

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1825

BARRY A. BILLIOT

VERSUS

PHILLIP F. HUE

Judgment Rendered: May 6, 2011

**Appealed from the
City Court of Houma,
Parish of Terrebonne,
State of Louisiana
Docket Number 10-02311**

The Honorable Jude Thaddeus Fanguy, Judge Presiding

**Dominick M. Bianca
Raphael Juneau, Jr.**

**Counsel for Plaintiff/Appellant,
Barry A. Billiot**

**Phillip F. Hue
Chauvin, LA**

**Defendant/Appellee,
In Proper Person**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCleendon, J. concurs

WHIPPLE, J.

This matter is before us on appeal by plaintiff, Barry A. Billiot, from a judgment of the Houma City Court in favor of defendant, Phillip F. Hue, dismissing Billiot's eviction proceeding. For the following reasons, we amend, and as amended, affirm.

FACTS AND PROCEDURAL HISTORY

On June 25, 2009, Billiot and Hue entered into a written agreement entitled, "Lease/Purchase Agreement," whereby Hue leased a trailer and property located at 5226 Bayouside Drive in Chauvin, Louisiana, from Billiot. According to the agreement, Hue was to make monthly payments to Billiot in the amount of \$2,000.00, payable on the 5th day of each month, until Hue had paid \$25,000.00, at which time, the parties were to confect an Act of Sale to sell the property to Hue, with Hue obligated to thereafter pay monthly notes on the stated remaining balance of \$61,500.00, for a total sale price of \$86,500.00. The agreement further provided that Hue was "assuming" the cost of a "policy of insurance covering building and improvements against risk by fire, wind, storm or tornado in value of the buildings and improvements thereon, including liability coverage."

On July 22, 2010, Billiot instituted an eviction proceeding against Hue in the City Court of Houma, contending that Hue was delinquent in rental payments and had failed to obtain insurance on the home. The matter was set for hearing on August 9, 2010. At the conclusion of the hearing, the court issued oral reasons and rendered judgment in conformity therewith, finding that the "Lease/Purchase Agreement" was contradictory, at best, and, after reviewing the payment histories and evidence submitted by the parties, that Hue was "actually ahead" in rental payments. The court further found that Billiot failed to prove his entitlement to evict Hue where other evidence indicated Billiot had accepted a rental payment from Hue after the eviction proceeding had been filed. Accordingly, a written

judgment dismissing Billiot's Rule for Eviction was signed by the court on August 9, 2010.

Billiot then filed the instant appeal, contending that the trial court erred in: (1) finding that the parties had a valid contract; (2) finding that Hue did not breach the terms of the lease agreement for untimely and insufficient payment of rent and failure to procure insurance coverage; (3) failing to recognize that the lease term had expired; (4) finding that Billiot accepted lease payments after the eviction proceedings were filed; and (5) ruling that the eviction proceeding be dismissed "with prejudice."

DISCUSSION

At the outset, we note that neither party objected to the city court determining the nature of the contract and such related issues in these proceedings.¹ Thus, to the extent that issues related to the nature of the contract could be deemed to be properly before the city court for determination in a summary eviction proceeding, we find no error in the court's determinations. As the judge correctly noted, "[t]he only way [to] interpret this agreement so that it makes sense and conforms to what seems to have been the intent of the parties is to consider it" a lease with an option to purchase, in favor of Hue at the price stated therein, whereby, upon the payment of \$25,000.00, the act of sale would be passed and the balance of \$61,500.00 would be paid in monthly installments. Thus, given the evidence of record herein, we find no error in the court's conclusions regarding the nature of the contract between the parties or its determination that Billiot failed to prove that a breach had occurred warranting the granting of an eviction judgment. Therefore, we find no merit to plaintiff's first three assignments of error for the reasons noted by the city court.

¹The record shows that the parties appeared in the proceedings below in proper person.

Further, regarding Billiot's fourth assignment of error, wherein he challenges the city court's decision premised on its finding that he accepted lease or rental payments after the eviction proceeding had been filed, we likewise find no merit.

It is well settled in Louisiana law that the summary action of eviction is based on a required notice to vacate and that acceptance of rent after that notice (but before the judgment of eviction) vitiates the notice and prevents a lessor from obtaining such judgment. LSA-C.C.P. arts. 4701, 4702, and 4731;² Bowling

²Louisiana Code of Civil Procedure article 4701, entitled, "Termination of lease; notice to vacate; waiver of notice," provides as follows:

When a lessee's right of occupancy has ceased because of the termination of the lease by expiration of its term, action by the lessor, nonpayment of rent, or for any other reason, and the lessor wishes to obtain possession of the premises, the lessor or his agent shall cause written notice to vacate the premises to be delivered to the lessee. The notice shall allow the lessee not less than five days from the date of its delivery to vacate the leased premises.

