IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE, IN AND FOR SUSSEX COUNTY COURT NO. 17

CARVEL GARDENS ASSOCIATES LLC Plaintiff Below, Type Appellee or Appellant	§ § §	
V.	§	C.A. No. JP17-16-006834
KESHEENA GREENE Defendant Below, Type Appellee or Appellant	§ §	

TRIAL DE NOVO

Submitted: June 12, 2017
Decided: July 28, 2017

APPEARANCES:
Plaintiff - represented by Michael Morton, Esq.
Defendant - represented by Neilson Himelein, Esq.

C.M. Alan Davis, Justice of the Peace
William Wood, Justice of the Peace
Christopher A Bradley, Justice of the Peace

IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE, IN AND FOR SUSSEX COUNTY COURT NO. 17

CIVIL ACTION NO: JP17-16-006834

CARVEL GARDENS ASSOCIATES LLC VS KESHEENA GREENE

ORDER ON TRIAL DE NOVO

The Court has entered a judgment or order in the following form:

Facts and Procedural Posture

Plaintiff, Carvel Gardens Associates, L.L.C., filed this action in November 2016 to recover possession of a federally subsidized housing unit from Kesheena Greene, alleging breach of rules of the housing complex. It alleges the defendant violated the rules of the housing complex by allowing a person on the community's "banned list" into her unit, constituting a threat to the health, safety and right of peaceful enjoyment of the premises by other tenants. After some delay of the matter, a trial before a single judge occurred on February 8, 2017 and a decision on that hearing issued on March 2, 2017, finding in favor of the Plaintiff.

Defendant appealed in a timely manner and that appeal was originally scheduled for May 8, 2017. At that hearing, counsel for Plaintiff moved for a continuance based on the fact that two necessary subpoenaed witnesses from the Laurel Police Department had failed to appear. The Defendant did not oppose the continuance, but moved to limit the testimony of the witnesses, in that they would be testifying about prior bad acts of the banned individual, and that the Plaintiff would then be asking the Court to find that it was more likely than not that the banned individual would act in a similar manner to that prior behavior. The Court adjourned the matter, instructing the Plaintiff to submit a proffer of evidence of the witnesses and the intended use of that evidence. Further the Defendant would have an opportunity to respond to that proffer. The parties responded appropriately to the Court's request.

The three-judge panel heard the re-convened matter on June 12, 2017. The panel consisted of Chief Magistrate Alan Davis, Judge William P. Wood and Judge Christopher Bradley. This is the Court's opinion after the hearing. The Court addressed the motion *in limine* in open court, ultimately allowing the testimony of the officers, so that decision is not memorialized here. For the reasons stated below, the Court finds in favor of the Plaintiff and against the Defendant on the case itself.

The facts, as presented in testimony at trial with little disagreement, establish that the Defendant permitted Stephon Belong, a person listed on the community's "banned list", into her apartment on or about September 10, 2016. Someone from the property management witnessed him enter her apartment and police were dispatched to the apartment. When questioned about the presence of Mr. Belong in the apartment, the Defendant stated that he was not there. Police subsequently found him in her bathroom, where he was exiting the shower. He was arrested for criminal trespass and removed from the premises.

Defendant's testimony was that she was aware of and had received the "banned list" in some fashion during her tenancy. She knew Mr. Belong through a previous boyfriend, whom he had accompanied to her apartment on a number of occasions. She claimed to know him only as "Fonzy", not by his real name. On the day in question, Belong came to her door and asked if he could take a shower; she agreed, as she knew that he was currently homeless. Within minutes the police arrived. Belong complied with the requests of officers and there

was no indication that he committed a criminal act (aside from the Trespassing charge resulting from simply being on the property) or otherwise constituted a threat on the day he was on the property.

According to testimony presented at the hearing, people are added to the list of individuals banned from the property in one of several ways. Either the community management initiates contact with the police about an individual who has committed an offense in the housing community or the police inform the community management about arrests made in the development. In either event, individuals on the banned list are sent notice from the police that they are not to be on the property. Community residents are informed of who is on the "banned list" by receiving an initial list with their rental agreement and, under the rules, an update is sent with the periodic newsletter. Testimony also showed that a copy is given more frequently by hand delivery as necessary between newsletter issues. The list is also posted at the management office. The list does not inform residents of why a person is barred from the property.

Arguments

Plaintiff argues that Defendant permitting a person on the community's banned list onto the property constitutes a threat to the health, safety and quiet enjoyment of the premises with regard to other residents, as required under the federal law, contract and rules. Further, Plaintiff asserts knowledge of the actual identity of the individual is not necessary, as it is a strict liability standard.

