cream shop owners. The monthly rent was due at the beginning of each month. The oral agreement was a "month-to-month" tenancy, terminable by either party at will.

The Whole Scoop was a seasonal business, operating at the Premises generally from May to October of each year. During the so-called "off season," Parrillo would frequently visit the Premises to retrieve mail and inspect the property. From 1999 to 2007, Plaintiff did not pay Defendant all rent when due. When rent was paid, Parrillo would deliver cash or a check either to Lombardi directly or to Barbara Imondi (Imondi), manager of Luxury Cleaners, who would in turn deliver the payment to Lombardi's office. Lombardi recorded rental payments in a handwritten ledger that he kept in a

manila envelope in his office at Luxury Cleaners. In the ledger, Lombardi recorded the date the rent was due, the date payments were made, and the balance. While some discrepancies appeared in the ledger, the ledger did evidence Parrillo's sporadic rental payments, which Parrillo did not credibly dispute. The ledger demonstrated that, as of March 2002, Parrillo's delinquent balance was in excess of $3000, and from that date through August 2007, the delinquent balance increased to $6100.

In August 2007, Lombardi requested a meeting with Parrillo to address the delinquent balance. That meeting took place on August 21, 2007 in Lombardi's office at Luxury Cleaners and was attended by Parrillo, Lombardi and Imondi. At the meeting, Parrillo acknowledged that she owed the delinquent balance in the amount of $6100. The parties agreed that she would pay an additional $500 per week until the balance was paid in full. The parties also agreed that they would execute a written document acknowledging the agreement.

An agreement was prepared as contemplated and reflected the $6100 arrearage, but a blank space was left for the amount of the delinquent balance that Parrillo had agreed she would pay weekly until the balance was paid in full. The day after the meeting, on August 22, 2007, Imondi hand wrote "$500" as the amount that Parrillo had agreed to pay per week and sent the agreement by certified mail to "The Whole Scoop, 604 Smithfield Avenue, Pawtucket, RI 02861." The United States Post Office attempted to deliver the certified parcel as addressed on three occasions: August 23, August 30, and September 7, 2007. Parrillo was notified of the presence of the certified mail but failed to respond to the Post Office to retrieve it. The parcel was returned to Imondi after the final notice was provided on September 7, 2007.

From late September 2007 until early 2008, Lombardi attempted to contact Parrillo, again for the purpose of addressing the delinquent balance and to discuss whether she intended to continue operating her business at the Premises. Lombardi called her several times at the cell phone number he had on file, leaving messages when she did not answer. He also appeared at her home, located at 340 Woodward Road, North Providence, Rhode Island, where he found Parrillo's mother, and requested that Parrillo contact him. Lombardi also contacted Parrillo's brother and requested that he ask Parrillo to contact him. Despite all of these attempts, Parrillo never contacted Lombardi and no rent payments were made by Parrillo following the August 21, 2007 meeting.

During 2007-08 off season, Imondi observed mail in front of the Premises that had overflowed from the designated mailbox for the Premises.

In February 2008, Lombardi concluded that Parrillo had abandoned the Premises and thereafter reentered the Premises to put a "For Lease" sign in the window. In April 2008, Lombardi entered into an agreement with a new tenant for the Premises in which the new tenant would pay the same amount of rent that Parrillo was to pay, $600 per month. At or about that same time, while vacationing in Mexico, Parrillo was notified by another individual that a For Lease sign had been placed in the window at the Premises.

Upon learning that the Premises were being advertised for lease, Parrillo contacted Lombardi's son, Chuck, by telephone. Chuck informed Parrillo that his father had concluded that she had abandoned the Premises and decided to release the Premises. Chuck also advised her that she would have to speak to his father about the matter. Thereafter, Parrillo and Lombardi spoke on the phone, during which Lombardi reiterated his conclusion that she had abandoned the Premises, informed her that he had leased it to

someone else, and told her that she was welcome to go to the Premises and retrieve her personal property therein. On at least two occasions thereafter, Parrillo went to the Premises and retrieved her personal belongings, some of which were placed in a box truck on one such visit.

