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Tenants Holding over - Effect of Election and Negotiation by Landlord - Donnelly Adver. Corp v. Flaccomio

Edward J. Fisher III

Tenants Holding Over — Effect Of Election And Negotiation By Landlord

Donnelly Adver. Corp v. Flaccomio[1]

The tenant and its predecessors had leased certain premises since April, 1947 under an original three year lease and three successive one year leases all on the same terms. On November 16, 1955, appellant, the tenant, acquired the interests of the original tenant in the lease which was to expire on March 20, 1956. On February 29, 1956 tenant wrote to the appellee-landlord, confirming a previous verbal offer made by tenant for renewal of the lease at a lower rent for a five year term. On March 12, landlord's attorney answered that his client did not wish to lease for less rent than the previous years. Three days after the lease expired, March 23, the tenant wrote:

> " 'Due to the fact that the present lease has expired, and as you are aware, we are attempting to renegotiate a new lease with you.
>
> " 'We will continue on the same rental basis from month to month until such time as we can come to some agreement as to the future.

[1] 216 Md. 113, 140 A. 2d 165 (1958).

* * *

" 'Check for one month is enclosed.' "[2]

Shortly thereafter on March 30, landlord's attorney replied:

> " 'Your lease has expired and I have authorized * * * [the landlord] to deposit the one check which pays for the current month, but * * * [the landlord] desires me to inform you that she is not willing for you to continue on a month to month basis, but she will rent year to year.
>
> " 'Please arrange to sign a lease for a year or remove your property from the premises. . . .' "[3]

The parties failed to arrive at a rental agreement, and when tenant paid rent for the period from April 20 to May 20, he notified landlord of his intention to vacate on May 20, 1956. On the theory that tenant was holding over and the landlord could elect to treat him as a tenant from year to year, the landlord brought this action to recover two months rent. Tenant contended that the negotiations existing at the expiration of the lease negated any election at that time and, in addition, the acceptance of the check should be treated as an acceptance of the offer made by the tenant to create a month to month tenancy.

The trial court accepted the landlord's contention and, based upon an implied lease for another year, awarded the landlord two months rent and costs.

In affirming the judgment of the lower court for the landlord, the Court of Appeals found that the parties were not actually engaged in negotiation when the lease expired and that the landlord was entitled to treat this tenant as holding over. At his election he could hold tenant for another year or treat him as a trespasser and eject him. The Court also held that acceptance of a month's rent from a tenant holding over did not create a month to month tenancy even though an offer to that effect by the tenant accompanied the rent. The repudiation of the offer to rent on a month to month basis precluded the creation of a new tenancy.

In a dissenting opinion, Judge Prescott and Chief Judge Brune considered the correspondence indicative of nego-

[2] *Ibid.*, 119.
[3] *Ibid.*, 119.

tiations, emphasizing the fact that in the letter of the landlord's attorney on March 30, the attorney did not deny negotiations as stated in the tenant's previous letter, but accepted the check and stated that the landlord "is not willing for you [tenant] to *continue on a month to month basis*".[4] The dissent questioned how the tenant could "continue" on a month to month basis if he was not in that status when the check was tendered.

In early Maryland decisions, a tenant holding over was held for a renewal of the lease on the basis of an express or implied contract. In this the court accepted the English Rule which requires an agreement between the parties but is most liberal in finding contractual intent.[5] More recently, however, the Court of Appeals has adopted the American Rule giving to the landlord the option of treating the tenant holding over as a trespasser or a tenant under a new year to year lease.[6] This rule gives tenants no choice if they hold over,[7] and pending the landlord's election, they remain on the land as tenants at sufferance.[8]

It is generally accepted that the burden of evidencing the election within a reasonable time is upon the landlord, and the election must in some manner be made known to the tenant.[9] He may elect by formal language or by acts effecting that result.[10] However by inaction or silence the landlord may lose his privilege of election, and the pre-

[4] *Supra*, n. 1, *dis. op.* 128, 129. Bracketed material added.

[5] Hobbs v. Batory, 86 Md. 68, 70, 37 A. 713 (1897); Biggs v. Stueler, 93 Md. 100, 48 A. 727 (1901).

[6] Fetting Etc. Co. v. Waltz, 160 Md. 50, 152 A. 434 (1930). For a discussion of the difference between the two doctrines, see Note, *Effect of a Tenant for Years' Holding Over*, 3 Wis. L. Rev. 37 (1924).

