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SUPREME COURT.

FILED

DEC 23 1972

State of Minnesota

In Supreme Court

JOHN MCCARTHY
CLERKTHE 614 COMPANY,
Plaintiff-Appellant,

vs.

D. H. OVERMYER CO., INC.,
Defendant-Respondent.

APPELLANT'S BRIEF AND APPENDIX

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Subscribed and sworn to before me this 7th day of November, 1971.

BARBARA M. HANSEN
Notary Public
Hennepin County, Minn.

(Title of Cause.)

FIRST INTERLOCUTORY ORDER

NO. 204678

The above-entitled action came duly on for trial before the undersigned judge of Municipal Court on the 9th day of November, 1972. Lowell J. Noleboom of Leonard, Street & Deinard, Attorneys at Law, Minneapolis, appeared for plaintiff. Richard D. Donohoo and Louis W. Brenner of Maun, Hazel, Green, Hayes, Simon and Aretz, Attorneys at Law, St. Paul, appeared for defendant.

At the trial, defendant moved to dismiss the complaint. The motion was taken under advisement. Thereafter testimony was taken. At the conclusion of the trial, the parties were given leave to submit simultaneous post-trial briefs. After the receipt of said briefs, parties submitted simultaneous reply briefs.

On all the files, records and proceedings herein, and the Court being fully advised in the premises, the Court enters the following Interlocutory Order.

1. IT IS HEREBY ORDERED that defendant's motion to dismiss be, and the same is hereby, denied.
2. IT IS FURTHER ORDERED that the above-en-

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titled case be set for further hearing on April 27, 1972, at 9 a.m., before the undersigned judge of Municipal Court in Room 1131 of the Courthouse, St. Paul, Minnesota, to take evidence on the following issues:

a. The amount of reasonable attorney's fees incurred by plaintiff up to April 27, 1972, to be paid by defendant D. H. Overmyer Co., Inc., a Minnesota Corporation, to plaintiff for violations of agreements and conditions of the lease between the parties dated February 28, 1969 (hereinafter referred to as "The Lease"), specifically defendant D. H. Overmyer Co., Inc.'s repeated and deliberate refusal to make timely payments of rent and additional rent in accordance with Section 3.01 and Section 3.03 of The Lease.

b. The amount of interest accrued up to April 27, 1972, to be paid by defendant D. H. Overmyer Co., Inc., to plaintiff, pursuant to Section 3.02 of The Lease, for late payments of rent and additional rent.

Dated at St. Paul, Minnesota, this 22nd day of April, 1972.

/s/ BERTRAND PORITSKY
Judge of Municipal Court

MEMORANDUM

This unlawful detainer action concerns a large warehouse constructed by defendant. According to defendant, it has a valuation in excess of one million dollars. In 1969 the parties entered into a sale-leaseback by which plaintiff

purchased the property from defendant and leased it, on February 28, 1969, back to defendant for a minimum term of twenty years, with options for two additional terms of ten years each.

This action was commenced in St. Paul Justice Court, from which defendant removed the matter to this Court. At the start of the trial, defendant made a motion to dismiss. The Court took the motion under advisement. The plaintiff presented evidence and the defendant rested without evidence. The parties thereafter submitted simultaneous briefs and following them simultaneous reply briefs.

I. Defendant's Motion to Dismiss.

Defendant's motion, dated November 12, 1970, is based upon plaintiff's failure to state a claim upon which relief can be granted against the defendant named in the complaint and failure to join an indispensable party. The two grounds are related.

The Lease states that the lessee is "D. H. Overmyer Co., Inc., . . . a Minnesota Corporation." Obviously, this entity is the proper defendant. The Summons and Complaint named "D H. Overmyer Co., a/k/a Internal Systems Leasing, Inc.," as the defendant. According to the return of the constable, D. H. Overmyer Co., and Internal Systems Leasing Inc., were served through service on C. T. Corporation Systems, agent for service.

It appears from the exhibits and the correspondence in the file that the Maun, Hazel Law Firm represented the defendant, whoever it was. It further appears that D. H. Overmyer Co., Inc., was put on notice of the action and was

given opportunity to defend, which it did. Thus the essence of this ground is that the Summons and Complaint did not denote the defendant as D. H. Overmyer Co., Inc. This omission is not grounds to dismiss. *Willard V. Marr*, 121 Minn. 23, 139 N.W. 1066 (1913).

II. Defendant's Grounds to Recover Possession of Premises.

Essentially, there are three grounds upon which plaintiff has relied in bringing this action.

1. Defendant's failure to pay interest because of late rental and tax escrow payments.
2. Defendant's failure to pay tax escrow payments of September, 1971.
3. Defendant's refusal to pay attorney's fees.