On October 29, 2008, Plaintiff filed suit to recover unspecified damages resulting from what Parrillo contends was an unlawful eviction by Lombardi. Parrillo alleges that Lombardi's eviction was accomplished by self help, in violation of G.L. 1956 § 34-18.1-15. Parrillo further alleges that in releasing the Premises, Lombardi allowed the new tenant to operate an ice cream store in which they used Plaintiff's personal property resulting in monetary damages. Lombardi filed a Counterclaim asserting that he is entitled to judgment for back rent.

This matter came on for a jury-waived trial conducted in Kent County with the parties' assent.

II

Presentation of Witnesses

Parrillo, Lombardi and Imondi testified before this Court.

It is important to note at the outset that the longtime familial friendship that Parrillo and Lombardi once enjoyed clearly has been strained. The parties were dismissive to one another at trial. Even more importantly, however, was how the parties' past relationship influenced the conduct that forms the basis of this suit. It was evident to the Court that both Parrillo and Lombardi took advantage of the close relationship they enjoyed and did not treat this commercial tenancy with any degree of urgency or professionalism. By way of example, Parrillo testified that there was a "loose agreement

to pay rent." Lombardi, for his part, allowed Plaintiff to accrue significant arrearage over a lengthy period of time, put no demands in writing but merely called several times and/or reached out to Parrillo's family members, and acknowledged that he never evicted anyone but rather "always tried to work it out." Throughout the tenancy, each party left the other with the impression that he or she would not be held firm to the obligations that arise in a commercial tenancy.

Beyond the general understanding that the commercial lease was "a loose agreement to pay rent," Parrillo's testimony downplayed her financial responsibility to Defendant. She kept no records of what she did pay towards rent or when; she acknowledged that most times she gave Defendant or Imondi cash, occasionally she would tender a check; and no receipts were ever given to her. Parrillo was not concerned with maintaining records of rental payments because they "knew each other." Excluding rental records, Plaintiff's "books" were maintained season-by-season by Parrillo's boyfriend[2] and kept at the Premises. She maintained that from 1999 to 2002 or 2003, Defendant never told Parrillo that rent was past due, and from 2003 to 2004, she made rental payments "sometimes on time." With respect to the arrearage due in 2007, she repeated her mantra that she never received notice that rent was past due. On cross-examination, however, she acknowledged that she had "no reason to dispute the accuracy of [Defendant's] ledger."

Parrillo's recollection of the events in 2007 through 2008 was selective. She did not recall any meeting with Defendant and Imondi or an agreement in August 2007 to address the $6100 arrearage; she did not recall ever seeing a certified letter delivered to

[2] No testimony was offered to establish his qualifications to maintain the business's books, nor was he presented as a witness at trial.

The Whole Scoop; she did not recall what rent, if any, was paid after August 2007; she did not recall that Defendant ever attempted to contact her in the 2007-08 off season; and she did not recall retrieving mail with any less frequency in that same off season as she had in prior years. By contrast, she recalled being "shocked" that a For Lease sign was placed in the window; that she did retrieve some materials from the Premises when she, Lombardi and her then-counsel went to the Premises together; but she emphatically denied that Lombardi ever gave her the opportunity to remove her personal property.

In response to questions about the arrearage discussed in August 2007, Parrillo claims that if they had agreed to an amount, then she would have paid it. She also testified that had Lombardi ever given her notice of an arrearage, she would have returned his calls and addressed it. In light of the track record of sporadic rental payments dating back to 1999 and what can reasonably be inferred as deliberately avoiding contact with Defendant, this Court rejects Parrillo's claims that had she known how much was outstanding, she would have made good on such debts.

Lombardi's testimony was self-serving but was supported in some respects by the documentary evidence. For instance, the fact that an August 2007 meeting took place between Parrillo, Lombardi and Imondi was supported by two written but unexecuted agreements specifying that $6100 was due and owing; one of which further specified that $500 weekly would be paid toward the balance due and the other left that weekly payment blank. Also supporting that meeting was the certified letter addressed to The Whole Scoop that was returned undelivered after the last attempted delivery on September 7, 2007.

