

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

CARVEL GARDENS ASSOCIATES LLC  
Plaintiff Below,  
Appellant

VS

THOMASINA JONES  
Defendant Below,  
Appellee

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§ C.A. No. JP17-19-005866  
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TRIAL DE NOVO

Submitted: December 5, 2019

Decided: January 23, 2020

**APPEARANCES:**

Plaintiff represented by David Zerbato, Esq.

Defendant self-represented at trial; represented by Anthony Sierzega, Esq., Community Legal Aid Society, Inc. for post-trial briefing.

Alan G Davis, Chief Magistrate

Deborah Keenan, Deputy Chief Magistrate

William P Wood, Justice of the Peace

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

**CIVIL ACTION NO: JP17-19-005866**

**CARVEL GARDENS ASSOCIATES LLC VS THOMASINA JONES**

**ORDER ON TRIAL DE NOVO**

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

Procedural Posture

Plaintiff, Carvel Gardens Associates LLC (hereinafter "Carvel Gardens"), brought this action in its capacity as landlord of a federally subsidized rental unit. It initiated the action September 26, 2019, seeking possession of the property based on a failure to pay rent and damages. A single Justice of the Peace heard the action on October 10, 2019 and found in favor of the defendant. Plaintiff brought a timely appeal.

The Court scheduled this case for a three judge panel to be heard on November 14, 2019. Chief Magistrate Davis, Judge Keenan and Judge Wood heard the appeal on that date. This is the Court's decision after trial and completion of supplementary briefing on the question of whether the Plaintiff had established the actual rental amount during trial. For the reasons stated below, the Court finds in favor of the Defendant.

Facts

Defendant, Thomasina Jones (hereinafter "Jones") rents a subsidized housing unit from Carvel Gardens. The initial rental agreement was signed and took effect on October 18, 2016. Rent under that agreement, which was admitted into evidence, was negative \$55, due to the then-current evaluation of Jones' financial status. Plaintiff presented the testimony of the assistant manager of the apartment complex, Betty Carmine, that Jones' rent at the time of the filing of the action was \$557 and that was her "regular rent" upon prompting questions of counsel.<sup>1</sup>

Carvel Gardens also introduced a ledger of Jones' transactions from the beginning of her tenancy. That ledger shows that the tenant had been charged \$557 for approximately 11 months, and that her rent had changed at least six times over the course of her tenancy to the date of the three-judge panel. That ledger also listed all items that could be considered "other rent" under the landlord-tenant code, including late fees and damages. As a result of those additional charges, Jones appeared to have a running balance for most of her time in the apartment, though she consistently paid the

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<sup>1</sup> See case hearing recording at 10:16:23 a.m.

COUNSEL: What was the rent charged for September, 2019?

CARMEAN: \$557.00

COUNSEL: That was her regular rent?

CARMEAN: Correct.

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claimed rental amount in a timely fashion. As of the date of the initiation of the litigation, Jones' ledger showed a balance of \$470.00. This amount included a fee applied the day before the case was filed, notated as "COURT – Legal Fee" for \$49. It also showed a late fee of \$28 applied on September 6, 2019.

The rental contract provides a couple of points salient to this matter. First, the landlord may charge for damages caused by the tenant due to "carelessness, misuse or neglect" as provided for in Paragraph 11 of the lease. Second, the landlord may charge a late fee of \$5 on the sixth day rent is late and a dollar a day thereafter, under Paragraph 5.

Carvel Gardens sent tenant a five-day notice of delinquency in rent. That notice demanded \$57 in rent, plus \$5 in late fees on September 6, 2019. The action that was filed on September 26, 2019 claimed a rental balance of \$57, plus a late fee of \$24. It also claimed for damages not yet paid of \$226. Subsequent to the filing, Jones made several payments, eventually coming even on her accounting, with the exception of the "COURT-Legal Fee", which the Plaintiff credited a few days before the trial de novo. Plaintiff reserved all rights with each payment.

Jones presented little in the way of a defense. She testified that she typically paid her rent timely.

The Court noted at the close of trial that Plaintiff had presented a lease that indicated a negative rental amount and that the only documentary evidence of the rental amount was the ledger, which had questionable charges on it. The Court requested briefing on the question of whether the Plaintiff had met its burden of proof with regard to a required element of the case, the rental amount.

#### Positions of the Parties

Carvel Gardens claims that Jones is delinquent in rent, was given appropriate notice and failed to cure within the appropriate time. Further, when Jones did make payment – outside the five-day cure period – plaintiff properly reserved its right to continue forward with the action to regain possession.

With regard to the question briefed for the Court, Plaintiff contends that Jones' course of conduct in paying the rental amount claimed, as evidenced in the ledger; the testimony of Betty Carmine; and the acquiescence of Jones to the evidence presented is sufficient to establish that rent was \$557.00.

On briefing, Defense Counsel argues that the lease is a complete representation of the agreement between the parties and, therefore, the Plaintiff cannot rely on parole evidence to prove the rental amount. Further, where the lease does provide for modification of rent, the Plaintiff must prove the methods by which that rent increase takes place, specifically that they must show that the requisite 30 days notice was given to the tenant before the rental increase.

In response to those positions, the plaintiff asserts that the lease makes provision for changes in rental amounts and is therefore not considered by the document itself or the law to be a complete understanding between the parties and that it could change according to the terms. As to the 30-day notice Plaintiff argues that it would be unfair to allow this argument, not made at trial, on evidence not contested at trial, to be brought at this time.

