

REMEDIES FOR TENANT DEFAULT UNDER REAL PROPERTY LEASES

**FORTY-FIFTH ANNUAL
BENCH BAR CONFERENCE**

Seven Springs Mountain Resort

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Acceleration of Future Rent

Homart Development Co. v. Sgrenci

662 A.2d 1092 (Pa. Super. Ct. 1995)

[W]here a landlord elects to terminate a lease and recover possession by *writ of habere facias*, following confession of judgment in an amicable action of ejectment, *he cannot also enter judgment against the tenant for the rent for the balance of the term which accrued after the judgment in ejectment, but became sooner payable under an acceleration clause in the lease for default in payment of prior installments of rent.* He cannot forfeit the lease, for default by the tenant, and recover possession, on the allegation that the lease then and there ended, and at the same time enter judgment against the tenant for the rent accruing after the eviction as if the lease were in full force and effect to the end of the term. He cannot *eject* the tenant and yet hold him responsible for rent accruing under the lease after the tenant has been evicted....He can eject the tenant and at the same time enter judgment for the rent accrued when the tenant was evicted;...but he cannot recover both the possession and the rent for the balance of the term....

Lease Termination

Mack v. Fennell

171 A.2d 844 (Pa. Super. Ct. 1961)

The court assumed, we think erroneously, that after February 28, 1958, the landlord was no longer entitled to rent, but was forced to seek damages which could be 'more or less than the rent previously charged.' It is true that *after* the entry of a judgment in ejectment a landlord cannot any longer collect rent, because he is then dealing the occupant of his premises as a trespasser, and not as a tenant. He can eject the tenant and at the same time enter judgment for the rent accrued when the tenant was evicted, but he cannot recover both the possession and the rent for the balance of the term. When the tenant unlawfully remained in possession subsequent to the expiration of the term, the landlord could elect either to collect rent for the occupancy or to deal with the occupant as trespasser and seek damages.

Pay and Stay Rule

Rule 518 of the PA Rules of Civil Procedure for Magisterial District Judges states:

At any time before actual delivery of the real property is made in execution of the order for possession, the defendant may, in a case for the recovery of possession solely because of failure to pay rent, satisfy the order for possession by paying to the executing officer the rent actually in arrears and the costs of the proceedings. The executing officer shall give the defendant a signed receipt for any such payment.

Self-Help (Residential Leases)

Wofford v. Vavreck

22 Pa. D.&C. 3d 444 (Pa.Com. Pl. 1981)

Our courts have a continual duty to reappraise old doctrines in light of the facts and values of contemporary life-particularly old common law doctrines which the courts themselves have created and developed: *Pugh v. Holmes*, 486 Pa. 272, 405 A. 2d 897 (1979). And when a doctrine has been duly tested by experience and found inconsistent with the sense of justice or the social welfare, there should be little hesitation in frank avowal and full abandonment: *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964).

There are numerous reasons why self-help evictions for nonpayment of rent should be abandoned. Obviously, the use of self-help increases the potential of violent confrontations between landlord and tenant. It is also less orderly than a proceeding at law and affords the tenants essentially no rights. Because self-help involves the taking of property (deprivation of shelter) without affording a tenant notice and an opportunity to present defenses or to otherwise be heard, it involves an arguable violation of due process: *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Moreover, the abandonment of the self-help eviction is but a natural judicial extension of the well settled doctrine and that a forfeiture of a leasehold is odious and must be strictly construed: *Elizabethtown Lodge No. 596 v. Ellis*, 391 Pa. 19, 137 A. 2d 286 (1958). By forbidding a private self-help repossession following a real or imagined forfeiture, and instead requiring a landlord to proceed by legal process, the judicial obligation to examine that forfeiture with close scrutiny is best served.

Finally, if not abandoned, self-help evictions would seriously undermine the protection inherent in the newly recognized implied warranty of habitability applicable to all residential leases: *Pugh, supra*. In *Pugh*, our Supreme Court held that the covenants and warranties in such a lease are mutually dependent; the tenant's obligation to pay rent and the landlord's obligation imposed by the

implied warranty of habitability to provide and maintain habitable premises are, therefore dependent and a material breach of one of these obligations will relieve the obligation of the other so long as the breach continues.

Thus, if a landlord breaches his implied warranty of habitability, a tenant is relieved of his duty to pay any or all of his rent. Nor must the unpaid rent be placed in escrow: *Pugh, supra*. Accordingly, a tenant, although relieved of his duty to pay rent because of what he perceives to be a breach of the landlord's warranty of habitability, becomes a sitting duck to a self-help eviction for failure to pay his rent. In fact, the threat of a self-help eviction, by making hollow the tenant's right to withhold rent, is the ultimate weapon by which a landlord could effectively subvert his obligation to deliver habitable premises.