Lombardi's own handwritten ledger tracking Plaintiff's tenancy contained multiple inaccurate entries and calculations. Lombardi admitted to changing the ledger to reflect the designated years on the entry dates once he "knew it was going to be litigated," but in doing so, placed the years 2004 and 2005 next to the wrong entries. At the end of the day, however, the ledger did show a sporadic payment history and Plaintiff acknowledged that she had "no reason to dispute the accuracy of the ledger."

Imondi presented as a credible witness. Her testimony was limited to her personal involvement in collecting rent from Parrillo, her participation in the August 21, 2007 meeting, her follow up in preparing and sending the written agreement to Plaintiff by certified mail, and her observations of mail spilling over from Plaintiff's designated mail box in the 2007-08 off season. This Court accepts Imondi's testimony as true and accurate, and, importantly, accepts that the parties agreed that $6100 was outstanding as of August 21, 2007.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'[t]he trial justice sits as a trier of fact as well as of law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is

the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

A

Self Help Prohibition in Commercial Leases

Plaintiff alleges that Defendant violated § 34-18.1-15, which prohibits the use of self help in commercial leasing, when he evicted her from the Premises and leased the

Premises to another tenant.[3] Plaintiff further alleges that Defendant's actions constitute a breach of the oral lease agreement. Plaintiff seeks damages for profits lost from not being able to operate The Whole Scoop and for conversion of her personal property and "long-established" good will, which Plaintiff asserts is now benefiting the new tenant. Defendant maintains that he did not violate § 34-18.1-15 because that statute did not abrogate the common law doctrine of abandonment and it was reasonable for him to conclude that Plaintiff had abandoned the Premises, thus affording him the right to reenter and release the Premises to a new tenant.

Rhode Island General Laws provide certain restrictions on landlords in both the residential and commercial tenancy contexts. In commercial leases, governed by chapter 18.1 of title 34, a landlord seeking to repossess lands for a tenant's failure to pay rent has recourse as follows: "All suits for possession of lands, buildings or parts of buildings covered by this chapter shall be by the ordinary process of actions for possession or otherwise as provided by law." Sec. 34-18.1-9(a) (emphasis added). Where rent is delinquent for a period of fifteen days, the statutory procedure requires a landlord to, "without the necessity of notice, institute a trespass and action for possession in the district court where the premises are situated, and in this action the court may award a plaintiff judgment for possession and for all rent due plus costs." Sec. 34-18.1-9(b)(1). Importantly, chapter 18.1 includes the following prohibition:

> "The right of a landlord or a reversioner to utilize 'self help', whether pursuant to the common law or pursuant to any agreement in writing or by parol, to reenter and repossess him or herself of land, buildings or parts of

[3] Plaintiff also contends that Defendant locked her out of the Premises. There was no credible evidence that Parrillo attempted to use her key or that the locks had been changed by Defendant or anyone else.

> buildings leased covered by this chapter upon nonpayment of rent, is prohibited." Sec. 34-18.1-15 (emphasis added).

Self help is also prohibited in the context of residential leases.[4] However, the Residential Landlord and Tenant Act, codified at § 34-18-1 et seq., carves out exceptions to the prohibition against self help. In the residential context, the law provides as follows:

> "A landlord may not recover or take possession of the dwelling unit by action or otherwise, including willful diminution of services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric, gas, or other essential service to the tenant, except in case of abandonment, surrender, or as permitted in this chapter." Sec. 34-18-44 (emphasis added).

It is this Court's function and duty to construe statutes and to establish and effectuate the intent of the Legislature. In re Barnacle, 623 A.2d 445, 450 (R.I. 1993). In the instant case, two principles of statutory construction are important to consider. First, "[i]n construing the provisions of statutes that relate to the same or to similar subject matter, the court should attempt to harmonize each statute with the other so as to be consistent with their general objective scope." Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996) (citing State v. Ahmadjian, 438 A.2d 1070, 1081 (R.I. 1981)) (reconciling injured-on-duty statute and Workers' Compensation Act). "'This rule of construction applies even though the statutes in question [may] contain no reference to each other and [even though they] are passed at different times.'" Id. (quoting Blanchette v. Stone, 591 A.2d 785, 786 (R.I. 1991)). Second, "[a] well-established tenet of statutory interpretation