A. FACTS. With respect to each of the above grounds, this Court finds the following.

1. a. The rentals due under Section 3.01 of The Lease were and are due on the first day of each month, and interest of six percent per year is due on each payment received by plaintiff after the first, for the period of time the date due until the date the payment is received.

- b. All monthly tax escrow payments required under Section 3.03, starting with the payment due on March 1, 1971, were and are due on the first day of each month, and interest of eight percent per year is due on each tax escrow payment received by the plaintiff after the due date, for the period of time from the date due until the date the payment is received.

Handwritten initials and signature at the bottom right of the page.

c. Defendant has failed to make various rental and tax escrow payments on time as required by The Lease and is in default on paying the interest thereon. The failure to make timely payments is deliberate. The default on paying interest is a default in violation of 15.01 (a) (ii) of The Lease.

2. a. Defendant tendered the September, 1971, tax escrow payment to plaintiff in court.

b. The failure to pay the September, 1971, rental was cured by the tender of the same in Court, except as interest of eight percent per year is due on the payment, from September 1, 1971, until November 9, 1971.

3. a. Defendant's failure to make (i) timely payments of rental as required by Section 3.01 and (ii) timely tax escrow payments as required by Section 3.03 and defendant's failure to pay the interest as required by Section 3.02 was a violation of an agreement and condition of The Lease which was to be performed by defendant, within the meaning of Section 5.02 of The Lease.

b. Defendant is obligated under Section 5.02 to pay reasonable attorney's fees incurred as a result of defendant's violation of agreements and conditions of The Lease.

B. LAW. Discussion of the law governing each of the above findings is as follows.

1. General. The controlling statute is Minn. Stat. 504.02:

"In case of a lease of real property, when the landlord has a subsisting right of reentry for the failure of the

tenant to pay rent he may bring an action to recover possession of the property and such action is equivalent to a demand for the rent and a reentry upon the property; but if, at any time before possession has been delivered to the plaintiff on recovery in the action, the lessee or his successor in interest as to the whole or any part of the property pays to the plaintiff or brings into court the amount of the rent then in arrears, with interest and costs of the action, and an attorney's fee not exceeding \$5.00, and performs the other covenants on the part of the lessee, he may be restored to the possession and hold the property according to the terms of the original lease."

The essential operation of this statute is to give the tenant the opportunity to retain possession by paying all monies due to the landlord, in cases where the landlord is attempting to oust him for failure to pay rent. This opportunity exists as long as the defendant remains in possession.

The statute uses the word "rent." According to Section 3.01 of The Lease the monthly payment for use of the premises is rent. According to Section 3.02 "all amounts, liabilities and obligations which Tenant assumes or agrees to pay, discharge or perform pursuant to this Lease" are "additional rent." Thus, according to The Lease, all sums due are "rent" and fall within the provisions of Minn. Stat. 504.02. Such a construction of the statute and lease is consistent with the purpose of the statute, which is to give tenants a right to bring their account up to date and retain possession where they are in default on payments, in distinction to other cases, such as waste or violation of a covenant against subletting, where the tenant would have no such opportunity.

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Plaintiff has argued that this statute is of equitable origin, and therefore, in order to obtain its protection, the defendant must have done equity, citing *Molyneux v. Town House, Inc.*, 195 A. 2d 744 (D.C.C.A. 1963). However, in *Molyneux* the doctrine upon which the tenant relied was a purely equitable doctrine, and not statutory as in *Minnesota*. Moreover, to deny defendant the operation of the statute would result in a forfeiture of a large and expensive tract of commercial real estate in which defendant has a forty-year lease, and this forfeiture would result from a nonpayment of relatively small disputed amounts. Such forfeitures are not favored if the party seeking the forfeiture is adequately protected by other means than the forfeiture. *Kostakes v. Daly*, 246 Minn. 312, 75 NW 2d 191 (1956). The plaintiff is adequately protected in that this Court has determined defendant must pay interest on the late payments and attorney's fees which plaintiff has incurred by result of defendant's actions.

Plaintiff has further argued that Minn. Stat. 504.02 is not available to defendant because:

"The statute permits redemption only where the landlord has brought an action in unlawful detainer for failure to pay rent. Such an action is not predicated upon a prior termination of the lease, nor does the commencement of the action effect such a termination. *First Minneapolis Trust Co. v. Lancaster Corp. Co.*, 185 Minn. 121, 240 NW 459 (1931). Where, as here, the lease has been previously terminated by the landlord, there is no provision in the statute permitting the tenant to redeem." Plaintiff's Memorandum of Law, p. 11.