[7] 1 TIFFANY, REAL PROPERTY (3rd ed. 1939) 282:
"It is somewhat surprising that the courts of this country, which have ordinarily shown a desire to mould the law in favor of the tenant rather than the landlord, should have originated and generally adopted a rule, the tendency of which is, in many cases, to operate with considerable severity upon a tenant. . . . However, it has been said that notwithstanding the rule imposes a penalty upon the individual tenant wrongfully holding over, a sound and rational basis is found for its adoption in the fact that it ultimately operates for the benefit of tenants as a class by its tendency to secure the agreed surrender of terms to incoming tenants who have severally yielded possession of other premises in anticipation of promptly entering into possession of the new, thus making for confidence and certainty in leasehold transactions."

[8] 51 C.J.S. 779, Landlord and Tenant, §175.

[9] Rose v. Congdon, 72 R.I. 21, 47 A. 2d 857, 860 (1946).

[10] Dragun v. Connolly, 2 N.J. Misc. 727, 125 A. 575 (1924).

sumption of new tenancy will be made.[11] The landlord may make only one choice, and having elected he is bound and may not afterward change his position.[12] The acceptance of rent by the landlord after the right to repossession of the land has accrued is inconsistent with the contention that the tenant continues in the status of a trespasser.[13] Under such circumstances the receipt of rent raises a presumption of waiver by the landlord of his right to treat the tenant as a trespasser.[14] The presumption seems to be rebuttable however, and a landlord who has expressly indicated to a tenant that he will not renew the tenancy under the terms of the lease will not be held to have consented to the renewal or extension merely because after the tenant has held over the landlord accepts rent from him.[15]

It appears that even though the landlord in this case accepted the check tendered by the tenant as rent for the period of holding over, he cannot be presumed to have elected to renew the term because of the tenor of the letter which he forwarded to tenant on March 30. The check, however, does not appear to be merely a payment of rent,

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[11] Baltimore & O. R. Co. v. West, 57 Ohio St. 161, 49 N.E. 344, 345 (1897); "Very slight acts on the part of the landlord, as a short lapse of time, are sufficient to conclude his election, and make the occupant his tenant."

[12] Peck v. Christman, 94 Ill. App. 435 (1900). But when the presumption has arisen, it may be rebutted. See Rainwater v. Preas, 32 Tenn. App. 79, 221 S.W. 2d 829, 830 (1949):

"Where the circumstances appear to indicate an intention not to terminate the relationship the burden is upon the lessor to rebut the presumption of an intention to extend the lease beyond the term. The presumption is rebuttable and not conclusive."

[13] Hall v. Myers, 43 Md. 446 (1876).

[14] Snee, *Acceptance of Rent as Waiver of Notice*, 17 Fordham L. Rev. 88 (1948).

[15] Kennedy v. Kenderian, 187 Misc. 861, 69 N.Y.S. 2d 121, 123 (1946):

"It is undoubtedly true that sentences and phrases can be excerpted from a large number of cases in many jurisdictions, which, standing by themselves, sustain tenant's position. These statements, taken out of their context, would make it appear that an acceptance of rent, by itself, irrevocably binds the landlord despite any other considerations. * * *

"A careful reading of these cases shows that they do not actually hold as strongly as tenant contends. The rule . . . seems to be . . . 'While . . . the payment by and acceptance of rent from a tenant holding over is generally held to create a tenancy for another term and to renew all rights and obligations incident to the relationship of landlord and tenant under the original lease, the presumption so raised is not conclusive but may be overcome by other circumstances attending the transaction which show that such was not the intention of the parties.' "

See also 45 A.L.R. 2d 827, 842.

but an integral component of an "offer" to lease on a month to month basis made in tenant's letter of March 23. The fact that the landlord-tenant relationship must arise out of a contract is well established.[16] The letter of the tenant, Donnelly, dated March 23, appears to meet the requirements of an offer,[17] and therefore the basic question appears: Can the landlord accept a check tendered in connection with an offer to lease on a month to month basis by the tenant, but at the same time decline the offer and treat the offeror as a tenant at sufferance requiring him to elect either to sign a written lease on a year to year basis or vacate the premises?

