Curtain

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

LAKESIDE DEVELOPMENT CORP.,

Appellant,

v.

D'ANGELO GLADES, LLC d/b/a
CAFÉ D'ANGELO,

Appellee.
_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502008AP000072XXXXMB
LT No.: 502008CC010224XXXXSB
Division: 'AY'

Opinion filed: December 15, 2009

Appeal from Honorable Donald Hafele, County Court Judge

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REVERSED.

Lakeside Development Corp. ("Lakeside") and D'Angelo Glades LLC, d/b/a Café D'Angelo ("Café D'Angelo") entered into a commercial lease agreement whereby Café D'Angelo would open and operate a restaurant on the leased premises. In June 2007, Café D'Angelo discovered water leaking through the ceiling at several locations around the restaurant. Café D'Angelo reported this problem to Lakeside. Lakeside hired a roofing company which determined that there were five leaks on the roof; four of those leaks were attributable to the

rooftop air conditioning units and one leak was attributable to the roof itself. Lakeside replaced the roof of the building in January 2008. Following the replacement, Café D'Angelo continued to experience leaking water. Café D'Angelo hired an air conditioning contractor to manufacture drip pans to place under the units.

Four months after Lakeside replaced the roof, Café D'Angelo closed for the purpose of conducting a "spring cleaning" during which damage was caused to a wall, revealing that the leak had caused the walls to crumble from becoming excessively wet. Café D'Angelo promptly reported the situation to Lakeside. Café D'Angelo hired a consultant to perform a mold analysis of the leased premises as a result of observing the premises' moist walls and rusted metal studs. Café D'Angelo stopped paying rent and requested Lakeside repair the restaurant.[1] Lakeside, operating on the premise that the water infiltration damage was caused by the rooftop air conditioning units (not the roof itself), refused to make the repairs as the air conditioning units were the responsibility of Café D'Angelo, under the terms of the lease. Lakeside served Café D'Angelo with a three-day notice of default and notice to pay rent and later filed an eviction action. A two-day bench trial took place and the trial court entered an order denying Lakeside's complaint for eviction. This appeal then ensued. The lower court's order merits reversal on several grounds.

First, the trial court's order stated specifically that Lakeside failed to prove the "exact and specific amount of rent owed." The lower court's order cites *Dream Closet, Inc. v. Palm Beach Mall, LLC*, 991 So. 2d 910 (Fla. 4th DCA 2008) as standing for the proposition that a landlord

[1] From what can be gleaned from the record, it appears that Café D'Angelo requested that Lakeside perform repairs of the damaged premises based on section 9.1 of the lease which states, in pertinent part: "In the event the Leased Premises should be damaged by fire, explosion or *casualty or occurrence* covered by Landlord's insurance to an extent which shall be twenty-five perfect or less of the replacement cost of the Leased Premises, the damage shall be repaired by Landlord at Landlord's expense...." (emphasis added). It appears that Café D'Angelo attempted to characterize the water infiltration and resulting damage to constitute "casualty" or "occurrence" which rendered the premises "untenantable" under section 9.1 of the lease, thereby permitting it to abate rent until the restaurant was repaired.

need "present a competent witness and evidence which establish the methodology and information that were used to arrive" at the amount of past due rent. *Dream Closet*, however, is not factually or legally synonymous with the case before us, because the parties in *Dream Closet* were disputing the amount of past-due rent that needed to be deposited into the court registry. Instead of following the proper procedure in challenging the claim and awaiting determination from the trial judge as to the amount the tenant need deposit, the tenant went ahead and deposited the contested amount with the court. The landlord then attempted to use this deposit as an admission as to the amount due and subsequent default. The Fourth District held that the fact that the tenant paid a sum into the registry did not constitute evidence of a default which would support eviction. Here, there was no issue regarding Café D'Angelo's payment of past due rent into the court registry, rendering *Dream Closet* inapplicable.

The elements for a cause of action for eviction are:

> 1) the parties had an agreement requiring the Tenant to pay the Landlord rent for the use of the property; 2) the Tenant defaulted in the payment of this rent; 3) three days' notice requiring the payment of the rent or the possession of the property was served on the Tenant; and 4) the Tenant failed to pay the rent or deliver possession of the property within three days.

See Boudreau v. M & H Food Corp., 895 So. 2d 501 (Fla. 2d DCA 2005). Proof of the exact amount due is not necessary. In nonresidential evictions, as is the case here, the issue to be determined in a possessory proceeding is not the amount of rent owing, but whether any rent is due or whether the landlord is otherwise entitled to possession under statutory provisions. *See State ex rel. Hillman v. Hutchins*, 118 Fla. 220, 158 So. 716 (1935). Thus, proving the exact amount of rent due is unnecessary so long as it is proven that the tenant has defaulted in the payment of rent.