...

If the void left by the abolishment of self-help cannot be adequately and effectively filled by the 1951 act, as amended, and the related rules of procedure, then any resulting unfair advantage to either landlord or tenant must be remedied by legislative correction.

Self-Help (Commercial Leases)

O'Brien v. Jacob Engle Foundation, Inc.

47 Pa. D.&C. 3d 557 (Pa. Com. Pl. 1987)

Whether or not a tenant at sufferance may be evicted by self-help need not be decided here because defendant conveniently forgets that it accepted \$500 in rent and in return allowed plaintiff to utilize the premises for over three months. At the very least that created a tenancy at will which legally precluded defendant from lawfully utilizing self-help to evict the plaintiff.

Abandonment and Reentry to Protect the Property

Hirsh v. Carbon Lehigh Intermediate Unit #21

65 Pa. D.&C. 4th 390 (Pa. Com. Pl. 2003)

The important distinction between *Homart* and the instant case is that tenant here has voluntarily relinquished possession of the property to landlord. Landlord has not sought judicial intervention to exclude tenant from the premises and is not seeking any such relief. Also, landlord has agreed to credit against the accelerated rent any rents that landlord is able to obtain from third parties for use of the leased premises while tenant is out of possession. In these circumstances there is no reason to be concerned about a double recovery. Landlord is not

asking the court to award him both possession and accelerated rent. He seeks a judgment only for the accelerated rent and other damages. He has re-entered and re-let the property not to exclude tenant, but for the purpose of protecting the property and mitigating the damages.

Surrender and Acceptance

Ralph v. Deily

293 Pa. 90, 141 A. 640 (1928)

When the lessee quits the premises with an intention to give up all rights to them, and to disengage himself from liabilities springing from the contract of lease, to make his effort effectual he must procure the lessor's assent, or, in other words, there must be a surrender. A surrender is the yielding up of an estate for years to him who has the immediate reversion, and the effect is to pass the estate of the tenant to the landlord, extinguishing the rent reserved. *Milling v. Becker*, 96 Pa. 182, 185. Surrender is a contractual act, and it occurs only through the consent of both parties, evidenced by an express agreement or unequivocal act of the parties which implies that they have agreed to consider the surrender as being made. *Felker v. Richardson*, 67 N. H. 509, 510, 32 A. 830, 831. Where assent has been given orally or in writing, no question can arise. The dispute occurs over the acts of the landlord as evidencing assent to the abandonment or a surrender of demised premises by implication of law. To show it, there must be evidence of acts so inconsistent with the terms of the first lease that the relation of landlord and tenant, established by the reletting, could not be enforced under the terms of the first lease. Such acts would indicate as a logical and reasonably necessary result that the lessor intended to accept the surrender tendered by the lessees. *Whitcomb v. Brant*, 90 N. J. Law, 245, 100 A. 175 L. R. A. 1917D, 609. These acts must be distinguished from acts of the landlord in protection of the property after an attempted surrender. The burden of showing such acceptance is on the lessee (*Auer v. Penn, supra; see, also, 35 O. J. 1094*), and is primarily a question of the landlord's intention. It is usually a question of fact for the jury (*Breuckmann v. Twibill*, 89 Pa. 58), but the evidence may be such as to make it one of law for the courts.

Tenant's Abandonment of Personal Property Left on the Premises

Hoyt v. Christofourou

692 A. 2d 217 (Pa. Super. 1997)

It is well-established that a lessor cannot infer abandonment of a lessee's personal property that remains at the leased premises following the tenant's departure. As we recently held in *Bednar v. Marino*, 435 Pa. Super. 417, 646 A. 2d 573 (1994):

As a general rule, a tenant does not forfeit or lose title to his personal property by neglecting to remove it from the leased premises after the termination of the lease. This is so even if the tenant fails to remove his personalty within a reasonable time after the expiration of the lease. Any retention, use or disposal of the tenant's property by the landlord, or any exercise of dominion over it to the exclusion of the rights of the tenants, constitutes a conversion of the tenant's property by the landlord.

...

Faced with the non-payment of rent and the possible abandonment of the premises, Trainer, as landlord, had two statutorily authorized options. First, Trainer could have obtained a Landlord Lien pursuant to 68 P.S. § 321. Second, Trainer could have availed himself of the distraint remedy provided for in 68 P.S. § 250.101 *et seq.* While the distraint remedy does contemplate sale of the lessee's property, strict notice requirements must be adhered to prior to lawful possession and disposition of the goods.

