IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANDRE ROGERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2000-07-140
	)	
ELISABETTA PROPERTIES, INC., a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

Date Submitted: December 21, 2001
Date Decided: January 8, 2002

Victor F. Battaglia, Jr., Esquire
Biggs & Battaglia
1800 Mellon Bank Center
P. O. Box 1489
Wilmington, DE 19899
Attorney for Plaintiff

Charles S. Knothe, Esquire
14 The Commons
3516 Silverside Road
Wilmington, DE 19810
Attorney for Defendant

FINAL ORDER AND OPINION

This is the Court's Final Order and Decision in the above-captioned matter. Trial took place on two (2) different dates, December 21, 2001 and September 10, 2001. The action is a landlord-tenant dispute brought by the plaintiff alleging a trespass to chattels action for breach of the landlord's statutory duties pursuant to 25 Del. C. § 5715. There is no dispute, even by plaintiff, that the Magistrate granted defendant possession of the leased premises. Plaintiff contends defendant trespassed and converted his chattels and goods in his apartment previously leased from the defendant. Plaintiff further

contends he gave proper notice to defendant for return of the goods. Defendant contends that plaintiff failed to timely request the return of his property as required by 25 Del. C. § 5715(e) within seven (7) days or to reimburse him for storage and removal of the goods and thereafter abandoned the property. For the reasons which follow, the Court finds plaintiff failed to prove by a preponderance of evidence the statutory requirements contained in 25 Del. C. § 5715(e) and therefore enters judgment in favor of the defendant. Each party shall bear their own costs.

Findings of Fact

The Court finds the following relevant facts following trial. Andre Rogers ("Rogers") leased a property from Elizabetta Properties, Inc. which was previously owned by one John A. Booth. Rogers contends at trial that no copy of the Landlord-Tenant Code was provided by the original landlord Booth and that only a three (3) page summary was given to him when he originally took possession. Rogers also contends that when Mele was sold the property he likewise did not give Rogers a copy of the Landlord-Tenant Code. The subject property is an apartment building at 1807 Washington Street, Wilmington, Delaware. According to the complaint, defendant brought a summary possession action against defendant for failure to pay rent. Defendant was granted judgment of possession on July 14, 1998. (Complaint, ¶5, 6).

Rogers' sister, Joy Martin Dixon, came to the subject property on August 3, 1998 and took Rogers shopping. When they returned, the apartment door was nailed shut and Rogers contends that when they returned, "There was nothing posted" either on the ground floor or the entrance to the apartment. Rogers believed his cat was still in the subject premises when the door was nailed shut. Rogers called Mr. Mele, his landlord, and President of Elizabetta Properties, Inc., "approximately two to three days thereafter",[1] who was "nasty." Rogers contends he informed Mele on that date that he wanted his property returned which was locked in the apartment. Rogers also said Mele identified where Rogers was making the telephone call because of Caller ID.[2] Rogers testified at trial the kitchen table cost to replace was $450 and that he has never located his cat. Rogers recollection is that there were two (2) nice cabinets; receipts in his briefcase; cassette player; a bowling ball; "lots of nice clothes"; three (3) suits; a leather coat; both worth a total of $2,000; silverware, dishes, pots and pans. Rogers also contends that a tool box was missing.[3]

During cross-examination, Rogers conceded that the lease agreement indicated that he acknowledged through his signature a receipt of a copy of the Landlord-Tenant Code. Rogers reiterated his

[1] See, Defendant's Answers to Interrogatories, ¶5 and 6.
[2] Subject copy of the Lease was marked as plaintiff's Exhibit "1" and received into evidence without objection by the defendant.
[3] Plaintiff's Exhibit "2," "3" and "4" were moved into evidence without objection by defendant.

testimony that he called Mele after he found his door to his apartment nailed shut from his sister's residence and Mele acknowledged his phone number by Caller ID. Rogers also contended that Mele had his forwarding address because of a letter he wrote to him.[4]

