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Summary of Mason McDuffie Real Estate v. Villa Fiore Development, 103 Nev. Adv. Op. 83

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CONTRACT LAW: LANDLORD TENANT

Summary

The Court determined that a commercial tenant may not be constructively evicted without “first providing the landlord notice of and a reasonable opportunity to cure the defect”, even when the defect persist after repeated failed attempts to cure by the landlord.

Background

Mason-McDuffie Real Estate leased commercial property from non-party Joe Hitch; Hitch sold to Villa Fiore in June 2007. Mason-McDuffie complained of water intrusion on multiple occasions in 2006 and 2007, resulting in a number of service calls, and eventually major roof repairs in the summer of 2006, and March and April of 2007. Hitch told Gary Arthur, property manager for Villa Fiore, about the roof problems and subsequent repairs.

In October 2007, Mason-McDuffie informed Villa Fiore of additional water leakage. Arthur visited the property and arranged repairs. Arthur testified that he gave Mason-McDuffie an emergency repair phone number at that time, but did not hear any further complaints.

Mason-McDuffie claims that there were additional leaks in the roof, witnessed by sales manager, David Hansen. Hansen testified there was major leaking in December 2007, and Arthur was called on multiple occasions between August and December 2007.

In December 2007, Mason-McDuffie hired a roofing engineer; engineers reported that the sections of the roof needed to be replaced. Mason-McDuffie did not provide this report to Arthur. Instead, Mason-McDuffie considered itself constructively evicted and vacated the premises.

Mason-McDuffie and Arthur exchanged voicemails, but there was no further contact between the parties. The district court found Mason-McDuffie had not complied with the “notice and cure” provision of the lease, requiring the landlord be given written notice and an opportunity to cure the defect, and ruled in favor of Villa Fiore.

Discussion

Standard of Review

The elements required of a constructive eviction are a question of law and are reviewed *de novo*².

Constructive eviction requires that the landlord have notice of and a reasonable opportunity to cure the defect.

¹ By Jessica Gandy.

² Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc., 130 Nev. ____ P. 3d ____, (Adv. Op. No. 68, Aug 7, 2014).

A party alleging constructive eviction must prove three elements: [1] the landlord must act or fail to act³; [2] the landlord's action or failure to act must render "the whole or a substantial part of the premises unfit for occupancy for the purpose for which it was leased"⁴; and [3] the tenant must vacate within a reasonable time⁵.

Villa Fiore argues there is a fourth element: the tenant must provide reasonable notice to the landlord and an opportunity to cure the defect. While the court had not previously considered this element, it found nothing to preclude discussion.

As the court had not previously considered this element, it looked to Washington⁶ and Illinois⁷ for guidance. Agreeing with these other jurisdictions, the court concluded that requiring a tenant to provide notice of and a reasonable opportunity to cure a defect as an element of constructive eviction protects both landlords' expectations in rental income and tenants' rights to possess the leased premises free from excessive intrusions by the landlord. A requirement of notice also encourages landlords and tenants to maintain open communication and solve problems outside of the court system.

The district court's findings are supported by substantial evidence, but they do not support a finding of constructive eviction.

The district court found Mason-McDuffie was constructively evicted, but relied on the "notice and cure" provision in the lease to find for Villa Fiore. Here, the court agrees that the three elements of constructive eviction are met, but these elements alone do not provide an equitable manner of deciding the issue of constructive eviction. For this reason, the court has introduced the fourth element of constructive eviction.

The court further explains that notice is especially important in circumstances where a defect has been previously identified and repaired. If the tenant does not give the landlord new notice of the continued problems, it is reasonable for the landlord to assume that the defect has been cured. Here, since Mason-McDuffie failed to advise Villa Fiore the roof was in further need of repair, Villa Fiore had no notice or opportunity to cure and thus the fourth element of constructive eviction was not satisfied.

Conclusion

The district court's factual findings did not support Mason-McDuffie's argument that it was constructively evicted because it found that Mason-McDuffie did not provide Villa Fiore notice of and a reasonable opportunity to cure the ongoing water intrusion. Judgment affirmed.

³ Yee v. Weiss, 110 Nev. 657, 660, 877 P.2d 510, 512 (1994).

⁴ *Id.*

⁵ Schultz v. Provenzano, 69 Nev. 324, 328, 251 P.2d 294, 296 (1952).

⁶ Pauge v. Petroleum Prods., Inc., 461 P. 2d 317, 319 (Wash. 1969).

⁷ Home Rentals Corp. v. Curtis, 602 N.E.2d 859, 863 (Ill. App. Ct. 1992).