Defendant claims that she had no knowledge that "Fonzy" was on the banned list, and could not because she never knew who he really was. Even if she should have known, this is a rules violation under State law and requires 7-days notice and an opportunity to cure. There was no irreparable harm, as required under the State standard for not giving such notice, evidenced in the mere presence of a person on the banned list.

Discussion

The Court will dispose of one question directly. It is well settled that federal law preempts state law with regard to the standard by which a person may be immediately evicted from federally subsidized housing without necessity of notice and an opportunity to cure.[1] A landlord must employ the local state law for the process by which that eviction will take place, but once the federal government occupied the field in establishing a standard, this Court was obligated to use that standard. Rather than the "irrevocable harm" standard required under Delaware law before a landlord may proceed to immediate eviction, we are bound by the use of the "threat to the health safety and welfare standard" invoked by the federal statute.[2] Defendant's reliance on the "irrevocable harm" standard is misapplied.

The law of this case turns on one question. Does allowing a person on the barred list onto the premises constitute a *per se* threat to the health, safety and welfare of the other tenants, constituting grounds for immediate termination of the lease agreement? We hold that it does not provide *per se* grounds, but that it is possible for such an action to constitute a threat to the health, safety and welfare of the residents, and it is the responsibility of the Plaintiff to prove that at trial.

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[1] *Milwaukee City Hous. Auth. v. Cobb*, 860 N.W.2d 267, 272 (Wis. 2015).

[2] 42 U.S.C.A. §1437(d)(1)(B)(iii) states: "...during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near the premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Plaintiff and other subsidized housing landlords often use a "barred list" to identify people that the management feels constitute a threat to their community. In doing so, they ostensibly develop the list from information that they receive from prior interactions with those individuals and use police resources to enforce their determination about these individuals.

There was some limited testimony in this case about how the list is developed for Carvel Gardens. While indicating that one existed, Plaintiff produced no policy indicating exactly how people are placed on the list, does not provide information about how individuals obtain such infamy when the list is disseminated to residents, and is even lackadaisical about complying with its own stated rule on how the list is disseminated. The testimony was inconclusive - at best - as to whether all the individuals contained on it actually pose a risk to the health, safety and welfare of the individual residents and leaves as an open question whether anyone can rely upon its contents to make determinations about the individuals named.

As a matter of proof, Plaintiff is attempting to use the mere existence of its "barred list" as a proxy for proving that someone is threat to the health, safety and welfare of its residents. It is well within the authority of the Plaintiff management company to limit troublesome individuals from its property. It is also not unreasonable for the landlord to expect that tenants assist in keeping others safe by keeping those the management has identified as a risk from entering the premises. However, in doing so, Plaintiff must not be arbitrary and must have established parameters for how an individual is placed on the list. Not all criminal behavior (assuming that criminal behavior is the necessary grounds for inclusion in the list, which was the testimony to the Court) constitutes a threat to health, safety and welfare, and the mere assertion that someone constitutes a risk is not enough. The process by which one makes the list, if removal from it is possible, and the types of reasons for inclusion must be available to the residents. Only with that type of assurance of actual understanding that the process is meaningful can the landlord expect its residents to comply with the rule, let alone be grounds for immediate termination of the lease.

The Delaware Superior Court explored a similar issue in *Howell v. Justice of the Peace Court No. 16* (2007 WL 2319147). In Howell, the Superior Court determined that, when considering the lease provision at issue here, the Justice of the Peace Court must make specific findings, "(1) that the tenant, a member of the tenant's household, a guest or any other person under the tenant's control; (2) engaged in any criminal activity; (3) that threatens the health, safety or right to peaceful enjoyment of the Management's public housing premises by other residents or employees of the Management."[3] The third section being the most significant here, the Howell Court stated that the criminal activity must actually cause a negative impact. It is not simply the commission of a crime, but the proof that such crime threatened the health, safety or right to peaceful enjoyment of those related to the housing facility.[4]

It is only logical that allowing a barred individual on the property cannot be a threat to the health, safety and welfare of the other residents and therefore be grounds for immediate termination where the individuals on the list are not themselves a threat to tenants' health, safety and welfare. Plaintiff still needs to prove that the person on the barred list is an actual threat to health, safety and welfare of the community members. If that cannot be proven, then Plaintiff is limited only to a standard rules violation, necessitating notice and an opportunity to cure.

