

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DANIEL M. ZITOFISKY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. CPU4-14-002836
)	
LAWRENCE GRAY and)	
NIRVANA GRAY,)	
)	
Defendants,)	

Submitted: June 22, 2015
Decided: July 16, 2015

Angeline M. Kogut, Esq.
203 West 18th Street
Wilmington, Delaware 19802
Attorney for Plaintiff

Lawrence Gray
Nirvana Gray
3152 Bramble Glen Drive
Myrtle Beach, SC 29579
Defendants, Pro Se

FRACZKOWSKI, J.

DECISION AFTER TRIAL

This is an action for breach of contract/debt collection arising from a residential lease agreement. On October 3, 2014, Plaintiff Daniel M. Zitofsky (“Plaintiff”) filed the Complaint, alleging that Defendants Lawrence “Larry” Gray and Nirvana Gray (“L. Gray”, “N. Gray”, collectively “Defendants”) entered into a lease agreement with Plaintiff for 110 East Kilts Lane

in Middletown, Delaware (“the Property”). Plaintiff alleges that Defendants failed to make timely payments, and seeks damages totaling \$33,294.75 plus costs and post-judgment interest.

On November 14, 2014, Defendants filed a joint answer to the Complaint denying the allegations and contended that they ceased further payment of rent because Plaintiff failed to inform them of pending foreclosure proceedings during the life of the tenancy. On June 22, 2015, trial was held. At the close of evidence, the Court reserved decision. This is the Court’s opinion and order on Plaintiff’s requested relief.

FACTS

Plaintiff’s testimony can be summarized as follows:¹ Plaintiff owned the Property from 2008 until its foreclosure.² Defendants were the tenants since June 2008. On March 15, 2010, the parties entered into a one-year lease agreement for the Property which was set to conclude on March 14, 2011.³ Rent was set at \$2,050/month, to be paid by the 15th of each month.⁴ In the event of a late or missed payment, the late fee was set at \$50.00 per cycle.⁵ After the initial leasehold expired, the lease was not renewed, and as a consequence, was converted to a month-to-month tenancy.

Defendants demonstrated a history of late payments over the course of the lease. When Defendants were late on rental payments, Plaintiff’s wife, acting as property manager, would call Defendants to ascertain why the rent payment was late. Plaintiff tried to work with Defendants,

¹ Plaintiff is a retired police officer and honorable dischargee of the United States Navy. For the last twenty years, Plaintiff has invested in real estate holdings.

² The date of foreclosure was not disclosed to the Court. Testimony on the matter indicates that the Property was foreclosed upon in 2014.

³Pl.’s Ex. 1.

⁴ *Id.*

⁵ *Id.*

who consistently had an excuse for their failure to pay. After the leasehold converted to a month-to-month tenancy, Defendants became excessively delinquent on payments.

On September 10, 2012, Plaintiff sent a late letter to Defendants advising them that he had not received rent payments since April 2012.⁶ When the delinquency was not resolved, Plaintiff, through Kevin Hensley⁷, instituted eviction proceedings in Justice of the Peace Court No. 9.⁸ However, because Mr. Hensley – who was not the owner of the Property – was the improper party to bring the action, the Court dismissed the suit without prejudice.⁹ Meanwhile, Defendants remained in possession of the Property. From January 2012 to September 2013, Defendants accumulated past-due rent and late fees totaling \$33,294.75.¹⁰ The last rent payment received was on July 15, 2012 in the amount of \$1,150.00, and was applied to the oldest month of outstanding rent.¹¹

Dawn Zitofsky (“Mrs. Zitofsky”) also testified.¹² Other than corroborating Plaintiff’s version of events¹³, Mrs. Zitofsky added that the property went into foreclosure as a direct result of Defendants’ failure to timely pay rent. Additionally, Mrs. Zitofsky stated that she placed

⁶ Pl.’s Ex. 2.

⁷ Plaintiff testified that Hensley was his real estate broker for his acquisition of the Property. Hensley served as the liaison between Plaintiff and the bank through which the Property was financed. Hensley often assisted Plaintiff with the Property’s mortgage payment.

⁸ See *Hensley v. Gray and Gray*, JP9-13-001090 (J.P. Ct. No. 9 Aug. 20, 2013).

⁹ Pl.’s Ex. 4.

¹⁰ Pl.’s Ex. 5.

¹¹ Pl.’s Ex. 5. From January 15, 2012 to the final payment received on July 15, 2012, Defendants made partial rent payments. In many instances, the partial payments were less than half of the total monthly rental rate.

¹² Mrs. Zitofsky acted as the property manager over the life of the tenancy. Her primary duties were the collection of rent and maintenance of the Property.

¹³ Mrs. Zitofsky was the primary liaison between Defendants and Plaintiff, and as a result was the party receiving Defendants’ excuses for late payment. According to Mrs. Zitofsky, some of the excuses received were (1) issues of fidelity in Defendants’ marriage; (2) Defendants’ payment of rent would preclude providing a “good Christmas” for Defendants’ kids; (3) Defendants were paying N. Gray’s mother’s medical bills due to a cancer diagnosis; and (4) Defendants’ car died.

Defendants on notice of the pending foreclosure proceedings, and urged them to cure their payment delinquency to remain at the property.

