10-1-1963

Landlord and Tenant -- Tenant's Liability for Increased Rent Demanded as a Condition of Holding Over

Donald M. Klein

chose to rely upon this propounded theory of "negligence in the air" with the novel result that it has now created a "reverse interpleader." Thus, a plaintiff who is injured joins all parties who are possibly responsible. Then, after he frees himself from fault and removes the possibility of unavoidable accident, the parties must battle among themselves as to who is not liable. This writer feels that this procedural "plaintiff's holiday" is repugnant to the entire concept of directed verdict and may, in turn, effect a change in the substantive law of negligence heretofore unrecognized in our system of jurisprudence.

THEODORE KLEIN

LANDLORD AND TENANT—TENANT'S LIABILITY FOR INCREASED RENT DEMANDED AS A CONDITION OF HOLDING OVER

The plaintiff sold a 320-acre tract to the defendant, taking back a purchase money mortgage. The plaintiff continued to dwell on the property without objection by the defendant. Subsequently, the parties executed a written lease for a fixed term at a rental of one dollar. The plaintiff held over when the lease expired, and the defendant served written notice that if the plaintiff did not vacate at once, he would be charged rent at the rate of 300 dollars per month for as long as he continued to occupy the premises. The plaintiff remained silent as to the notice and one year later, notice was again served on him quoting the same terms. When the defendant defaulted on a mortgage installment, the plaintiff sued to foreclose. The defendant counterclaimed for rent at the rate of 300 dollars per month, electing to treat the plaintiff as a tenant rather than as a trespasser and choosing not to hold the plaintiff under Florida's double rent statute.[1] The trial court dismissed the counterclaim on the grounds that the rented premises were not worth 300 dollars per month. On appeal, *held*, reversed: when a landlord demands of the tenant different rent for continued possession of property after the expiration of a lease, and the tenant thereafter continues in possession without protest, he impliedly agrees to pay the rent demanded. *David Properties, Inc. v. Selk*, 151 So.2d 334 (Fla. 1st Dist. 1963).[2]

tion of negligence was ultimately left for the jury to decide. However, the *Sheehan* court did not avail itself of this theory. Even had it done so, it does not appear that the situation in the instant case would have been materially altered. The court admitted the fact of the legal sufficiency of the evidence as to either defendant which would have justified submission of the question of negligence to the jury.

1. FLA. STAT. § 83.06 (1961). This section provides that "when any tenant shall refuse to give up possession of the premises at the end of his lease, the landlord or his agent, attorney or legal representatives, may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month, or in the manner pointed out hereinafter."

2. In the lower court the chancellor pointed out that the building was no more than

It has long been settled that when a tenant holds over at the expiration of his lease the landlord may elect to treat him as a wrongdoer or as a tenant for a new term.[3] This right of election in the landlord is exclusive to him, the tenant having no choice in the matter,[4] and the option to treat the tenant holding over as a tenant for a new term is said to rest on the theory that one should not be able to refute the existence of a landlord-tenant relationship by asserting that he is a wrongdoer.[5] The tenant's liability is quasi-contractual,[6] and in the absence of an agreement to the contrary the law will imply a continuance of the tenancy on the same terms as those contained in the expired lease.[7]

NOTICE OF NEW TERMS

The Apathetic Tenant

The law is considerably less settled, however, when prior to the expiration of the lease, the landlord notifies his tenant that upon holding over beyond the term of the lease, the latter will be held to a lease subject

---

a shack, having no rental value. In the district court of appeal, the tenant argued that since the chancellor found that the property had no rental value, the landlord was entitled to no damages. The tenant further argued that because the landlord did not demand double rent under the statute, he was again entitled to no damages.

Both of these contentions were rejected by the court above. Citing 32 A.L.R.2d 582, 584 (1953), the court pointed out:

> There is a difference, although it is not always clearly recognized, between an action for rent accrued during a period of holdover and for damages for depriving another of the use of property to which he is entitled during such period. . . .
>
> One situation which generally involves an action for rent as distinguished from an action for damages is that in which the lessor notifies the lessee that upon holding over beyond the expiration of the lease period, the latter will be charged a higher rental. The action in such case is usually upon the implied contract.