[4] Although the Residential Landlord and Tenant Act does not govern the commercial lease at issue here, Defendant relies on the definition of abandonment set forth therein in support of his defense to Plaintiff's Complaint. See Def.'s Post-Trial Mem., at 8 n.2. This Court will address the statutory scheme relating to residential leases only to the extent necessary to distinguish the express provisions governing commercial leases.

posits that the Legislature is 'presumed to know the state of existing law when it enacts or amends a statute.'" Simeone v. Charron, 762 A.2d 442, 446 (R.I. 2000) (quoting Providence Journal Co. v. Rodgers, 711 A.2d 1131, 1134 (R.I. 1998)).

In reviewing the prohibitions against self help in both the commercial and the residential contexts, it is clear that the General Assembly intended that such prohibitions be treated differently. The Legislature clearly and unambiguously provided for certain exceptions to the self help prohibition in the residential context, including in the case of abandonment, yet elected not to provide a similar exception or exceptions in the commercial context. See § 34-18-44; cf. § 34-18.1-15. Accordingly, this Court concludes that in enacting § 34-18.1-15, the Legislature did not intend to preserve a commercial landlord's right to self help for possession in the case of abandonment by the tenant.

Notwithstanding that the Legislature clearly provided that there be no exception to the prohibition against self help in commercial leases, Defendant maintains that a United States District Court decision has "impliedly recognize[d] the continued viability of the common law abandonment doctrine" in the commercial lease context. Def.'s Post-Trial Mem., at 10. In Turks Head Realty Trust v. Shearson Lehman Hutton, Inc., 736 F. Supp. 422 (D.R.I. 1990) aff'd, 930 F.2d 905 (1st Cir. 1991), the defendant-tenant entered into a commercial lease agreement with the owner of a downtown office building. In September 1988, just a few months after the parties had entered into a written amendment extending the term of the lease from 1988 to 1991, the defendant moved to a new office location and left behind personal computer equipment and files. Id. at 426. The defendant actively sought to sublease the office space and continued to pay rent when

due. Id. at 426-27. On October 19, 1988, the plaintiff's office manager changed the locks on the office suite, preventing the defendant from accessing the premises or the personal property that remained therein. Id. at 426. The plaintiff then sent a letter to the defendant advising that they had breached the lease by vacating, but did not purport to terminate the lease. Id. A second letter was sent declaring that the defendant had defaulted on the lease because it had abandoned the premises for fourteen consecutive days and declared that the lease would terminate five days thereafter pursuant to the terms of the lease.

The plaintiff sued the defendant for defaulting on the lease and sought damages; the defendant counterclaimed that the plaintiff's conduct constituted an eviction which precludes the plaintiff from recovering any damages. The federal court rejected the plaintiff's claims for several reasons.[5] First, contrary to the plaintiff's argument that the court should substitute certain language in a pre-printed lease relating to the tenant's abandonment or vacancy of the property for an illegible portion of the subject lease, the court found that there was no operative clause in the written lease which permitted the plaintiff to terminate the lease if the tenant abandoned, vacated or otherwise did not occupy the premises for fourteen days as alleged. Id. at 427. Second, even if there were such a provision in the written lease, the defendant's conduct in maintaining the office suite, possessing keys, paying rent, attempting to sublet and continuing to exercise control over the property until the locks were changed demonstrated that the defendant did not vacate or abandon the leased premises but rather considered itself to be bound by the lease. Id. at 427-48. Third, by changing the locks on the defendant's office suite, the

[5] The court did grant the plaintiff relief for certain escalation fees that did not become due until March 1989 but were based upon the defendant's occupancy in 1988. Id. at 429. Such relief is wholly inapposite to whether a landlord may rely upon the doctrine of abandonment, but is pertinent to this Defendant's Counterclaim. See Section IV.E, infra.

plaintiff deprived the defendant of its rightful possession, and such conduct constituted an eviction and violated the statutory prohibition against self help in commercial leases as found in § 34-18.1-15. Id. at 428-29.