Second, Lakeside argues the trial court erred in finding that the damage sustained in the leased premises was from a "casualty" and an "occurrence" and thus, pursuant to the lease, it was Lakeside's obligation to repair the damage, and rent was abated during the repair period. (Section 9.1 is quoted above in Footnote 1).

The trial court's order specifically states that the damage sustained in the leased premises was from "a casualty and an occurrence." The court's order continues in stating:

> "Applying the definitions above to the provisions of Section 9.1, as well as other sections of the lease establishes that the lease premises were seriously damaged (thus a casualty occurred), and that such damage was a result of unintended *continuing* water infiltration *over time either through the air conditioner or the roof leak* (thus an occurrence)." (emphasis added).

Section 9.1 of the lease, addresses "fire, explosion, or casualty or occurrence." Other sections of the lease apportion responsibility for insurance and maintenance of the roof to Lakeside and responsibility for insurance and maintenance of the air conditioning units to Café D'Angelo. It may be presumed, then, that Section 9.1 is intended to address casualties or occurrences not caused by either the roof or the air conditioners, and therefore the definitions of "casualty" and "occurrence" exclude problems caused by the roof or air conditioning.

The lower court's order, however, characterized the damage to the leased premises as being *both* a casualty *and* an occurrence attributable to *either* the roof *or* the air conditioners. Since the damage cannot be both a casualty and an occurrence, and the order fails to make a determination as to whether it was either the roof or the air conditioners that caused the damage, the trial court's conclusion is legally and factually impossible. As a result, this Court is unable to determine the rightfulness of Café D'Angelo's abatement of rent.

Third, Lakeside contends that the lower court's order is erroneous in finding that Lakeside breached Section 7.3 of the lease agreement in failing to provide Café D'Angelo with

quiet enjoyment of the leased premises and that such failure caused irreparable harm to Café D'Angelo's business. Café D'Angelo fails to substantially address this argument as well.

Section 7.3 of the lease states:

> "Landlord covenants and agrees that Tenant, subject to the terms and provisions of this Lease, on payment of the rent and observing, keeping and performing all of Tenant's covenants, shall lawfully, peaceably and quietly have, hold, occupy, and enjoy the Leased Premises... without hindrance or ejection by the Landlord."

Because the lower court failed to determine the cause of the leak (*i.e.*, merely noting that it was either the roof *or* the air conditioner), and therefore could not properly determine the rightfulness of Café D'Angelo's apparent attempt to abate payment of rent, the issue of whether Lakeside breached the covenant of quiet enjoyment is unreachable.

Lastly, Lakeside contends that the lower court erred in finding that its acceptance of rent payments for the time period between September 1, 2007 and April 1, 2008 effectively waived Lakeside's right to evict Café D'Angelo for nonpayment of rent. Lakeside contends that Section 10.6 of the lease constitutes a nonwaiver provision.

Section 10.6 of the lease agreement states:

> "No failure by the Landlord to insist upon the strict performance of any covenant, agreement, term or condition of this Lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach or of such covenant, agreement, term or condition."

The express nonwaiver provision contained in the lease precludes the affirmative defense of waiver. *See also Kelly Tractor Co. v. R.J. Canfield Contracting, Inc.*, 579 So.2d 261 (Fla. 4th DCA 1991). Therefore, the lower court's order erred in stating that Lakeside's acceptance of the full amount of rent past due with knowledge of Café D'Angelo's previous breach constituted a waiver of the right to evict.

The lower court's order denying Lakeside's complaint for eviction is hereby REVERSED and REMANDED for further proceedings consistent with this opinion. Lakeside's Motion for Appellate Attorneys' Fees and Costs is hereby GRANTED and the matter is REMANDED to the trial court for determination of the reasonable amount thereof.

(CROW and GARRISON, JJ., concur.) (MCCARTHY, J., dissents with an opinion.)

MCCARTHY, J., dissenting.

I disagree with the majority's ruling in favor of the landlord.

The lease here is a Net-Net Lease wherein the tenant is responsible for the maintenance of mechanical elements of the building, while the landlord remains responsible for the structural elements of the building. It is noteworthy that the lease here is not a triple-net lease where the tenant is also responsible for structural elements.

Under the terms of the lease, no matter what mechanical problem the building may have, it is the landlord's responsibility to maintain the structure, including the water integrity of the roof. In fact, the landlord did replace the roof here, but the water intrusion continued. Exterior water intrusion is a structural problem for the landlord to cure, not a mechanical problem for the tenant to cure.

The lease provides that when a casualty makes the premises untenantable, the tenant has a right to abate the rent until the landlord repairs the premises.

Here, the thousands of roaches which invaded the Defendant's café from the water saturated wall and the high levels of toxic wall mold spores caused by exterior water intruding into the premises, obviously make this restaurant untenantable.

The landlord has yet to make successful structural repairs as required by the lease. Therefore, the rent may be abated pending those repairs. I would affirm.