David Properties, Inc. v. Selk, 151 So.2d 334, 339-40 (Fla. 1st Dist. 1963).

3. City of Pittsburgh v. Charles Zubik & Sons, 404 Pa. 219, 171 A.2d 776 (1961); 1 RASCH, LANDLORD AND TENANT AND SUMMARY PROCEEDINGS § 134 (1950); 3 THOMPSON, REAL PROPERTY § 1024 (1959); 2 TIFFANY, LANDLORD AND TENANT § 209a (1912).

4. See 1 RASCH, *op. cit. supra* note 3, § 134. See also 3 THOMPSON, *op. cit. supra* note 3, § 1024; 2 TIFFANY, *op. cit. supra* note 3, § 209a.

5. *E.g.*, 2 TIFFANY, *op. cit. supra* note 3, § 209b.

6. That liability in such cases is founded upon an agreement which arises by implication of law rather than upon actual assent is evident from the fact that the tenant may be held liable notwithstanding any statements he may make evincing a contrary intention. *Ibid.*

7. This principle seems to carry almost universal acceptance in the American jurisdictions. See, *e.g.*, Wingert v. Prince, 123 So.2d 277 (Fla. 2d Dist. 1960).

The general principle holds true even though the tenant informs his landlord that he does not wish to renew their lease, since his intent to renew must be inferred from the act of holding over. It is thus the tenant's actions rather than his intent which give the landlord the right to treat him as a tenant for a renewed term. Cramer v. Baugher, 130 Md. 212, 100 Atl. 507 (1917); Tonkel v. Riteman, 163 Miss. 216, 141 So. 344 (1932); Williams v. King, 247 N.C. 581, 101 S.E.2d 308 (1958).

Rasch notes the importance of denoting the new tenancy as a renewal of the old term: "The holdover tenancy created at the election of the landlord is not an extension or prolongation of the original term. It is a new term for the new period, separate and distinct from that which preceded it." 1 RASCH, *op. cit. supra* note 3, § 165.

to new terms. The contract creating the new tenancy, if not expressly assented to, would then seem to be implied in fact,[8] the implication arising from the act of holding over after the tenant is notified that to do so will signify his assent to the new terms proposed.[9] It is thus generally held that if a landlord notifies his tenant for a fixed term[10] that the rent will increase if the tenant holds over, the tenant is liable for the increased rental if he in fact holds over, and either remains silent with respect to the notice or fails to dissent from the terms thereof.[11]

Since the liability of the tenant is governed by principles of contract law, we may now examine the question of what constitutes assent by the tenant to the new terms proposed. When the tenant expresses no dissent to the new terms but rather continues in silence to occupy the premises, the courts have spoken almost unanimously in holding that the act of holding over, in itself, raises the implication that the tenant has assented to the new terms,[12] although many of the decisions speak in terms of quasi-contract.[13] However, an occasional decision refuses to grant recovery on the contract in the absence of express assent.[14] As if to

8. See Buesch v. McCullough, 245 Ill. App. 68 (1927); Hunt v. Bailey, 39 Mo. 257 (1866). The relations between the parties or other circumstances may have been such as to have justified the offeror's expectation of a reply and his assumption that silence indicated assent to his proposal. WILLISTON & THOMPSON, CONTRACTS § 90 (1938).

9. See, *e.g.*, Higgins v. Halligan, 46 Ill. 173 (1867); Giordano v. Loperfide, 203 App. Div. 164, 196 N.Y. Supp. 472 (1922).

10. This note will deal only with a tenancy which by agreement will expire at some predetermined date in the future. It is beyond the scope of the note to discuss the effects of the landlord's notice of increased rent on one holding under a periodic tenancy or a tenancy at will, since such tenancies must be terminated by a seasonable notice.