In the case at bar, Defendant urges this Court to find that the district court impliedly decided that the common law doctrine of abandonment was not superseded by § 34-18.1-15 because it did not conclude that the "lease provision was invalid as a matter of law." Def.'s Post-Trial Mem., at 10. This Court finds Defendant's argument wholly unpersuasive. The federal court determined that there was no operative lease provision allowing for termination or repossession after the tenant vacated or abandoned the property, thus there was no need to determine that a non-existent lease provision was invalid as a matter of law. See Turks Head Realty, 736 F. Supp. at 427. Moreover, the court specifically cited § 34-18.1-15, and its residential counterpart § 34-18-9, and reasoned as follows:

> "The Rhode Island courts have broadly construed [§ 34-18-9] relating to residential leases, finding that the statute, although specifically addressed to evictions for the non-payment of rent, pertained to all self-help evictions. . . . Applying the same broad construction to the commercial lease statute, plaintiff's conduct violated the self-help provisions relating to commercial leases." Id. at 428-29 (emphasis in original) (internal citations omitted).

Unquestionably then, the federal court concluded that all self help evictions are statutorily prohibited in the context of commercial leases. This holding more aptly supports Plaintiff's cause of action than Defendant's affirmative defense thereto.

This Court concludes that § 34-18.1-15 clearly and unequivocally prohibits all self help remedies in the context of commercial leases. Moreover, Defendant's action in releasing the Premises to a new tenant evidences Defendant's dominion and control over

the Premises to the exclusion of Plaintiff and constitutes an eviction that failed to follow statutory procedures. Therefore, Defendant is liable to Plaintiff for unlawfully evicting Plaintiff in violation of § 34-18.1-15.

B

Abandonment

Even assuming, arguendo, that Defendant had the right to engage in self help in the event of an abandonment, neither the law nor the facts presented at trial support a finding that Plaintiff abandoned the Premises.

Defendant maintains that it was reasonable for him to conclude that Plaintiff had abandoned the Premises. Contrary to Defendant's argument, the subjective understanding of Lombardi and/or Imondi as it relates to Plaintiff's occupancy of the Premises is not the controlling issue before this Court. Instead, the pertinent case law reveals a consistent inquiry into the tenant's intent at the time of the alleged abandonment. See, e.g., Ciambelli v. Porter, 55 R.I. 14, 17, 177 A. 145, 146 (1935) (overturning trial court's grant of directed verdict for residential landlord as conflicting evidence existed whether tenant intended to surrender the property and landlord intended to accept surrender); McGinn v. B.H. Gladding Dry Goods Co., 40 R.I. 348, 360-61, 101 A. 129, 133 (1917) (parsing the conduct of commercial tenant and concluding tenant did not surrender at time when he continued to house horses and wagon at premises, but evidence of abandonment did exist when he thereafter mailed key to landlord); Smith v. Hunt, 32 R.I. 326, 330, 79 A. 826, 828 (1911) (considering whether landlord has accepted a surrender or tenant has surrendered residential property "is to be determined by the intention of the parties"); White v. Berry, 24 R.I. 74, 79, 52 A. 682, 684 (1902)

(tenant's express statement to residential landlord that he was going to move constituted "circumstances which indicated a purpose on [tenant's] part not only to cease to occupy the same, but also to permit the [landlord] to gain access thereto and resume possession thereof"); see also Turks Head Realty, 736 F. Supp. at 427 (outside context of Rhode Island's statutory self help prohibition, citing other jurisdictions for general proposition that "[c]ourts have recognized abandonments only when lessees have vacated the premises and demonstrated a clear intent not to be bound under the lease").

The evidence before this Court fails to establish that Plaintiff intended that she no longer be bound under the lease. The evidence clearly demonstrates that Lombardi and Parrillo met in August 2007 concerning the rental arrearage, at which time it was understood that Parrillo intended to continue occupying the Premises. The fact that Plaintiff subsequently failed to make payments in accordance with the parties' August 2007 agreement to pay back rent and in accordance with their month-to-month oral lease does not demonstrate an intent to abandon the property, particularly in light of Plaintiff's lengthy history of occupying the Premises and operating the business without regularly paying rent as agreed. At worst, Plaintiff's actions demonstrate a misunderstanding that she could continue to operate without paying the rent, believing that Defendant, a longtime family friend, would not institute an eviction action for nonpayment of rent.

