STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

August 10, 2018

Honorable Steve Little
Justice Court Judge
Post Office Box 360
Glen, MS 38846

Re: Eviction

Dear Judge Little:

Attorney General Hood is in receipt of your request for an official opinion, and it has been assigned to me for research and reply.

Background and Issues Presented

Your request states:

> As to the first question per SB 2473, section 4 the Landlord has been given judgement for eviction. Can he or she set the tenant out before the warrant is actually issued if there is NOT a disturbance?
>
> **Section 4 Section 89-7-45, Mississippi Code of 1972,** is amended as follows:
> **89-7-45.** If the proceedings be founded upon the nonpayment of rent, the issuance of the warrant for the removal of the tenant shall be stayed if the person owing the rent shall, before the warrant***is actually issued, pay the full and complete amount of rent due, including any late fees that have accrued as a result of the nonpayment of rent as provided in the rental agreement, and the cost of the proceedings,*** to the person entitled to the rent, for the payment thereof and costs in ten (10) days, and if the rent and costs shall not be paid accordingly, the warrant shall issue as if the proceedings had not been stayed.
>
> **Second question,** in the past Mississippi Law has provided "Self-Help" Eviction that requires (1) the lease says the landlord has the right, (2) there has been proper notice of eviction given and (3) this be

accomplished with no "Breach of Peace", but if the landlord makes a mistake, they may be held liable for damages. Does this still hold true?

Response and Discussion

In regard to your first question, Miss. Code Ann. Section 89-7-45 states:

> If the proceedings be founded upon the nonpayment of rent, the issuance of the warrant for the removal of the tenant shall be stayed if the person owing the rent shall, before the warrant is actually issued, pay the full and complete amount of rent due, including any late fees that have accrued as a result of the nonpayment of rent as provided in the rental agreement, and the costs of the proceedings, to the person entitled to the rent, for the payment thereof and costs in ten (10) days; and if the rent and costs shall not be paid accordingly, the warrant shall then issue as if the proceedings had not been stayed.

This office previously opined:

> "If a summons is issued pursuant to Section 89-7-31 and the proceedings are founded on the non-payment of rent, the Court, pursuant to Section 89-7-45, is required to stay the issuance of a warrant of removal for ten (10) days and if the rent and costs are not paid within that ten (10) day period, the warrant of removal shall then issue." MS AG Op., Shirley (June 22, 2018)

Your question asks if the landlord has been given judgment for eviction for nonpayment of rent, can he or she set the tenant out before the warrant is actually issued if there is no disturbance. It is the opinion of this office that lack of a disturbance has no bearing on the removal of a tenant under this subsection. Since the court is required to stay the issuance of the warrant for ten (10) days to allow the tenant to pay rent and costs, it is the opinion of this office that the landlord cannot set the tenant out before the warrant is actually issued, regardless of whether there is a disturbance.

With regard to your second question, the Mississippi Supreme Court has found that "self-help" eviction is legal under certain circumstances. We direct you to *Clark v. Service Auto Co.,* 143 Miss. 602 (1926) where the Mississippi Supreme Court held:

> "Where the landlord is entitled to possession which is unlawfully withheld by his tenant, and the lease contract provides, as it does in effect in the present case, that the landlord may re-enter without legal proceedings, such a contract is binding to the extent that the landlord may re-enter, provided he does so without breaking doors, windows, or other passages of ingress, and neither uses nor threatens personal violence towards the tenant or those holding possession for him. Putting it differently, if the tenant yields possession without such breaking on the part of the landlord

> and without either the use of or the threat of personal violence by the latter against the tenant or those holding for him, the landlord's possession so taken is legal."

Although this case is from 1926, we find no case law or statutes in opposition to that holding. While this office does not opine on matters of liability, the court does address the issue in *Clark*, but states that the question of liability would be left up to the jury, meaning that liability would be determined on a case-by-case basis. I am enclosing a copy of the case for your convenience.

If we can be of further assistance, do not hesitate to call us.

Very truly yours,

JIM HOOD, ATTORNEY GENERAL

By: Emiko Hemleben

Emiko Hemleben
Special Assistant Attorney General

Enclosure

143 Miss. 602
Supreme Court of Mississippi, Division B.

CLARK et al.
v.
SERVICE AUTO CO.

No. 25425.
|
May 24, 1926.
|
Suggestion of Error Overruled June 21, 1926.

***704** *Syllabus by the Court.*

Though at common law nonpayment of rent, in absence of provision therefor in lease, does not operate as forfeiture of term or confer on lessor right of re–entry, a provision in lease for forfeiture and re–entry for nonpayment of rent is valid and enforceable.