11. 32 AM. JUR. *Landlord and Tenant* § 950 (1938); Annot., 109 A.L.R. 197 (1937). See also, *e.g.*, Sherriff v. Kromer, 232 Ill. App. 589 (1924); Heckman v. Walker, 167 Neb. 216, 92 N.W.2d 548 (1958); Best Realty Corp. v. Luftig, 234 N.Y.S.2d 462 (New York City Civ. Ct. 1962).

12. Higgins v. Halligan, 46 Ill. 173 (1867); Hunt v. Bailey, 39 Mo. 257 (1866); Heckman v. Walker, 167 Neb. 216, 92 N.W.2d 548 (1958); Giordano v. Loperfide, 203 App. Div. 164, 196 N.Y. Supp. 472 (1922); Machson v. Katz, 187 N.Y. Supp. 411 (New York City Munic. Ct. 1921); Walnut Hills Inv. Corp. v. Goodman, 109 Ohio App. 106, 163 N.E.2d 801 (1958); Glascock v. Marmon, 4 Tenn. Civ. App. 140 (1914); Amsden v. Floyd, 60 Vt. 386, 15 Atl. 332 (1888).

Higgins v. Halligan, *supra*, one of the very first cases to hand down the doctrine, found no trouble in formulating the rule in the absence of ostensible precedent, when it said:

> The inference is irresistible, that he was content to hold at the increased rent, and his assent thereto will be implied. The presumption, that he held, after this notice, on the terms of the original lease, is fully rebutted by his own act and conduct. Higgins v. Halligan, 46 Ill. 173, 179 (1867).

13. The courts seem to say that the tenant's silence is *in law*, a virtual assent to the terms prescribed in the notice. Despard v. Walbridge, 15 N.Y. 374, 376 (1857). For various expressions of the same rationale see the following: Reithman v. Brandenberg, 7 Colo. 480, 4 Pac. 788 (1884); Fordham Hill Associates v. Fiebach, 21 Misc. 2d 277, 193 N.Y.S.2d 677 (App. Div. 1959); Kaufman v. Bartels, 182 Misc. 128, 50 N.Y.S.2d 568 (App. Div. 1944); V.G.C. Realty Corp. v. Rosa, 193 N.Y.S.2d 678 (Munic. Ct. 1959); Beck Inv. Co. v. Ganser, 259 Wis. 69, 47 N.W.2d 490 (1951).

14. The tenant who remains silent and fails to express assent to the new terms is not made liable for the increased rent merely by his act of holding over. He must accept or reject the offer. Lautmann v. Miller, 158 Ind. 382, 63 N.E. 761 (1902).

strengthen their decisions with an embellishment of public policy, some courts, although holding the tenant liable on the implied contract, declare that to allow the tenant to substitute different terms merely by remaining in possession is to deprive the landlord of the control of his own property.[15]

The Tenant Who Objects—and Says So

It is this very conflict between adherence to settled principles of contract law and the right of the property owner to control the terms under which another may occupy his property that has split the American courts in cases where the tenant expresses dissent to the new terms proposed, but nevertheless holds over beyond the expiration of the lease. A number of decisions say that a tenant who holds over after notice of the new terms becomes absolutely liable notwithstanding his protests.[16] Some adopt the theory that the landlord is master over his property,[17] while others consider the act of holding over to be a powerful enough manifestation of assent to outweigh the tenant's most vehement protesta-

---

15. Sherriff v. Kromer, 232 Ill. App. 589 (1924). The dicta of a few decisions go even farther, stating that it is the *duty* of the tenant to vacate if he does not wish to accede to the landlord's demand. Hunt v. Bailey, 39 Mo. 257 (1866); Glascock v. Marmon, 4 Tenn. Civ. App. 140 (1914).