Defendant also failed to demonstrate that Plaintiff had actually vacated the Premises at the time that he reentered the Premises and placed a For Lease sign in the window. First, some unidentified personal property used in the operation of the ice cream business and belonging to Plaintiff remained on the Premises at the time Defendant reentered and released it in the Spring of 2008. Second, Lombardi's and

Imondi's testimony that Parrillo failed to pick up mail during the off-season, as evidenced by the overflow of mail from the designated mail slot, is insufficient to establish Plaintiff's clear intent to have vacated the Premises and no longer be bound by the lease.

Therefore, even if the doctrine of abandonment was available to the Defendant in a commercial lease as an exception to the self help prohibition, which this Court holds that it is not, Defendant has failed to sustain his burden of proving that Plaintiff had abandoned the Premises. Accordingly, his affirmative defense asserting abandonment fails.

C

Futility of Written Notice

Defendant alleges that he should not be faulted for having failed to provide Plaintiff with written notice to quit pursuant to § 34-18.1-5 because sending written notice to Plaintiff would have been futile in light of his many failed efforts to contact Parrillo after August 2007 and through the Spring of 2008. See Def.'s Post-Trial Mem., at 11-12. Defendant misses the mark. Rhode Island law provides that a commercial tenancy-at-will will terminate "at the end of the term upon notice in writing from the landlord." Sec. 34-18.1-5. Requiring written notice to terminate a lease allows a landlord to seek possession if a tenant fails to quit the premises at the end of the term, but the written notice to quit does not, in itself, authorize a landlord to reenter the property. Rather, should the tenant fail to vacate after written notice to quit, the landlord has legal recourse: "[a]ll suits for possession of lands . . . shall be by the ordinary process of actions for possession" but the right of self help to reenter or repossess such land is prohibited. Secs. 34-18.1-9(a) and 34-18.1-15.

Here, Defendant elected not to pursue any legal action but rather reverted to self help in violation of §§ 34-18.1-9(a) and 34-18.1-15. Perhaps Defendant, like Parrillo, mistakenly believed that a lifelong family friend would not hail him into court for such statutory violations. In any event, in sidestepping the judicial process for repossessing the Premises, Defendant cannot rely on the futility of sending a written notice to quit as a basis for engaging in self help.

Notably, Defendant overlooks that no written notice was required for Defendant to institute an action for possession based upon Plaintiff's nonpayment of rent. Sec. 34-18.1-9(b)(1). However, that, too, required compliance with judicial procedures and cannot be accomplished by self help remedies as Defendant attempted to accomplish here.

D

Damages

Plaintiff argues that as a result of Defendant's violation of § 34-18.1-15, and particularly releasing the Premises and allowing another tenant to use Plaintiff's personal property, Defendant converted Plaintiff's property and caused substantial monetary loss, including lost profits. Defendant contends that Plaintiff failed to prove at trial any damages resulting from Defendant's actions, thus failing to sustain her burden of proof for damages by a fair preponderance of the evidence.

Unlike in the residential context, which expressly provides for damages for an unlawful eviction, see § 34-18-34,[6] chapter 18.1 is bereft of any penalty for unlawfully

[6] That section provides:

> "If a landlord unlawfully removes or excludes the tenant from the premises . . . the tenant may recover possession or terminate the rental

evicting a commercial tenant or otherwise violating § 34-18.1-15 or any other section therein. Whereas a formula exists for determining which greater amount may be awarded as damages in the residential context, no such formula exists in the commercial context. Accordingly, actual damages as proven may be awarded as a result of a wrongful self help eviction.