After Plaintiff rested, Defendants called Plaintiff as a hostile witness. He testified that he created the ledger which illustrates Defendants' payment delinquency himself after the dismissal of the Justice of the Peace case.¹⁴ Next, L. Gray testified. According to L. Gray, Defendants made full payments until January 15, 2012, when they received notice from the bank that the property was in foreclosure. On cross-examination, L. Gray admitted that since January 15, 2012, although payments were made, no full payment was made.

Finally, N. Gray testified. She asserted that although full payments were not made from January 15, 2012, the ledger does not account for additional cash payments made to Plaintiff from January 15, 2015 to July 15, 2012.¹⁵

DISCUSSION

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of the evidence that: (1) a contract existed between the parties; (2) the defendants breached an obligation imposed by the contract, and (3) plaintiff suffered damages as a result of that breach.¹⁶

10 *Del. C.* § 5061(c)(1) provides, in relevant part:

(c) The following persons whose real or equitable interests in the real estate may be adversely affected by plaintiff's cause of action shall not be deemed to be necessary parties and shall not be required to be joined as a defendant in mortgage foreclosure actions:

¹⁴ Defendants' Ex. 1

¹⁵ Defendants did not provide any documentary evidence of the additional cash payments allegedly made during the period in question.

¹⁶ *Gregory v. Frazer*, 2010 WL 4262030, *1 (Del. Com. Pl. Oct. 8, 2010); *VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

(1) Tenants seized of an estate for years or at will.

Notice in writing, however, shall be given to the above classes of persons in the manner prescribed from time to time by the civil rules of the Superior Court of the State. It is the intent of this subsection that written notice be deemed sufficient in lieu of joinder to protect the property interests of the above classes of persons in the mortgaged real estate since those property interests are created and defined by the legal operations of existing statutes and law.¹⁷

The parties agree that a lease – and thus a contract – existed between the parties. Further, although Defendants’ Answer to the Complaint denies that they breached the lease by failing to make timely and complete rent payments, by their testimony at trial Defendants admit that they did not pay the rent in full. Additionally, Defendants admit that the last rental payment was made on July 15, 2012. In essence, Defendants admitted at trial that they breached their obligation to pay rent, and thus incurred liability for rental payments and the associated late fees.

Where the parties disagree is the damages arising from the breach. Defendants argue that they are excused from making rent payments because they were not informed of foreclosure proceedings. (But L. Gray did testify that the Defendants received written notice from the bank/mortgagee of the foreclosure.) Plaintiff counters that notice of the pending foreclosure proceeding was provided to Defendants. Both parties failed to introduce evidence of the date of foreclosure, and Defendants did not present the notice of foreclosure attached to the front door of the property.

Where the testimony of both parties is in conflict, it is the duty of the Court to assess the credibility of the witnesses and resolve any existing conflicts in testimony.¹⁸ In analyzing the evidence adduced at trial, the Court finds that Plaintiff’s version of events is more credible and

¹⁷ 10 Del. C. § 5061(c)(1).

¹⁸ See *Hsu v. Citibank South Dakota, N.A.*, 931 A.2d 437 (Del. 2007) (quoting *Knight v. State*, 690 A.2d 929, 932 (Del. 1996) (The judge, as the trier of fact, is the “sole judge of the credibility of witnesses and responsible for resolving conflicts in testimony.”))

supported by the weight of the evidence. In other words, without more, the Court simply cannot find that Defendants were excused from paying rent on the record before the Court.

Defendants testified at trial that a notice of the pending foreclosure was posted to their door, yet claim that they did not receive notice of the foreclosure.¹⁹ In presenting this testimony to the Court, Defendants invalidated their entire defense, which hinges on the premise that no notice of the proceeding was received. Further, even if the Court accepts that Plaintiff did not inform Defendants of the pending foreclosure, no provision of 10 *Del. C.* § 5061(c)(1) states that the notice of foreclosure must come from the landlord. The fact that a foreclosure proceeding document was placed on Defendants' front door – a fact which Defendants testified to at trial – sufficiently put them on notice that they needed to take steps to protect their interest. Accordingly, the Court finds by a preponderance of the evidence that Defendants breached the lease agreement without excuse, and are thus liable for damages in connection with the lease agreement.

Damages Calculation

After a review of Plaintiff's Exhibits 1 and 5, the Court finds that Defendants incurred rent charges for the period of January 15, 2012 to September 9, 2013 in the amount of \$40,634.75. With late fees totaling \$950.00, that amount increases to \$41,584.75. During that same period, Defendants made total payments in the amount of \$8,290.00. The Court awards judgment in favor of Plaintiff for the difference, totaling \$33,294.75.

¹⁹ Defendants did not present the notice to the Court.

CONCLUSION

For the foregoing reasons, the Court finds in favor of Plaintiff Daniel M. Zitofsky and against Defendants Lawrence Gray and Nirvana Gray, and enters judgment in the amount of \$33,294.75 plus costs and post-judgment interest at 5.75% per annum until satisfied.

IT IS SO ORDERED this 16th day of July, 2015.

Alfred Fraczkowski²⁰
Associate Judge

²⁰ Sitting by appointment pursuant to Del. Const. art. IV, § 38 and 29 *Del. C.* § 5610.