16. The New York decisions have been based erroneously upon Despard v. Walbridge, 15 N.Y. 374 (1857), a case in which the tenant's assent to the new terms was held to be manifested by his silence. Moreover, there was no consideration, even in dictum, of what the court might hold had the tenant objected to the new terms. Yet, one hundred years later, the New York courts hold the tenant liable over his protests on the basis of Despard v. Walbridge, *supra*. 4145 Corp. v. Brown, 189 N.Y.S.2d 500 (App. Div. 1959); Harrison v. Berkowitz, 202 Misc. 799, 109 N.Y.S.2d 722 (New York City Munic. Ct. 1951).

17. It has been said that a tenant cannot hold the premises after notice from the landlord and thereby fix his own terms of occupation. Sherriff v. Kromer, 232 Ill. App. 589 (1924); Scully v. Roche, 76 Misc. 458, 135 N.Y. Supp. 633 (App. Div. 1912).

In Griffin v. Knisely, 75 Ill. 411 (1874), the tenant protested the landlord's proposal before notice was sent, but failed to protest after he received the notice. Thus, the question of the liability of the tenant who protests a notice of increased rent was never decided. But in a dictum which has apparently affected subsequent decisions, the court explained that the tenant,

> Concedes that, if he had held over, after notice of the terms, without objection, he might be held responsible upon the contract. But what difference can his objection make? The property belonged to appellee, and he surely might charge for its use what he pleased. If appellant was not willing to accede to his terms, he should have left the property. He had no right to remain in possession against appellee's wishes, and force him to accept himself as a tenant, on the same terms that he held the property the preceding year. Griffin v. Knisely, 75 Ill. 411, 417 (1874).

Galloway v. Kerby, 9 Ill. App. 501 (1881) held that a tenant was not liable when he protested the increased rent after receipt of notice, and distinguished Griffin v. Knisely, *supra*, on its facts. But a later decision, Wilson v. Rodman, 243 Ill. App. 570 (1927), apparently ignored the *Galloway* decision and instead allowed recovery, citing *Griffin v. Knisely* as precedent.

It is generally held that the tenant who waits until the lease has expired before he first expresses an objection is in no better position than the tenant who remains silent throughout. Chun Yin Kok v. Woo See Wo, 30 Hawaii 29 (1929); Russells Factory Stores v. Fielden Furniture Co., 232 S.W.2d 592 (Tenn. App. 1950).

tions.[18] With the assistance of a remarkable piece of circular reasoning, one court has held the tenant liable in such situations by making use of the doubtful "presumption" that a tenant holds over on the landlord's terms rather than as a wrongdoer.[19]

The majority of jurisdictions, however, have denied liability when the tenant objects to the new terms proposed, notwithstanding his continued occupation.[20] It has been said that to allow the landlord to recover the rent demanded in such situations is not only unjust but also illogical; rent is the result of contract, and although a contract may be implied, no implication could arise where the party sought to be bound had dissented.[21] It is evident from the decisions that the concern of the courts is more with logic than with justice, since numerous cases denying liability declare in dicta that had the tenant remained silent his assent might be implied.[22] The courts have never pinpointed the elements that will amount to dissent sufficient to relieve the tenant of liability. They are apparently content that a refusal to pay the rent demanded,[23] a rejection of a new lease offered by the landlord,[24] or a tender by the tenant of a

18. Stees v. Bergmeier, 91 Minn. 513, 98 N.W. 648 (1904); Harrison v. Berkowitz, 202 Misc. 799, 109 N.Y.S.2d 722 (New York City Munic. Ct. 1951).

19. Moore v. Harter, 67 Ohio St. 250, 65 N.E. 883 (1902). It would seem more correct to say that the tenant holds over on the landlord's terms rather than as a trespasser because the landlord has elected to hold him as a tenant. See also text with note 3 *supra*.