Where landlord is entitled to possession unlawfully withheld by tenant, lease contract providing that landlord may re–enter without legal proceedings is binding to extent that landlord may re–enter, provided he does so without ***705** breaking doors, windows, or other passages of ingress, and neither uses nor threatens personal violence towards tenant or those holding for him.

Landlord, taking possession of leased premises on nonpayment of rent under lease giving him right to dispossess tenant for failure to pay rent, *held* not guilty of trespass on taking possession without use of physical force, though tenant did not consent to be ousted from leased premises.

Under lease for one year, with provision that, on nonpayment of any of monthly rent notes, landlord should have right to dispossess tenant, permitting three rent installments to remain unpaid *held* not to constitute waiver of default, since tenant was not permitted to hold over into another year without payment of accrued rent.

Landlord is liable to tenant for any unlawful conversion of personal property belonging to tenant and found on leased premises on landlord's taking possession of premises because of failure to pay rent.

Synopsis
Appeal from Circuit Court, Clay County; J. I. Sturdivant, Judge.

Action in trespass by the Service Auto Company against L. G. Clark and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

West Headnotes (5)

[1] Landlord and Tenant
⇐ Nonpayment of Rent

Provision in lease for forfeiture and re-entry for nonpayment of rent is valid and enforceable, though at common-law, in absence of such provision, nonpayment of rent does not operate as forfeiture or confer on lessor right of re-entry.

5 Cases that cite this headnote

[2] Landlord and Tenant
⇐ Waiver of Forfeiture

Permitting three rent installments to become in default under yearly lease providing for landlord's right to dispossess in default of any monthly payment held not waiver of tenant's default, where he was not permitted to hold over into another year.

1 Cases that cite this headnote

[3] Landlord and Tenant
⇐ Personal Property on Premises at Termination of Tenancy

Landlord is liable for conversion of personal property belonging to tenant found on leased premises on taking possession because of nonpayment of rent.

1 Cases that cite this headnote

[4] **Landlord and Tenant**
Right to reenter by force

Lease contract that landlord may re-enter without legal proceedings is binding to extent that landlord, entitled to possession unlawfully withheld, may re-enter without breaking doors or passages of ingress and without personal violence.

2 Cases that cite this headnote

[5] **Landlord and Tenant**
Judgment

Landlord, having taken possession of premises without use of force under lease giving him right to dispossess tenant on nonpayment of rent, held not guilty of trespass, though tenant did not consent to be ousted.

3 Cases that cite this headnote

Attorneys and Law Firms

McIntyre & Roberds, of West Point, for appellants.

Leftwich & Tubb, of Aberdeen, and J. E. Caradine, of West Point, for appellee.

Opinion

ANDERSON, J.

Appellee, Service Auto Company, a corporation under the laws of this state, brought this action in trespass in the circuit court of Clay county against appellants, L. G. Clark and H. E. Cox, to recover damages claimed by appellee, a tenant of appellant Clark, on account of the alleged unlawful ousting of appellee by appellants from the leased premises and the conversion to their own use of certain personal property situated on such premises. There was a trial resulting in a verdict and judgment in favor of appellee from which appellants prosecute this appeal.

Appellant Clark owned a lot in West Point on which was situated a building. In August, 1924, appellant Clark leased this lot and building to appellee for one year beginning September 1, 1924, and ending September 1, 1925. The lease contract was in writing as follows, leaving off the formal parts and signatures:
"This contract made by and between L. G. Clark of West Point, Miss., party of the first part, and the Service Auto Company of West Point, Miss., party of the second part, witnesseth:

First. That the party of the first part has rented to the party of the second part the same buildings that the party of the second part now occupy from September 1, 1924, to September 1, 1925. Said party of the second part has executed to the party of the first part, twelve promissory notes of $45 each, one payable 1st day of each month, beginning September 1, 1924, and one each month thereafter, until all are paid.

Second. The failure on the part of the party of the second part to pay either or any of these notes as they fall due makes them all become due and payable and gives the party of the first part the right to dispossess the party of the second part and take possession of said buildings, without further notice."

It will be observed from the contract that appellee agreed to pay a rental of $45 per month in advance on the 1st of each month for the period of the term. The monthly rent installments were evidenced by twelve promissory notes payable to the order of the appellant Clark at the Bank of West Point, where they were all placed for collection. H. C. Terrell was president of appellee company, and W. F. McCrary was secretary and manager, and, so far as the record shows, they were the only stockholders of the company.

Appellee operated on the leased premises what is known as an automobile garage, where it sold oil and gasoline and automobile parts and carried on an automobile service department in connection therewith. Appellee knew that the rent notes had been placed in the Bank of West Point for collection. The three notes due the 1st of September, the 1st of October, and the 1st of November, 1924, were not paid, although the bank had requested payment of appellee of each of them. These three notes all remained unpaid on the 13th of November, 1924.