This Court does not read the cited case so as to make

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Minn. Stat. 504.02 unavailable to defendant. In *Lancaster*, it appears from the opinion that the tenant did not tender any of the rent or tax payments to the landlord while the tenant was still in possession of the premises. Nor is there any discussion in the opinion of what might have occurred had the Minneapolis Municipal Court given the tenant the opportunity to pay the arrearages, as is being done in this case. The tender of arrearages was not before the court in *Lancaster*. The best the case could stand for, from plaintiff's point of view, is that the Supreme Court says there is a difference in various kinds of unlawful detainer cases, and this implication arises out of the following dicta:

"Indeed, in such a proceeding as this it is not contended that the lease is terminated, and it is not upon that theory that such an action founded upon the failure to pay rent is prosecuted. In this kind of a proceeding the landlord seeks primarily to secure payment of the rent due; and, as an alternative, in case the rent is not paid, to secure possession of the premises. *G. S. 1923 (2 Mason, 1927) § 8187*, provides that the tenant may at any time before possession is delivered to plaintiff pay up and retain possession." 185 Minn. 132.

There is, however, no language in the case that says "that the statute is not available to a tenant if the landlord acts to terminate the lease prior to bringing the unlawful detainer, and plaintiff's interpretation to this effect is strained. This Court fails to perceive how the landlord's intention, whether it be to secure payment of the rent due or secure possession of the premises, makes any difference under the statute. In all unlawful detainer actions, the landlord seeks to regain possession of the premises. In all un-

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lawful detainer actions brought for failure to pay monies to the landlord, the tenant has the right to bring his account up to date and retain possession of the premises. Minn. Stat. 504.02 does not recognize a distinction in unlawful detainer cases based on the intention of the landlord. The statute applies to cases "when the landlord has a subsisting right of reentry for the failure of the tenant to pay rent . . ." Thus the argument plaintiff raises in this connection is not only based on a strained interpretation of dicta, it flies in the face of the plain language of the statute.

It is the Court's intention to take testimony on interest payment's and attorney's fees at the hearing of April 27, 1972, after which an order will be entered determining defendant's liability on these hitherto disputed items. Defendant will thereafter be given a short time to pay the amounts. If defendant fails to do so, judgment will be entered in favor of plaintiff. If defendant makes the payments it will have complied with Minn. Stat. 504.02 and judgment will be entered in favor of defendant.

A discussion of the specific items is as follows.

2. Interest payments.

Under Section 3.02 of The Lease interest is to run from the due date on both rental and tax escrow payments. The ten-day provision of 15.01 does not, as defendant implies on page 7 of its brief, determine when the interest is to start running. It merely gives the tenant a reasonable length of time to pay interest (or other monies) after notice.

3. September, 1971, Tax Escrow Payment.

This amount was tendered at trial, and under Minn. Stat.

504.02 the defendant has substantially complied. Although defendant has not paid the interest and costs of the action and an attorney's fee of \$5.00, under the cited statute it may do so as long as it is in possession. Upon such payment, defendant will have fully complied with the statute and be entitled to its operation.

4. Attorney's Fees.

The parties have agreed that Section 5.02 of The Lease controls attorney's fees. Under this section, as defendant has conceded, plaintiff was obligated to show:

"1. Violation of any agreement or condition of the Lease, and

"2. Said violation resulted in an expense of attorney's fees to plaintiff, and

"3. The amount and reasonableness of the attorney's fees required to be paid by Landlord." Defendant's brief page 10.

At the trial, plaintiff proved the first requirement. The second was shown by the evidence of trial and by the fact of this lawsuit, of which the Court takes judicial notice. Plaintiff having established these facts and shown that there is liability for attorney's fees, this Court is of the opinion that the most expeditious [sic] manner to handle this issue is to allow the exact amount of liability to be determined, so that defendant can pay the attorney's fees and therefore avail itself of the protection of Minn. Stat. 504.02.

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CONCLUSION.

Minn. Stat. 504.02 gives the Court the authority to allow a tenant to bring its account to the landlord up to date in order to retain possession. The two items upon which plaintiff bases its right to terminate the lease—interest payments and attorney's fees—were disputed. It would work a forfeiture to enter judgment in favor of plaintiff and give it possession at this time. Such forfeitures are not favored, especially since plaintiff has alternate protection, i.e. interest on late payments and all attorney's fees incurred by reason of defendant's default. For these reasons, the Court will not enter judgment in favor of defendant at this time, even though defendant was shown to be in default.

B.P.

(Title of Cause.)