20. *E.g.*, Meaher v. Pomeroy, 49 Ala. 146 (1873); Moll v. Main Motor Co., 213 Ark. 28, 210 S.W.2d 321 (1948); Colyear v. Tobriner, 7 Cal. 2d 735, 62 P.2d 741 (1936); Canning v. Fibush, 77 Cal. 196, 19 Pac. 376 (1888); Atkinson v. Cole, 16 Colo. 83, 26 Pac. 815 (1891); Lasher v. Heist, 126 Ill. App. 82 (1906); Galloway v. Kerby, 9 Ill. App. 501 (1881); Rodriguez v. Combes, 2 La. 275 (1819); Iorio v. Donnelly, 178 N.E.2d 28 (Mass. 1961); Abrams v. Sherwin, 269 Pa. 31, 112 Atl. 235 (1920); Pfingstl v. Chenot, 165 Pa. Super. 222, 67 A.2d 649 (1949).

21. Lane v. Greene, 21 Ohio App. 62, 152 N.E. 790 (1926). In Meaher v. Pomeroy, 49 Ala. 146 (1873) and Lasher v. Heist, 126 Ill. App. 82 (1906), the courts denied recovery on the principle that the law never implies a promise against the express declaration of a party sought to be charged.

In Galloway v. Kerby, 9 Ill. App. 501, 504 (1881), the court explained: "Such a right of recovery could, under the circumstances, arise only upon privity of contract; and mutual assent is the fundamental principle of all contracts."

In the first reported American case deciding the issue, the court denied liability on the grounds that no action for rent could be maintained where no contract existed between the parties. Rodriguez v. Combes, 2 La. 275 (1819).

The language varies only slightly. In Welk v. Bidwell, 136 Conn. 603, 606, 73 A.2d 295, 297 (1950):

> The crux of the matter lies in the fact that a lease is a contract. . . .Where there has been no meeting of the minds there is no contract. If a landlord insists on one rate of rental and the tenant insists on another, there is no meeting of the minds.

22. Meaher v. Pomeroy, 49 Ala. 146 (1873); Moll v. Main Motor Co., 213 Ark. 28, 210 S.W.2d 321 (1948); Cowell v. Snyder, 15 Cal. App. 634, 115 Pac. 961 (1911); Atkinson v. Cole, 16 Colo. 83, 26 Pac. 815 (1891); Welk v. Bidwell, 136 Conn. 603, 73 A.2d 295 (1950); Galloway v. Kerby, 9 Ill. App. 501 (1881).

23. Meaher v. Pomeroy, *supra* note 22; Welk v. Bidwell, *supra* note 22; Galloway v. Kerby, *supra* note 22. See also 52 C.J.S. *Landlord and Tenant* § 506 (1947).

24. Abrams v. Sherwin, 269 Pa. 31, 112 Atl. 235 (1920); Pfingstl v. Chenot, 165 Pa. Super. 222, 67 A.2d 649 (1949).

sum equal to the previous rent[25] will suffice to constitute a protest. In general, any reaction by the tenant beyond silence should be sufficient to destroy the element of assent necessary to the tenant's liability.

The cases which have refused to hold the tenant liable over his expressed objections to the landlord's demand nevertheless disagree as to the measure of damages for holding over. The majority of decisions seem to favor damages equal to the reasonable rental value of the property,[26] while other courts have assessed liability in terms of the rent stipulated in the expired lease.[27] A variant of the rental value standard imposes liability for the reasonable rental value of the premises provided that this sum is no greater than the stipulated rent of the former term.[28] It would seem that consistency of principle would be better served if damages were assessed at the rental stipulated in the previous lease, inasmuch as the tenant's refusal to assent to the new terms raises the implication in law that the holdover is subject to the terms of the previous lease.[29] Moreover, the reasonable rental value is more appropriately the standard of damages as against the trespasser.[30] If the landlord must elect to hold the defendant as either a tenant or a wrongdoer, and if the court has found that a contractual relationship of landlord and tenant does not exist, then by bringing suit for rent, the landlord should not be allowed to recover on a different theory in the same action.