Joy Martin Dixon ("Dixon"), plaintiff's sister, was sworn and testified. She testified on August 1998 she had contact with her brother and visited his apartment. When returning she noticed the front door of his apartment was nailed shut and "nothing was posted on the door." Dixon also observed nothing on the entry door to the porch of the apartment building and had visited Rogers' apartment previously. Dixon told Rogers to go to her house and they both were in the dining room when he called Mele, defendant's landlord, who she indicated was upset with Rogers and hung-up on him.[5]

The defense presented its case in chief. Eddie Rodriquez ("Rodriquez") was sworn and testified. He is a Delaware State Constable employed at Magistrate Court 11 in New Castle County. Rodriquez served the papers from Court 13 on the subject property granting a writ of possession to Elizabetta Properties, Inc. following a hearing in Magistrate Court. According to Rodriquez the procedure for serving the Eviction Notice is that he travels to the apartment, knocks on the door and/or rings the bell. If no tenant appears he then posts a Notice of Eviction on the front door, which he did in this case on July 30, 1998 at

[4] Plaintiff's Exhibit "4."
[5] See, Answers to Interrogatories, ¶5.

6:25 p.m. The next step according to Rogers is that he attempts to call the landlord to inform him "follow through with the eviction." On September 3, 1998, Rodriquez finished the eviction procedure after approximately one-half hour and then gave a copy of the notice of eviction to defendant.[6] Rodriquez did not call the landlord in this action and he "does not recall" how many doors are on the apartment building. However, Rodriquez believes he placed the eviction notice on the right door at 6:25 p.m.[7] The Court finds the notice was "posted on [the] door." (Defendant's Exhibit "1").

Pat Souffie ("Souffie") testified at trial for the defendants. Souffie was otherwise qualified as an expert witness following a voir dire hearing and oral bench ruling by the Court. Souffie has been a red-tag sale appraiser for 24 years and has performed approximately 3,500 "red tag sales."[8] Souffie performs research for red tag sales depending on the items to be sold and is familiar with the range of prices for certain goods that she sells at red tag sales. Souffie believes it is helpful to see the condition of the property as well as the item but that she did not see Rogers' goods in his apartment. Souffie believes there is no formal certification by the State but she can render a "realistic range of values" based upon her training and experience for the last 25 years.

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[6] Defendant's Exhibit "1" for identification was moved into evidence without objection by plaintiff.

[7] This testimony was "cleaned up" during defendant's case in chief.

[8] Originally Souffie was struck as a witness but after oral briefing and motion by defense counsel, the Court ruled that upon proper foundation Ms. Souffie could testified as an expert witness. Following a voir dire hearing and legal argument the Court qualified her as an expert witness.

An exhibit was moved into evidence indicating the range of goods for the property listed by Rogers in pretrial documents which were allegedly taken by defendants.[9] On cross-examination Souffie testified that if a TV is working it is only worth $65 to $150 but believes the TV was not working. She also indicated through the exhibit introduced into evidence by defendants that she is simply offering a range of values for the property which is the subject of the trespassing chattels.

Frederick Paolino ("Paolino") testified. Paolino works in the private sector as Paolino Properties, Inc. and worked with defendant at his subject property at 2507 Washington Street. Paolino also assisted Mele with the Writ of Possession hearing in Magistrate Court where Mele was granted a possession and later served an Eviction Notice against Rogers for failure to pay rent. Paolino went with the constable the same day Rodriquez went out and posted the Notice on the front door of plaintiff's property. Paolino testified Elizabetta Properties, Inc.'s phone number was on the notice which was posted on the front door and he was present with the constable on August 3, 2000 when possession was taken. Paolino gained entry by key to the hallway and believed he picked the lock to the apartment door. Paolino heard a cat moaning and crying, which he later took possession and provided veterinarian care.

Paolino saw a lot of junk in the subject property, Cheerios for the cat, but none of the subject property which Rogers contends is

[9] See defendant's Exhibit "1."

missing in this lawsuit other than the TV. Paolino remembers some clothing, some garbage and some dishes, but no furniture, paintings or other matters and the apartment Paolino stored the subject property that he actually took from the subject property for seven (7) days but no claim was made to the goods. Paolino testified he works for Mele and Elizabetta Properties, Inc. and was paid $18 per hour for his assistance in the writ of possession.