Instead of availing himself of one of these lawful options, Trainer unilaterally took possession of the equipment by physically barring the occupants of the restaurant from entering the premises. Undoubtedly, this constitutes an unauthorized exercise of dominion and control over the property and, thus, a conversion. *See Bednar, supra* 646 A. 2d at 578.

Cf. Allegheny Clarklift, Inc. v. Woodline Industries of Pennsylvania, Inc.

356 Pa. Super. 269, 514 A. 2d 606 (1986); holding the distinct provisions of the Landlord and Tenant Act unconstitutional:

Thus, the state having once authorized private action in conjunction with its own officials, must ensure at the outset that the procedural scheme to be followed is beyond (constitutional) reproach. This is never more true than where the owner of the distressed property is not the delinquent tenant, but a third party.

...

Finally appellant argues that because he gave notice, the demands of due process were met notwithstanding the Act's putative infirmity. When a similar contention was advanced in *Stots, supra*, the court found that once the statute was invalidated, the exemplary behavior of the implementing party became irrelevant. We see no reason to disagree.

Mitigation

While commercial landlords in Pennsylvania do not have a duty to mitigate damages, it is unclear whether residential landlords have a duty.

-In the 1882 case *Auer v. Penn*, 99 Pa. 370 (1882), the Pennsylvania Supreme Court said that landlords do not have a duty to mitigate damages.

-In 1979, however, the Pennsylvania Supreme Court said that leases were to be controlled by contract law, leading many to believe that since contract law required damages to be mitigated, the courts would also require landlords to mitigate damages. *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); Backer, pg. 75-76.

-In *Stonehedge Square Ltd. Partnership v. Movie Merchants Inc.*, 715 A.2d 1082, 1084 (Pa. 1998), the Supreme Court refused to overturn *Auer v. Penn* and held “that a non-breaching landlord whose tenant has abandoned the property in violation of the lease has no duty to mitigate damages.”

--“It seems self-evident that in choosing between requiring the non-breaching party and the breaching party to mitigate damages, the requirement, if any, should be placed on the breaching party, as it has been for centuries.”

-Further complicating matters, prior to the decision in *Stonehedge*, the Allegheny County Court of Common Pleas held in *Essex House Apartments v. Keyser*, 22 Pa. D&C. 4th 253, 260 (Pa. Com. Pl. 1994), that, “...*Pugh v. Holmes* establish[ed] that the principles of contract law, including contract remedies governing the breach of contractual obligations, govern residential leases, I find to be valid the tenant’s defense that the landlord failed to take reasonable measures to mitigate damages.”

-Commercial landlords clearly have no duty to mitigate damages, but it is uncertain whether residential landlords have a duty to mitigate or whether they can also follow *Stonehedge*.

Execution of Confession of Judgment

In *Jordan v. Fox, Rothschild, O’Brien & Frankel*, the 3rd Circuit determined that Pennsylvania’s garnishment procedure was unconstitutional because it violated due process by failing to provide adequate notice. *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994). In response, the Pennsylvania Rules of Civil Procedure were amended to ensure adequate notice. Rule 2970 states,

Except as otherwise provided in this chapter, the procedure in an action to enter a judgment in ejectment for possession of real property by confession pursuant to an instrument, other than a residential lease executed by a natural person,

authorizing such confession shall be in accordance with the rules relating to confession of judgment for money.¹

Rule 2973.2 requires that at least thirty days notice must be given to the property holder before filing the praecipe for a writ of possession.

Garnishment of Wages for Tenant Damages

The Pennsylvania Consolidated Statutes permit landlords to garnish a tenant's wages if the tenant has caused damage to the property. Only compensation for the damage to the property can be recovered in a garnishment proceeding; no garnishment is permitted for unpaid rent.

42 Pa. Cons. Stat. § 8127(a)-(d) requires in part that:

- any damages must first be subtracted from security deposit
- the landlord has the burden of proving that the security deposit was applied toward rent
- no more than 10% of net wages per pay period can be garnished and the debtor's income cannot be placed below the poverty level
- if the landlord fails to notify the clerk of court in the jurisdiction where the judgment arose within thirty days that the judgment has been satisfied, the landlord must return 1% of the original judgment to the debtor per day that the judgment is not recorded as satisfied
 - the total amount of penalty cannot exceed 50% of the value of the original judgment
 - this penalty can be recovered through supplemental proceedings

Additional Sources

Ronald G. Backer, *Pennsylvania Landlord Remedies: An Update*, 107 Dick. L. Rev. 75 (2002-2003).

¹ The rules relating to confession of judgment for money are found in Rules 2950-2967 of the Pennsylvania Rules of Civil Procedure.