FLORIDA FORECAST: THE OBJECTING TENANT

In the instant case the landlord did not notify the tenant until *after* their lease had expired that a higher rent would be demanded in the future. It is submitted, however, that the principles of law set out above are of equal application in such a situation. The principle that a tenant who holds over is, in the absence of a modifying agreement, subject to

---

25. Canning v. Fibush, 77 Cal. 196, 19 Pac. 376 (1888); Lasher v. Heist, 126 Ill. App. 82 (1906).

26. The courts have assessed damages equal to the reasonable rental value of the premises on the theory that the defendant, by objecting to the landlord's proposal, becomes a tenant at sufferance or a trespasser. Colyear v. Tobriner, 7 Cal. 2d 735, 62 P.2d 741 (1936); Cowell v. Snyder, 15 Cal. App. 634, 115 Pac. 961 (1911); Welk v. Bidwell, 136 Conn. 603, 73 A.2d 295 (1950); Holmes v. Freeman, 23 Conn. Supp. 504, 185 A.2d 88 (1963); Rodriguez v. Combes, 2 La. 275 (1819); Iorio v. Donnelly, 178 N.E.2d 28 (Mass. 1961).

In Abrams v. Sherwin, 269 Pa. 31, 112 Atl. 235 (1920), the tenant was held not liable for the rent demanded, but the court decided that by holding over he consented to pay a reasonable and compensatory rate.

27. Lasher v. Heist, 126 Ill. App. 82 (1906); De Young v. Buchanan, 23 Md. (10 Gill & J) 101 (1838); Pfingstl v. Chenot, 165 Pa. Super. 222, 67 A.2d 649 (1949).

28. Atkinson v. Cole, 16 Colo. 83, 26 Pac. 815 (1891).

29. See text with note 7 *supra*.

30. Greenberg v. Koppelow, 76 Cal. App. 2d 631, 173 P.2d 821 (1946); Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947). For a discussion of the liability of a holdover tenant when the landlord elects to treat him as a trespasser, see Annot., 32 A.L.R.2d 582 (1953).

the terms of the previous tenancy, would seem to be unaffected by the time at which the tenancy is modified by agreement. Although Florida has abrogated by statute[31] the common-law rule that holding over gives rise to a tenancy for the same term as the previous lease, this does not negate the existence of a new tenancy which arises by implication of law and which may be modified by contract.

Inasmuch as the instant case decided only the liability of the hold-over tenant who remains silent with respect to a notice that the previous rent will be increased, the Florida courts may have to decide whether their rule should be different in the case of the tenant who excepts to the landlord's demand. Although permitting recovery would seem to violate the principles of contract law by which the instant case was decided, there is much to be said for a rule which allows the property owner to establish the conditions by which another may use his property. If the tenant refuses to pay what the landlord asks, he may vacate the premises and seek a new location, or he may negotiate with the landlord for a different rental more to his liking. The courts, by holding that the tenant may stay on at the same rental as stipulated in the expired lease, make it possible for the tenant to stay on the premises while he shops around for another location at a better rent. In effect, this amounts to a judicial mandate extending the previous lease beyond the term mutually agreed upon by the parties, and moreover fails to give effect to a superseding contract created by an acceptance conforming to the manner provided for in the landlord's offer—*i.e.*, by the tenant's holding over. The severity of such a rule to the tenant could be minimized by allowing him to hold over at the former rental when his continued occupation is due to a bona fide dispute, or when the landlord's demand was prompted by knowledge that the tenant would be unable to vacate the premises on time.

DONALD M. KLEIN

INCOME TAX—DEDUCTIBILITY OF LEGAL FEES INCURRED DEFENDING INCOME PRODUCING PROPERTY IN A DIVORCE ACTION

When a California wife sued for divorce, her husband filed a cross-claim and won a complete victory. He, not the wife, was granted the divorce and her extensive property claims were completely denied.[1] The

31. FLA. STAT. § 83.04 (1961). This section provides that the tenancy which results shall be a tenancy at sufferance unless the landlord consents to the tenants' continued occupation, in which case a tenancy at will results.

1. The wife alleged that the earnings accumulated and retained by her husband's three controlled corporations were the product of his personal services, not the result of an accretion in capital values. Therefore she contended that his stockholdings in the enter-