## Discussion

The Court has undeniably struggled with this case. While it is unusual to reveal such internal deliberations, multiple members of this panel have changed their positions multiple times. It is a troubling case for many reasons: Plaintiff was less than rigorous in its development of the case; Defendant was unrepresented and compliant, even acquiescent, to the process taking place, presenting no defense where there may have been one available to her; it involves subsidized housing, with all of the legal and personal implications of that case type; and the Court finds the reliability of the evidence that was presented somewhat circumspect. All of these factors have combined to cause the Court to deliberate on what it means to prove the elements of a summary possession case, especially involving subsidized housing.

Plaintiff always has the burden of proof on the essential elements of the case-in-chief, and is required to meet that burden at the “preponderance of the evidence” standard, indicating that something is more likely than not. Specifically, “...it means that certain evidence, when compared to the evidence opposed to it, has the more convincing force...”<sup>2</sup> As set forth in 25 *Del.C.* § 5702, an action for summary possession may be brought because a tenant allegedly failed to pay agreed upon rent or deducted money from an agreed upon rent. As such, in a landlord/ tenant summary possession action where failure to pay rent is alleged, the rental amount is a critical element of the case, along with what portion of the rent was unpaid and how the plaintiff arrived at that amount. Once the plaintiff meets that burden of proof, the burden shifts to the defense to overcome the preponderance on a factual or legal basis. It is also important to note, however, that the shifting of the burden to the defendant is a burden of production. The plaintiff at all times maintains the burden of persuasion.<sup>3</sup>

The plaintiff may meet that burden of proof in one of three different ways. The first option is testimonial evidence. The second is documentary evidence. Third, the plaintiff may benefit from an admission or stipulation on the part of the defendant. The Court will address each of these options in turn.

The testimonial evidence presented by plaintiff under these circumstances was insufficient to meet the burden of proof. Plaintiff relies on the testimony of Betty Carmine to partially establish that Jones’ rent is “more likely than not” \$557. The exchange noted above is the best evidence presented by Plaintiff of proof of the accurate rental amount of the tenant. However, it is not completely adequate in and of itself. The Court is aware that, in subsidized housing situations, rental amounts change due to changes in the circumstances of the tenant or modifications of housing allowances through the federal or state government. The rental contract lays out a process by which that change occurs. Plaintiff would have benefitted greatly from expanded testimony showing how - at the very least - the last rental change came to be. Plaintiff’s witness did not testify regarding any recertification to show how and why the rental amount had changed, which was significant given that the lease quoted a rent of negative \$55. Carmean testified that the \$557 rent was Jones’ “regular rent”, when, in fact, her rental amount had changed at least six times over the course of her tenancy.

The documentary evidence of the ledger itself also fails to meet the burden of proof. Although Plaintiff did submit additional documentary evidence that is consistent with the charges contained in the ledger, the ledger also contained charges that are either precluded by law or were unearned at the time they were posted. Although Plaintiff asserts that the addition of these charges does not go to the

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<sup>2</sup> *Grand Acquisition, LLC v. Passco Indian Springs DST*, 145 A.3d 990 (Del. Ch. 2016), *as revised* (Sept. 7, 2016), *aff’d*, 158 A.3d 449 (Del. 2017)

<sup>3</sup> *Quaker Hill Place v. Saville*, 523 A.2d 947 (Del. Super. Ct.), *aff’d*, 531 A.2d 201 (Del. 1987)

credibility of the rent charged, the Court disagrees. The credibility of one portion of such a document directly impacts the credibility of the document as a whole, since the ledger was controlled and maintained at all times only by the Plaintiff. In addition, since the amount in actual rent due claimed by Carvel Gardens in the original complaint was only \$57, there is sufficient mistrust on the part of the Court of this ledger that, it is as likely to the Court that no rent was due at all as it was that there was a delinquency.

Finally, Plaintiff asserts that Defendant's failure to produce any evidence, testimonial or documentary, is an admission or stipulation on the part of the Defendant to the rental amount claimed by the Plaintiff. Admissions have been defined as, "voluntary and knowing concessions of fact made by a party during judicial proceedings."<sup>4</sup> Although admissions are generally considered conclusive and binding against the party upon whom they operate, there was no indication in Defendant's testimony that her statements were a voluntary or knowing concession of fact; further, her most expansive statement was not made during testimony. While the Court is not giving leeway to Defendant due to her pro se status at trial, it must be cognizant of the fact that Defendant's failure to present much evidence in her defense does not automatically translate into an admission as defined above.

The Court wishes to be clear that this case should not be construed as some established rule that, in a subsidized housing situation, a plaintiff must produce evidence of all modifications to the rental amount. A best practice may be to testify or present documentary evidence in a trial setting of at least the last modification, but it is case dependent. In this particular case, the best testimonial evidence was undercut by a discrepancy between the lease and the testimony, along with the damaged credibility of the ledger. Had the ledger been without questionable entries, if Mrs. Carmine had testified a little more fully, or if there had been further documentary evidence of the last rental change this case may have had a different result.

#### Judgment

After lengthy and meaningful consideration, the Court finds that the Plaintiff did not meet its burden of proof through either testimonial or documentary evidence and the Defendant's lack of evidentiary production did not rise to the level of an admission or stipulation. Plaintiff's evidence suffered from credibility flaws that were not overcome by other evidence.

IT IS SO ORDERED 23rd day of January, 2020

/s/ Alan G Davis (SEAL)  
Chief Magistrate  
For the Three Judge Panel

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).

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<sup>4</sup> Merritt v. United Parcel Serv., 956 A.2d 1196, 1201 (Del. 2008)