On that date appellant Clark went into the building on the leased premises, and, without breaking or threats and without physical force or personal violence of any kind, and in the presence of appellee's employees in charge as well as of McCrary, its secretary and manager, declared the lease, forfeited for nonpayment of the past–due rent installments, and thereupon took charge of the premises ***706** and put appellant Cox, his new tenant, in possession.

Appellee's evidence tended to show that it did not consent to be ousted from the leased premises, but on the contrary protested and offered, if given an opportunity, to pay the overdue rent. The evidence showed without conflict, however, that appellee yielded possession to appellant Clark and his new tenant, appellant Cox, without the exercise on their part of either physical violence or the threat thereof. After so taking possession of the leased premises, appellants retained and used for a while the showcases therein and other personal property belonging to appellee. Later appellants notified appellee to remove from the leased premises all of its property therein except what had been levied on by distress for the rent against appellee on behalf of appellant Clark, which was in the custody of the officer making the levy. As a result of the re–entry and taking possession of the premises in the manner stated, appellee recovered damages of appellants in the sum of $3,000. The elements of damages which appellee's evidence tended to establish were the alleged unlawful trespass in re–entering the leased premises, the conversion by appellants of certain personal property therein belonging to appellee, and the loss of profits on appellee's business, which business was destroyed by the retaking of the premises.

The principal question presented and argued is whether appellants were guilty of a trespass in taking possession of the leased premises in the manner stated. The appellants' position is that they were justified by the last paragraph of the lease contract in so taking possession of the leased premises. Besides the general issue, appellants interposed a special plea to appellee's declaration, in which they set up the right of appellant Clark to re–enter the leased premises under the forfeiture clause of the lease contract because of the nonpayment of the rent installments, and the plea averred further that the re–entry was made "peaceably, without force or objection." Appellee's demurrer to this special plea was sustained.

Appellants requested a directed verdict in their favor, which was refused by the court. Appellee requested and was granted a directed verdict in its favor on the question of liability. The granting and refusal of these instructions is the main ground of error argued and relied on by the appellants. The question alone was submitted to the jury of the amount of damages suffered by appellee. The turning point on the question of liability for the alleged trespass depends on the meaning of the last paragraph of the lease contract, which provides, in substance, that a failure to pay any of the rent notes as they fell due shall give the landlord the right to dispossess the tenant and take possession of the leased premises without further notice.

[1] At common law, nonpayment of rent does not operate in the absence of a provision therefor in the lease as a forfeiture of the term or confer upon the lessor the right of re–entry. But, where there is a provision in the lease for forfeiture and re–entry for nonpayment of rent, such a provision is valid and enforceable. There seems to be no division of authority on this proposition. 16 R. C. L. p. 1126, § 647, and cases collated in the notes. Under such a stipulation in the lease contract, can the landlord re–enter without a legal proceeding? There are three lines of authority treating this subject.

The weight of authority is to the effect that, where the lessor is entitled to the possession of the leased premises by reason of a clause in the lease contract giving him the right of entry for a breach thereof, he is entitled to make re–entry by force, using no more force for that purpose than is reasonably necessary, and that he may do so without incurring any civil liability to the lessee. Such cases rest on the same foundation as cases where the term has expired by efflux of time; and statutes directed against forcible entries do not impose civil liability upon the landlord who, after his right to possession has accrued, forcibly ejects the tenant. The only liability, if any, incurred by the landlord in so entering, is criminal for assault or assault and battery, or other breach of the peace. There is another line of authorities holding that the right of the landlord to take forcible possession of the leased premises is not conducive to public order, and that the force used for that purpose must stop short of personal violence. There is still another line holding that the landlord is without right to make forcible entry, and is liable to the tenant in damages therefor. These latter decisions appear to be based on the ground of public policy. Some of the cases

are from states having statutes making a forcible entry upon land tortious, and some are based upon the fact that summary proceedings have been provided by statute through which the landlord may obtain speedy possession. 36 C. J. p. 600, § 1761; 16 R. C. L. p. 1143, § 663; and the authorities collated in the notes in each reference.