Paolino sent letters to all tenants indicating he was now the Property Manager for the subject properties by Elizabetta Properties, Inc., including 2507 Washington Street, which listed Palomino's phone number and Mele's address in the letter. Paolino screwed the second door shut to the apartment.

Ronald Forushon ("Forushon") testified at trial. Forushon was previously employed by Elizabetta Properties, Inc. "to do clean up work." Forushon was outside on the porch on 1805-1807 Washington Street when he saw the plaintiff and a woman taking boxes and clothing out of the apartment. He does not recall the exact date but believes it was sometime before the Writ of Possession was granted by the Magistrate Court in 1998. Forushon testified there was four (4) separate doors on the porch, two to 1805 and two to 1807 and saw a beige looking car with the defendant and another black female retrieving property from the subject premises.

Daniel Mele ("Mele") presented sworn testimony at trial. Mele runs Elizabetta Properties, Inc. with his wife and purchased the subject property. Rogers was an existing tenant in Apartment 3 at 1807 Washington Street when he bought the building and became delinquent on his rent. Mele filed a Notice of Eviction with successful in Magistrate Court removing Rogers from the subject property. Mele was working with the constable at 11:00 a.m. when he arrived at the property and Mr. Rogers was not present. Mele, two (2) workers, and a constable where present at the time when the constable arrived and went upstairs to plaintiff's apartment. Mele knocked on the door when he got there. When the constable arrived, Mele observed dirty, greasy kitchen utensils with garbage and broken furniture all over the apartment and a cat uncared for in the subject premises. Mele took the television to 1926 West Fifth Street and it remains there today with no picture.

Mele believes there was only two (2) items of value and Rogers claimed nothing between 7 and 10 days after the eviction notice and writ of possession was served. Mele took the range and refrigerator out of the premises because they smelled and were too greasy and dirty to be used by the next tenant. Mele saw chairs which were present and were in "poor condition." Anything of value was kept by the workers and stored. The kitchen set had stains and was broken and believed it was nothing worth of value. Mele observed no boom box or radio or other items listed in plaintiff's "2" which was received into evidence.

Mele testified at trial that he "never received any phone call from Rogers" after the eviction and believed he "had done everything proper" according to the Code. Mele believed Rogers was trying to avoid him for failure to pay back rent and the judgment entered from Magistrate Court. Mele believes he did receive a call something after "all the statutory time periods had run wherein Rogers stated, "What happened to my stuff?" and he was advised by Mele, "It was gone."[10] Mele believed Rogers was hiding so that he could not execute a judgment on Rogers following the Magistrate's decision granting him possession and back rent.[11]

The Law

> **Section 5113. Service of notices or pleadings and process.**
>
> (a) Any notice or service of process required by this Code shall be served either personally upon the tenant or landlord or upon the tenant by leaving a copy thereof at the person's rental unit or usual place of abode with an adult person residing therein; and upon the landlord by leaving a copy thereof at the landlord's address as set forth in the lease or as otherwise provided by landlord with an adult person residing therein, or with an agent or other person in the employ of the landlord whose responsibility it is to accept such notice. . . .
> (b) . . .
> (c) In the alternative, service of notice or process may also be obtained by 1 of the following 2 alternatives:

[10] See, 25 Del. C. § 5715.
[11] See, Defendant's Exhibit "1."

(1) Posting of the notice on the rental unit, when combined with a return receipt or certificate of mailing; or
(2) Personal service by a special process-server appointed by the Court.

(Emphasis supplied.)

Section 5715. Execution of judgment; writ of possession.

(a) Upon rendering a final judgment for plaintiff, but in no case prior to the expiration of the time for the filing of an appeal or motion to vacate or open the judgment, the court shall issue a writ of possession directed to the constable or the sheriff of the sheriff of the county in which the property is located, describing the property and commanding the officer to remove all persons and put the plaintiff into full possession.
(b) The officer to whom the writ of possession is directed and delivered shall give at least 24 hours' notice to the person or persons to be removed and shall execute it between the hours of sunrise and sunset. . . .
(c) The plaintiff has the obligation to notify the constable to take the steps necessary to put the plaintiff in full possession.
(d) The issuance of a writ of possession for the removal of a tenant cancels the agreement under which the person removed held the premises and annuls the relationship of landlord and tenant. Plaintiff may recover, by an action for summary possession , any sum of money which was payable at the time when the action for summary possession was commenced and the reasonable value of the use and occupation to the time when a writ of possession was issued and for any period of time with respect to which the agreement does not make any provision for payment of rent, including the time between the issuance of the writ and the landlord's actual recovery of the premises.