614 COMPANY'S SUPPLEMENTAL COMPLAINT

NO. 204678

Plaintiff, the 614 Company for its Supplemental Complaint against the defendant, D. H. Overmyer Co., Inc., alleges and states as follows:

1. Repeats, realleges and incorporates by reference each and every allegation of the original verified Complaint dated October 5, 1971 on file herein.
2. Since the date of the trial before this Court on November 9, 1971, defendant has continued to fail and refuse to pay monthly rental payments in the amount of \$7,395 in a timely manner when due, has failed and re-

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(Title of Cause.)

SECOND INTERLOCUTORY ORDER

NO. 204678

The above-entitled action came duly on for hearing before the undersigned judge of Municipal Court on the 27th day of April, 1972. The matter was before the Court pursuant to order of the Court in this matter dated April 22, 1972. Lowell J. Noteboom of Leonard, Street and Deinard, Attorneys at Law, Minneapolis, appeared for plaintiff, and Richard D. Donohoo of Maun, Hazel, Green, Hayes, Simon and Arcetz, Attorneys at Law, St. Paul, appeared for defendant.

At the hearing plaintiff presented evidence and defendant rested without evidence. At the conclusion of the hearing, defendant was given until May 8, 1972, to submit written reply to plaintiff's evidence, which reply has been received and considered by the Court.

On all the files, records and proceedings herein, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant pay the following sums to plaintiff and that proof of such payment be filed with the Clerk of this Court at or before 4:30 p.m., on July 7, 1972:

1. Two tax escrow payments in the amount of \$5,375.69 each due on the first days of January and February, 1972, and four tax escrow payments in the amount of \$3,535.89 each due on the first days of March, April, May and June, 1972, for a total tax escrow payments in the amount of \$24,894.94.

2. \$204.21 representing interest due on late rental payments as of May 8, 1972, and \$1,171.72 representing interest due on late tax escrow payments as of May 8, 1972, for a total interest due as of May 8, 1972, in the amount of \$1,375.93.
3. Attorneys' fees, pursuant to Minn. Stat. 504.02 in the amount of \$5.00.
4. Attorneys' fees pursuant to Paragraph 5.02 of the lease between the parties herein dated February 28, 1969, in the amount of \$4,000.00 and disbursements in the amount of \$49.12.

Dated at St. Paul, Minnesota, this 9th day of June, 1972.

/s/ BERTRAND PORITSKY
Judge of Municipal Court

MEMORANDUM

This proceeding is an unlawful detainer. It is, however, a substantial and complex matter. As defendant has pointed out, the property involved is a large tract of commercial real estate, with a valuation in excess of one million dollars. This action concerns a complex lease, fifty pages in length with numerous attachments. The sums secured by plaintiff as a result of this action are large. This action involved various court hearings, briefs, reply briefs, and correspondence with the Court.

Most importantly, in the opinion of this Court, the case involved two large commercial interests which entered into a negotiated contract, presumably for the mutual bene-

fit of the parties. Thereafter, defendant deliberately undertook to finance its operation with funds that belonged, under the contract, to the plaintiff. This deliberate course of action on the part of defendant caused the plaintiff to require legal services, both prior to bringing the action and during the course of the action. At no time did defendant offer any excuse for its repeated and deliberate failure to make timely payments, and at one point defendant had retained over \$16,000.00 in funds which, under the contract, belonged to the plaintiff. But for the operation of Minn. Stat. 504.02, and the rule of Minnesota Common Law which holds that forfeitures are not favored, plaintiff would have been entitled to the real estate involved, and defendant would have lost a forty-year right to possession to commercial real estate with a value of over a million dollars.

On all the facts and circumstances, this Court is of the opinion that the figure of \$4,000.00 is a reasonable fee within the meaning of Section 5.02 of the lease. It represents a figure of somewhat less than \$35.00 an hour for all the work performed by plaintiff's attorneys as a result of services which were necessitated by defendant's deliberate defaults under the lease.

As the Court indicated in its Memorandum opinion attached to the order of April 22, 1972, the defendant will have one month in which to pay the sums required by the attached order. If the defendant complies with the attached order, judgment will be entered in its favor. If the defendant fails to comply with the attached order in each and every particular, judgment will be entered in favor of

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plaintiff, awarding it immediate possession of the premises in question.

B.P.

(Title of Cause.)

ORDER FOR JUDGMENT

Pursuant to the Order of the Honorable Bertrand Poritsky, Judge of this Court, dated the 9th day of June, 1972, and said Order's Subpended [sic] Memorandum, and it appearing that all the payments in said Order to be made by the Defendant to the Plaintiff have been made, and the undersigned having been requested by the said Honorable Bertrand Poritsky, Judge of this Court, prior to his temporary departure from the city to make the following Order upon such payments being made,

IT IS ORDERED that judgment be entered in favor of the Defendant.

DATED: This 20th day of July, 1972.

CLIFFORD JANES

Judge

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