If the lease has no definite term, the notice required by law for its termination shall be considered as a notice to vacate under this article. If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term.

A lessee may waive the notice requirements of this Article by written waiver contained in the lease, in which case, upon termination of the lessee's right of occupancy for any reason, the lessor or his agent may immediately institute eviction proceedings in accordance with Chapter 2 of Title XI of the Louisiana Code of Civil Procedure.

Further, LSA-C.C.P. art. 4702, entitled, "Notice to occupant other than tenant to vacate," provides as follows:

When an owner of immovable property wishes to evict the occupant therefrom, after the purpose of the occupancy has ceased, the owner, or his agent, shall first cause a written notice to vacate the property to be delivered to the occupant.

This notice shall allow the occupant five days from its delivery to vacate the premises.

Additionally, pursuant to LSA-C.C.P. art. 4731:

A. If the lessee or occupant fails to comply with the notice to vacate required under this Title, or if the lessee has waived his right to notice to vacate by written waiver contained in the lease, and has lost his right of occupancy for any reason, the lessor or owner, or agent thereof, may cause the lessee or occupant to be cited summarily by a court of competent jurisdiction to show cause why he should not be ordered to deliver possession of the premises to the lessor or owner. The rule to show cause shall state the grounds upon which eviction is sought.

U.S.A., Inc. v. Genco, 536 So. 2d 814 (La. App. 1st Cir. 1988). Although a lessor may have a right to rental payments for the occupancy during the time the tenant stays against the landlord's wishes, acceptance of rent is deemed to negate the notice to vacate required for summary eviction. Bowling U.S.A., Inc. v. Genco, 536 So. 2d at 815-816; Four Seasons, Inc. v. New Orleans Silversmiths, Inc., 223 So. 2d 686, 689 (La. App. 4th Cir. 1969).

The notice to vacate is an essential part of the summary eviction procedure provided for in LSA-C.C.P. art. 4701. Without this notice, there can be no judgment issued under LSA-C.C.P. art. 4701. Bowling U.S.A., Inc. v. Genco, 536 So. 2d at 816. Thus, even if we were to find that the city court had erred in concluding that Hue's payments were "actually ahead," and that, arguendo, the payments were actually late, the record reflects that Billiot repeatedly accepted such payments, even up to the filing of the suit for eviction.

The record shows that the eviction proceedings were filed on July 22, 2010, with a hearing held on August 9, 2010. The record further shows that at trial, Hue introduced evidence in the form of a deposit slip from Capitol One Bank showing that on July 22, 2010 at 13:42 (military time), he deposited \$1,000.00 into Billiot's bank account for payment of rent. Although Billiot stated that he had checked his bank account on July 22, 2010, and that he had not received the lease payment prior to filing the eviction proceeding in city court, as the funds were not in his account at that time, he presented no evidence to rebut the affirmative

B. After the required notice has been given, the lessor or owner, or agent thereof, may lawfully take possession of the premises without further judicial process, upon a reasonable belief that the lessee or occupant has abandoned the premises. Indicia of abandonment include a cessation of business activity or residential occupancy, returning keys to the premises, and removal of equipment, furnishings, or other movables from the premises.

showing by Hue that the funds had been paid and accepted by deposit into Billiot's bank account.

Thus, on the record before us, we find that the city court correctly determined that Billiot's July 22, 2010 acceptance of the lease or rental payment by Hue, which was subsequent to the notice of eviction, vitiated the notice and maintained Hue's right to possession of the premises. Accordingly, we find no merit to this assignment of error.

With regard to Billiot's fifth assignment of error, however, wherein he contends that the trial court erred in dismissing his rule for eviction "with prejudice," we find merit. Where a plaintiff/landlord fails to meet his burden of proof in an eviction proceeding and the tenant/defendant remains in occupancy of the home, the eviction proceeding is dismissed without prejudice. Edwards v. Edwards, 439 So. 2d 478, 479 (La. App. 1st Cir. 1983); cf. Soileau v. Knighten, 423 So. 2d 61 (La. App. 1st Cir. 1982) (where rule for eviction was dismissed with prejudice on plaintiff's motion when the defendant vacated the premises before the hearing on the rule for eviction, thereby rendering the dispute moot). Accordingly, the August 9, 2010 judgment of the trial court is amended to reflect that the suit for eviction is dismissed without prejudice.

CONCLUSION

For the above and foregoing reasons, the August 9, 2010 judgment of the trial court is hereby amended to provide that the dismissal of the eviction suit is without prejudice. In all other respects, the August 9, 2010 judgment of the trial court is affirmed. Costs of this appeal are assessed 75% against appellant, Barry A. Billiot and 25% against appellee, Phillip F. Hue.

AMENDED, AND AS AMENDED, AFFIRMED.