In the instant case, Plaintiff contends that such actual damages include future lost profits and the value of Plaintiff's personal property that remained at the Premises. See 49 Am. Jur. 2d Landlord and Tenant § 837 (2014) (recognizing damages in wrongful self help eviction may include future lost profits in commercial tenancy and value of removed personal property or injury to the same resulting from landlord's repossession). It is axiomatic that the burden of proving damages rests with Plaintiff and must be established by a preponderance of the evidence. See Perrotti v. Gonicberg, 877 A.2d 631, 636 (R.I. 2005).

Here, Plaintiff has failed to prove damages by a preponderance of the evidence. First, there is no credible evidence to establish future lost profits. Although Parrillo offered testimony that she "made between $10,000 and $12,000 per season" that The Whole Scoop operated, there was no documentary evidence to substantiate such amounts,[7] nor did she testify whether such amounts reflected her gross income or net income. In any event, this Court is not satisfied that these amounts accurately calculate

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> agreement and, in either case, recover an amount not more than three (3) months periodic rent or threefold the actual damages sustained by him or her, whichever is greater, and reasonable attorney's fees." Sec. 34-18-34.

[7] Even if this Court were to accept that the business's income tax returns that had been located in "the back room" at the Premises "disappeared" as Parrillo testified, this Court is not satisfied that Plaintiff could not obtain other credible evidence of past earnings and profits to support her claim for future lost profits.

The Whole Scoop's net income as would be required for a lost profits claim, see Abbey Medical/Abbey Rents, Inc. v. Mignacca, 471 A.2d 189, 195 (R.I. 1984), because Parrillo continued to downplay—and therefore likely did not include—the serious delinquency in rental payments due over the previous years. While it is not necessary to establish lost profit damages with mathematical certainty, it is required that such loss be established with reasonable certainty. Id. Here, this Court gives no credence to Plaintiff's overstated, unsupported claim of past earnings and concludes that future lost profits have not been established with reasonable certainty.

Additionally, Plaintiff's claim for personal property damages appears to be grounded in theory of tort conversion cause of action. "To maintain an action for conversion, [a] plaintiff must establish that [it] was in possession of the personalty, or entitled to possession of the personalty, at the time of conversion." Narragansett Elec. Co., 898 A.2d at 97 (quoting Montecalvo v. Mandarelli, 682 A.2d 918, 928 (R.I. 1996)). "[T]he gravamen of an action for conversion lies in the defendant's taking the plaintiff's personalty without consent and exercising dominion over it inconsistent with the plaintiff's right to possession." Id. (quoting Fuscellaro v. Indus. Nat'l Corp., 117 R.I. 558, 560, 368 A.2d 1227, 1230 (1977)). "[T]he measure of damages for conversion is usually the value of the property at the time of its conversion, a matter susceptible of being proved by evidence of market value." Jeffrey v. Am. Screw Co., 98 R.I. 286, 291, 201 A.2d 146, 150 (1964).

In proving that Defendant violated § 34-18.1-15 by entering the Premises without permission and without instituting judicial eviction proceedings, Plaintiff has proven that Defendant unlawfully evicted her. Defendant entered the Premises that Plaintiff

continued to occupy by right, without Plaintiff's consent, and exercised dominion over the Premises when he put a For Lease sign in the window and proceeded to enter into a lease agreement with a third party. Parrillo testified that upon learning that Defendant had released the Premises, she visited the Premises and observed the new tenant to have removed or otherwise exerted dominion over her personal property within the store.

Parrillo's testimony, however, was insufficient to prove damages against Defendant. As a threshold matter, the new tenant who purportedly has removed or otherwise used Plaintiff's personal property and "goodwill" to its benefit is not a party to this action, and there is no legal basis for attributing such damages to Defendant. Additionally, the trial testimony established that Parrillo did enter the Premises on at least two occasions and removed many items, at least once with the assistance of a box truck. What personal property was left behind appears to have broken Plaintiff's claim of possession thereto, and therefore such items can no longer be the subject of a conversion action. Finally, and importantly, there was no credible evidence identifying exactly which items remained in the Premises and the value thereof. While Plaintiff relied upon the Asset Purchase Agreement, dated January 26, 1999, in which Lespar purchased Aaron's Ice Cream, as evidence of $9000 worth of assets that appeared on the attached itemized list of the equipment, such evidence is outdated and clearly fails to establish the fair market value at the time of the alleged conversion in 2008.