Acceptance of the offer could not have reasonably been implied from Flaccomio's conduct.[18] The modification of the offer by Flaccomio in the letter to Donnelly on March 30 rejected the original offer and appears to have had the effect of a counter-offer.[19] A flat rejection of this offer by Flaccomio would have terminated the existing negotiations, but clearly by proposing new terms in the letter Flaccomio did make a counter-offer which operated to renew or continue negotiations.[20]

Both the majority and dissent in the *Donnelly* case appear to agree that the acceptance of the check did not constitute an acceptance of the tenant's offer. The issue between them was whether the conduct did establish negotiations between the parties, thereby precluding the landlord from treating the tenant as holding over for another term. As was pointed out in the majority opinion:

> ". . . the landlord is entitled to treat the tenant *as a tenant holding over* for another term of one year unless the tenant has definitely established one of two circumstances: either (i) that the landlord *consented* . . . or (ii) that the parties were *actually engaged in*

[16] Regan v. Rogers, 68 R.I. 319, 27 A. 2d 302 (1942). In this case a new landlord wrote to the tenant telling him he had purchased the property and would call for the rent on the first of the month. The tenant did not answer the letter nor pay rent, and the court held the landlord's letter was only an offer. Since this offer was not accepted no landlord-tenant relationship existed and the tenant therefore was a tenant at sufferance entitled to statutory notice to quit. See also 51 C.J.S. 510, Landlord and Tenant, §2 b.

[17] 12 AM. JUR. 524, Contracts, §26.

[18] 1 WILLISTON, CONTRACTS (3rd ed. 1957), §90.

[19] *Op. cit. ibid.*, §77.

[20] 1 RESTATEMENT, CONTRACTS (1932) 66, §60; 12 AM. JUR. 543, Contracts, §53.

> *negotiations* as to a renewal of the lease when the previous term ended."[21]

Bouvier defines negotiation as "[t]he deliberation which takes place between the parties touching a proposed agreement."[22] As to the nature of negotiations:

> "To 'negotiate' is to transact business; to treat with another respecting a purchase and sale; to hold intercourse; to bargain or trade; to conduct communications or conferences. It is that which passes between parties . . . in the course of or incident to the making of a contract;. . . . The mere offer or solicitation, which meets with prompt refusal or rejection . . . cannot be regarded as negotiations within the meaning of the contract."[23]

When the tenant holds over pending completion of negotiations, by express or tacit consent of the landlord, the landlord is usually not permitted to treat the tenant as holding over for another term.[24] It appears in this case that the tenant was attempting to establish "negotiations" during the correspondence between the parties and in fact stated in his letter of March 23 that they were attempting to *renegotiate* for a new lease. Whether the landlord recognized the significance of this statement is unknown, but by (1) accepting the check, (2) counter-offering to rent on a year to year basis and (3) not refuting the fact that the parties were negotiating for a new lease, it appears that the landlord's conduct precluded him from afterwards exercising his election, as the dissent contended. If the tenant occupied the premises pending negotiations for a new lease, a tenancy at will may be presumed,[25] and the tenant

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[21] Donnelly Adver. Corp. v. Flaccomio, 216 Md. 113, 122, 140 A. 2d 165 (1958); see also Tonkel v. Riteman, 163 Miss. 216, 141 So. 344 (1932).

[22] 2 BOUVIER'S LAW DICTIONARY (3rd ed. 1914) 2331.

[23] Werner v. Hendricks, 121 Pa. Super. 46, 182 A. 748, 749. 750 (1936).

[24] Leggett v. Louisiana Purchase Exposition Co., 157 Mo. App. 108, 137 S.W. 893 (1911). In footnote 1 to the dissenting opinion of the Donnelly case, *supra* n. 1, *dis. op.* 128, this point is conceded by everyone and it is stated there that a tenant who holds over pending negotiations with express or tacit consent of the landlord does not afford the landlord an opportunity to treat the holding over as a lease for another term.

[25] 51 C.J.S. 769, Landlord and Tenant, §164. For a discussion of the difference between the tenant at sufferance and the tenant at will, see, Note, *Notice of Termination Required to Terminate a Periodic Tenancy Implied Under a Void Lease*, 9 Md. L. Rev. 362, 364 (1948), and Gem, Inc. v. Felton, 341 Pa. 96, 17 A. 2d 386 (1914).

is not subject to the arbitrary election of the landlord but may terminate the relationship and vacate with only 30 days statutory notice.[26]

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[26] Charter & P.L.L. of Balto. City (1949) §731; Darling Shops v. Balto. Center, 191 Md. 289, 60 A. 2d 669, 6 A.L.R. 2d 677 (1948) Following extended negotiations the tenancy may be determined by the measuring period of the rent. In Schilling v. Klein, 41 Ill. App. 209 (1921) the tenant held over, paid rent, and negotiated for a new lease. Terms were never agreed upon and the Court held that the negotiations were inconsistent with the previous lease and since the tenant was in possession paying a monthly rent, that in itself created a month to month tenancy.