The necessity of proof is echoed by other courts as well, including the District of Columbia Superior Court, which held that the same lease provision at issue here required more than "mere documentation of criminal activity" to include an additional showing that the illegal act threatened the health and safety of other residents or disturbed their peaceful enjoyment of the property.[5] Similarly, In Powell v. Housing Authority of the City of Pittsburgh, the Pennsylvania Supreme Court determined that if Congress had intended this particular

[3] *Howell v. Justice of the Peace Court No. 16* (2007 WL 2319147 at *7).
[4] *Id.* At *7.
[5] *D.C. Housing Authority v. Whitfield*, 2004 WL 1789912 (D.C. Super.).

statute to impose strict liability eviction standards, it would have done so. By not imposing strict liability language, Congress intended this standard require some demonstrated causal connection between the crime and the threat to others.[6]

In the case before us, the question is a close call. Reliance on the list itself is of no help. Plaintiff failed to show that the process of placing individuals on the list has any serious rigor. There is no assurance that any individual on the list constitutes an actual threat to health, safety or welfare of residents. That said, the Court finds that Plaintiff did prove to a preponderance of the evidence that Stephon Belong's presence on the premises is a threat to the health, safety and welfare of the residents of the housing community.

Mr. Belong, while still a juvenile – was arrested on the property for the offenses of DUI and possession of marijuana (an offense for which the Court finds interesting that Mr. Belong's mother was evicted, but for which he was not placed on the barred list). Mr. Belong had another offense on the property – the offensive touching of a resident - for which he was placed on the barred list. In addition, he was found by police off-premises in a car with masks & BB guns. In short, the behavior of Mr. Belong is not only troubling, but increasing in severity and potential for disruption of the health, safety and welfare of the residents.

The Defense has argued that, even if Mr. Belong is appropriately on the list and is a threat to the community, there is no way that Ms. Greene knew or should have known that "Fonzy" was Stephon Belong. The Plaintiff responds that this is a strict liability standard and cites the *Maddrey* case for the proposition. Addressing the Plaintiff's contention first, the Court has reviewed both the Superior Court and Supreme Court decisions in *Maddrey* and has found nothing resembling an endorsement of the theory that a tenant is strictly liable for knowing the identity of any person who enters the property on their behest. The Court gives the benefit of the doubt to Plaintiff's counsel that this case was incorrectly cited, but, lacking other direction on the issue, the Court has considered the defense's position in this regard. The Court finds the position wanting.

Ms. Greene's testimony is that she only knew Mr. Belong as a passing acquaintance of her former boyfriend, who she had seen a couple of times and had only met a month or two before the incident. She testified that she allowed him to enter her apartment, unannounced, for the first time not in the company of anyone she knew because she was aware he was homeless and he said he needed a shower. This Court finds such a situation to strain the bounds of credibility to the point of breaking. Whether he constituted a threat to the health, safety and welfare of the community, such a stranger could certainly pose one to her or her child who was present in the unit.

Credibility is further strained by the assertion that she only knew him as "Fonzy" and therefore could not have known that he was on the list. Even if she did not know him as Stephon Belong, the list of barred individuals presented to the Court in evidence identifies one Alfonzo Johnson by his nickname – "Fonzy." There was no testimony that she made any attempt to determine that her friend "Fonzy" was not Mr. Johnson. In doing so she would have easily determined that this "Fonzy" was also banned from the property. Ms. Greene is either not being honest or had no intention of ensuring that those barred from the property by the management would not cause harm to the community. The Court is not disposed to reward either dishonesty or near intentional neglect.

Conclusion

The Court, after reviewing all the evidence, finds by a preponderance of the evidence that Stephon Belong's criminal history, both on and off the property, is of the character that his mere presence on the property constitutes a threat to the health, safety and welfare of the community. We also find that Ms. Greene knew or should have known that he was banned from the property. As such, the Plaintiff appropriately sought immediate termination and is entitled to possession.

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[6] *Powell v. Housing Authority of the City of Pittsburgh*, 812 A.2d 1201 (Pa. 2002).

Judgment is entered in favor of the Plaintiff and against the Defendant for possession of the rental unit. The Court also awards court costs in the amount of $58.75.

IT IS SO ORDERED 28th day of July, 2017

/s/Chief Magistrate Alan Davis
_____ **(SEAL)**
Justice of the Peace

Information on post-judgment procedures for default judgment on Trial De Novo is found in the attached sheet entitled Justice of the Peace Courts Civil Post-Judgment Procedures Three Judge Panel (J.P. Civ. Form No. 14A3J).