For all these reasons, while Plaintiff has sustained her burden in proving that Defendant wrongfully evicted her and unlawfully engaged in self help in violation of § 34-18.1-15, she has failed to sustain her burden of proving actual damages.

Accordingly, judgment shall enter for Plaintiff on her Complaint, but no damages shall be awarded.

E

Defendant's Counterclaim for Back Rent

Defendant maintains that he is entitled to back rent in the amount of $9700,[8] which represents $6100 in arrears as of the parties' August 21, 2007 meeting and an additional $600 per month due from September 2007 through February 2008, inclusive. In support thereof, Defendant relies upon his handwritten ledger, the testimony and unexecuted agreement relating to the August 21, 2007 meeting, and the undisputed terms of the oral lease.

While this Court recognizes that it is Defendant's burden of establishing each and every element of his cause of action by a preponderance of the evidence, it is noteworthy that Parrillo did not credibly dispute the amount owed to Defendant. Moreover, this Court recognizes that Plaintiff's rental obligations continued to exist until Plaintiff was unlawfully evicted from the Premises by Defendant. See Turks Head Realty, 736 F. Supp. at 429 (citing King v. King-McLeod-Fraser, Inc., 98 R.I. 226, 230-31, 200 A.2d 705, 707 (1964) (where plaintiff-landlord's actions constituted eviction, plaintiff had no right to remaining rents due for duration of lease but entitled to fees accrued during tenancy). Defendant does not seek rent due at any time after the eviction in the Spring of

[8] Defendant's Pre-Trial Memorandum identified $10,900 in back rent due through April 2008, see Def.'s Pre-Trial Mem., at 15, but now requests judgment in the amount of $9700. See Def.'s Post-Trial Mem., at 7. This Court utilizes Defendant's revised and most recent request for damages in ruling upon his Counterclaim.

2008.[9] Defendant is entitled to the benefit of his bargain in renting the Premises to Plaintiff for a monthly sum certain.

The evidence conclusively established that the parties agreed that $6100 was in arrears as of August 21, 2007, and that no rent was paid by Plaintiff at any time after September 2007. Defendant is entitled to judgment on his Counterclaim for back rent in the amount of $9700. This Court expressly declines to award Defendant any pre-judgment interest in accordance with G.L. 1956 § 9-21-10.[10]

V

Conclusion

For all these reasons, Plaintiff is entitled to judgment on her Complaint but is awarded nothing. Defendant is entitled to judgment on his Counterclaim and is awarded $9700 in damages; no prejudgment interest shall be added to Defendant's award. The parties shall bear their own attorneys' fees and costs.

Counsel for Defendant shall submit an appropriate form of judgment in accordance with this Decision.

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[9] The precise date of the self help eviction was unspecified, but, in any event, occurred sometime in March 2008 or thereafter. In light of the damages now sought by Defendant only up through February 2008, the exact date of the eviction is inconsequential.

[10] See Commercial Assoc. Inc. v. Tilcon Gammino, Inc., 801 F. Supp. 939, 942-43 (D.R.I. 1992) aff'd 998 F.2d 1092 (1st Cir. 1993) (finding state statute does not abrogate court's discretion to determine whether and to what extent prejudgment interest is awarded). Prejudgment interest statutes serve the dual purpose of encouraging the early settlement of claims and compensating plaintiffs for waiting for recompense to which they are legally entitled. Martin v. Lumbermen's Mut. Cas. Co., 559 A.2d 1028, 1031 (R.I. 1989). Because Defendant elected to forego the judicial process and instead engage in an unlawful, self help eviction, Plaintiff was not given the opportunity to consider an early settlement of Defendant's claim for back rent. Under the unique circumstances of this case, it would be inherently unjust to charge Plaintiff with prejudgment interest and therefore this Court declines to do so.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Leslie Parrillo, et al. v. Charles Lombardi**
CASE NO:	**C.A. No. PC-2008-6875**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 30, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Bryan P. Owens, Esq.**
For Defendant:	**Kevin M. Daley, Esq.**