It was held in Moring v. Ables, 62 Miss. 263, 52 Am. Rep. 186, that a vendee of land in possession having no legal title thereto and having failed to comply with his contract of purchase could not recover possession of such land from one who, being the purchaser of the legal title thereof and having the right to make a peaceable entry thereon, took forcible possession of the land; that the only remedy in such case was resort to an action of unlawful entry and detainer. That case on its facts is not controlling here, but in the opinion the court discussed the principles governing the present case. The court said, in substance, that there was great diversity among the authorities upon the *707 question of the rights and remedies of an occupant of land who had been forcibly evicted by the owner having the undoubted right to make a peaceable entry; that the courts of this country occupied radically different positions on the question, and there was no little conflict among the English courts; that after the entry into power of the Norman conquerors a tenant under such circumstances had no civil remedy, and it was even doubtful whether the owner of land re–entering by force was subject to indictment unless guilty of a breach of the peace in addition to forcible entry; that the conflict of authority arose after the adoption of the statute (5 Rich. 2, c. 8) prohibiting the entry upon lands "'with strong hand nor with multitude of people, but only in a peaceable and easy manner, ' on pain of punishment," etc.; that, after the passage of that statute, some courts held that, since the act of entering by force was made unlawful, no right could arise from it, that a lawful possession could not be acquired by an unlawful act, and therefore the possession so acquired could not be interposed by the owner as a defense in any character of action; that another view declared by the majority of the English courts was that, though the tenant may recover damages against the landlord for any trespass against his person or property committed in making the forcible entry or in evicting the tenant after such entry, yet he could not recover damages done to the premises, since to an action of trespass quare clausum a plea of liberum tenementum could be successfully interposed by the owner, nor could the tenant recover possession of the premises in any other manner than provided by the statute against forcible entry and unlawful detainer; that in this country, as stated in 1 Washburn on Real Property, 538, the weight of authority was to the effect that, if the owner of land, unlawfully held by another, enter and expel the occupant, but makes use of no more force than is necessary to accomplish this, he would not be liable to an action of trespass quare clausum, nor for injury to the occupant's goods, nor for an assault and battery, although he might be liable to criminal prosecution for assault and battery. Judge Cooper who wrote the opinion for the court in that case concluded the discussion by stating that the courts of Vermont and Illinois stood alone in holding that a tenant who continues unlawfully in possession can, as against the owner who has made a forcible entry, recover damages in an action of trespass quare clausum, or possession of the premises by ejectment, and that the decided weight of authority by which the opposite view was sustained was especially applicable in this state, since here the action of ejectment was no longer a mere possessory action but one in which the title is tried, a judgment in which would conclude, not only the question of possession, but also the right of title. Winston v. Franklin Academy, 28 Miss. 118, 61 Am. Dec. 540, tends to support the same view.

[2] [3] Our landlord and tenant and unlawful entry and detainer statutes give the landlord, in the state of cases therein provided for, effectual and summary remedies for regaining possession of leased premises unlawfully withheld. We think those statutes declare the public policy of the state with reference to that subject. One of the purposes of these statutes was to furnish the landlord a peaceful as well as an effectual remedy. It was to prevent infractions of the criminal laws in regaining possession of lands unlawfully withheld. We hold contrary to the greater number of cases that a landlord cannot, by breaking or threats of personal violence or the exercise of such violence, regain possession of the leased premises, although entitled thereto under the law. But we go no further. Where the landlord is entitled to possession which is unlawfully withheld by his tenant, and the lease contract provides, as it does in effect in the present case, that the landlord may re–enter without legal proceedings, such a contract is binding to the extent that the landlord may re–enter, provided he does so without breaking doors, windows, or other passages of ingress, and neither uses nor threatens personal violence towards the tenant or those holding possession for him. Putting it differently, if the tenant yields possession without such breaking on the part of the landlord and without either the use of or the threat of personal violence by the latter against the tenant or

those holding for him, the landlord's possession so taken is legal. We see no evil results which could flow from such principle. It is only carrying out to that extent the contract of lease made between the parties. And we see no public policy that would be violated by such a principle. We hold, therefore, that under the undisputed facts in this case the landlord got possession of the leased premises, and in doing so was not guilty of a trespass.

[4] It is argued by appellee that appellant Clark condoned or waived appellee's default in paying the rent installments by permitting three installments to remain unpaid and appellee to hold over into another month. We do not think the principle invoked has any application to the facts of this case. This was not a letting by the month but for a specified period, one year, the rent to be paid in advance in monthly installments. There might be some force in appellee's position if the year had expired and the appellant Clark had permitted appellee to hold over into another year without payment of the accrued rent.

It follows from these views that the court erred in sustaining the appellee's demurrer ***708** to appellants' special plea, and also erred in directing a verdict for appellee on the question of liability for an unlawful trespass.

[5] It is true, however, that, notwithstanding appellants were lawfully in possession of the leased premises, they would be liable to appellee for any unlawful conversion to their use of the personal property belonging to appellee found by them on the leased premises. That question alone should have been left to the jury for determination.

Reversed and remanded.

All Citations

143 Miss. 602, 108 So. 704, 49 A.L.R. 511

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