(e) If, at the time of the execution of the writ of possession, the tenant fails to remove tenant's property, the landlord shall have the right to and may immediately remove and store such property for a period of 7 days, at tenant's expense, unless the property is a manufactured home . . . If, at the end of such period, the tenant has failed to claim said property and to reimburse the landlord for the expense of removal and storage in a reasonable amount, such property and possessions shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant. Nothing in this subsection shall be construed to prevent the landlord from suing for both rent and possession at the same hearing.

a. If there is no appeal from the judgment of summary possession at the time of the execution of the writ of possession and the tenant has failed to remove tenant's property, then the landlord may immediately remove and store such property for a period of 7 days, at tenant's expense, . . .
b. If, at the end of such period, the tenant has failed to claim said property and to reimburse the landlord for the expense of removal and storage in a reasonable amount, such property and possessions shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.
c. All writs of possession where no appeal has been filed must contain the following language:

NOTICE WHERE NO APPEAL FILED

If you do not remove your property from the premises within 24 hours, then the landlord may immediately remove and store your property for a period of 7 days at your expense, unless . . . If you fail to

> claim your property and reimburse the landlord prior to the expiration of the 7-day period, then the landlord may dispose of your property without any further legal action.
>
> . . .
>
> (g) Nothing in subsection (d) of this section shall prevent the landlord from making a claim for rent due from the tenant under the provisions of the lease. The landlord shall have the duty of exercising diligence in landlord's efforts to re-rent the premises. The landlord shall have the burden of showing the exercise of such diligence. The landlord shall have the right to sue for both rent and possession at the same hearing.
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> (h) Whenever the plaintiff is put into full possession under this chapter it shall be the duty of the plaintiff, at the time actual repossession occurs, to have the locks to the premises changed if said premises are to be further leased out. Any plaintiff who fails to comply with this subsection shall be liable to any new tenant whose person or property is injured as a result of entry to the premises gained by the dispossessed tenant by use of a key still in their possession which fit the lock to the premises at the time of this tenancy.

Discussion

The Court finds the required Eviction Notice was properly posted by defendant. 25 Del. C. § 5113. There are only two (2) issues for this Court to decide. First, the Court must determine whether Rogers complied with the requirements of 25 Del. C. § 5715(e) by properly claiming the subject property and reimbursing defendant for the reasonable expense of removal and storage. Second, the Court must determine if Rogers did, in fact, comply with Section 5715(e), whether

Rogers has proven by a preponderance of evidence the existence of the goods or property and the value of the trespass for chattels action for the allegedly illegal disposition by defendant of his chattels.

Opinion and Order

The Court finds by a preponderance of evidence pursuant to 25 Del. C. § 5715(e) that Rogers failed to timely claim his property from the premises within 7 days and/or to reimburse Mele for the removal and storage expenses in a "reasonable amount." 25 Del. C. § 5715(e). The only testimony before the Court by Rogers is his sworn affidavit and his oral testimony presented at trial. No contemporaneous writing documents Rogers' conversation with Mele. Likewise, Mele has presented sworn testimony contradicting Rogers. The evidence, at best, is equally balanced. Further, pursuant to 25 Del. C. § 5715(e), the Court therefore finds defendant properly disposed of Roger's property and/or goods without the necessity of any further legal action. The Court so finds based upon the totality of circumstances by a preponderance in the record.

Since the Court finds that Rogers failed to timely request return of the property, the Court need not address the second issue before the Court because Mele acted properly and the property and/or

chattels were deemed to be abandoned by Rogers. 25 Del. C. § 5715(e). Each party shall bear their own costs.

IT IS SO ORDERED this 8th day of January, 2002.

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JOHN K. WELCH
ASSOCIATE JUDGE