IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
****

CECILIA DENNERY,	**CIVIL NO. ST-09-CV-561**
Plaintiff,	**ACTION FOR FORCIBLE ENTRY AND DETAINER**
vs.	
MEDINA HENRY,	
Defendant.	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on appeal from a December 28, 2009 Judgment entered by Magistrate Alan Smith of the Superior Court of the Virgin Islands, Magistrate Division. For the reasons stated below, the Court will affirm the Judgment and will lift the stay of execution on the Judgment.

I. FACTUAL AND PROCEDURAL POSTURE

A. Background[1]

This matter arose in late March 2009 when Plaintiff Cecilia Dennery ("Dennery") agreed to allow a childhood friend, Defendant Medina Henry ("Henry"), to rent a portion of her home. Henry told Dennery that she was having financial difficulties and could not pay the rent at the apartment she was currently occupying. Dennery therefore orally agreed with Henry that Henry could rent part of the home located at 10-22 Estate Mariendahl, St. Thomas, U.S. Virgin Islands. In exchange for possession, Henry was required to provide monthly rent. Each month she was required to pay Three Hundred Dollars ($300.00) in cash and Two Hundred Dollars ($200.00) in services.

[1] Because Henry did not appear at the trial, as discussed below, the facts are taken from the testimony of Plaintiff Cecilia Dennery, the only witness to testify at the March 11, 2010 trial.

Within a short time after agreeing to rent the apartment to Henry, Dennery decided that she had made a "mistake," and sought restitution of her premises. Henry agreed to leave the property by early May. In exchange for Henry's agreement to leave, Dennery agreed to provide certain funds to Henry that were to be used to move her property out of the home. Dennery gave Henry cash in the approximate amount of Nine Hundred Dollars ($900.00). However, Henry refused to leave the premises.

On October 14, 2009, Denney served Henry with a copy of a thirty (30) day notice to quit. However, Henry remained on the property past the expiration of the thirty-day period. On November 18, 2009, Dennery filed her Complaint in this matter.

B. Proceedings in the Magistrate Division

Because Dennery's Complaint states an action for forcible entry and detainer ("FED"), pursuant to V.I. CODE ANN tit. 28, § 782 (1996), her case was heard in the Magistrate Division. V.I. CODE ANN. tit. 4, § 123(a) (1997). A hearing was scheduled for December 16, 2009. Because the transcript has not been provided to the Court, it is unclear exactly what transpired during the hearing in the Magistrate Division. It is clear that both parties appeared. Henry appeared *pro se* and Dennery appeared telephonically and through her counsel, Christopher Johnson, Esq., of The Bornn Firm, PLLC. Both parties provided documentary evidence.

Magistrate Alan Smith initially found that there was no lease agreement between the parties, and that their agreement was more appropriately considered an employment agreement. Magistrate Smith suggested that the matter might not be an FED action and continued the hearing until the following day in order to make his findings. On December 17, 2009, the hearing resumed. It

becomes even more unclear what transpired next. The Record of Proceedings prepared by the clerk states that "[t]he Court found that there were [sic] no lease nor any money collected for rent in this matter. The Court found that according to the Third Circuit the law clearly states that an FED action can be filed once there were [sic] written or verbal agreement in reference to a lease agreement and rent was being collected. The Court found Plaintiff stated there was a lease agreement whereas the defendant stated this was a business agreement (employment relationship). The Court finds that even if there was a [sic] employment arrangement between the two it doesn't give the defendant the right to poscession [sic]. The court found that there needed to be additional documents provided to the Court. The Court doesn't find that the defendant exhibits [sic] is sufficient enough to allow her to continue living on the premises. The Court granted judgment of restitution."

Thereafter, on December 28, 2009, Magistrate Smith entered a written Judgment granting Dennery restitution of her premises, but stayed the restitution until December 31, 2009, at 11:59 p.m. On December 17, 2009, Henry filed a handwritten letter of appeal. Her appeal stated that the notice to quit was "unfair" and "insufficient." On December 30, 2009, Henry faxed the Court another handwritten note. That note stated that the Judgment in this matter "is in conflict with case no. 365/09 that was held on 8/25/09 with the honorable Judge Kathleen MacKay." Henry's notations appear to refer to an Order issued by Magistrate MacKay on September 15, 2009 in case number ST-09-CV-365. In that Order, Magistrate MacKay stated that the matter came on for trial on August 25, 2009, and that the Notice to Quit was insufficient because Henry is a "tenant at will and must be given ninety (90) days notice." The Order dismissed the action in case number ST-09-

CV-365.

Henry also faxed a copy of the October 14, 2009 Notice to Quit. She attached it to the handwritten note described above, which was faxed on December 30, 2009. At the top of the Notice to Quit, she wrote, "please note: this is the notice to quit that was given to me as of 8/25/09, insufficient time, and this is in violation of my order of case 365/09." The Notice to Quit Henry submitted states that Henry was to vacate the premises by November 15, 2009.

Following the receipt of Henry's appeal, Magistrate Smith issued an Order staying enforcement of the Judgment of restitution. That Order, dated December 31, 2009, stayed the enforcement pending appeal "provided the Defendant, Medina Henry, gives an undertaking to Plaintiff, Celia Dennery, with two sureties in the sum of Six Hundred Dollars ($600.00) with the Clerk of the Court." The Order states that if Henry failed to give the undertaking, "the stay shall, without further Order of the Court, be lifted, and Plaintiff may proceed to execute on the Judgment."

C. Proceedings on Appeal

Because the record was insufficient to determine precisely what occurred during the proceedings in the Magistrate Division, the Court sitting in its appellate capacity held a trial *de novo* on March 11, 2010. Dennery's counsel, Christopher Johnson, Esq., appeared in person, and Dennery appeared telephonically. Henry was absent. Henry was not served with the Court's February 19, 2010 Order scheduling this matter. However, Attorney Johnson represented to the Court that he served Henry with his motions relating to Dennery's telephonic participation at the trial, and the motions stated the date of the trial. Early in the week of the trial, Attorney Johnson

placed the motions in the door of the house in which Henry is residing. He left the property, and called the property manager, Keith Snell ("Snell"), to alert him that unauthorized locks had been placed on the property. Snell visited the property and, while on the phone with Attorney Johnson, spoke with Henry and asked her if she had received the motions. She replied that she had received them. Attorney Johnson recognized Henry's voice and heard her reply. His statement to the Court relating Henry's confirmation that she had received the motions is competent evidence, because he recognized her voice, and it is admissible as a party admission. V.I. CODE ANN. tit. 5, § 932(7) (1997) (stating that party admissions are excepted from the rule excluding hearsay evidence). The Court finds, therefore, that Henry had notice of the proceeding. Because Henry had notice but did not appear, the Court proceeded to hear testimony from Dennery, the only witness at the trial.[2]

II. JURISDICTION AND STANDARD OF REVIEW

A. Appellate Jurisdiction of the Civil Division of the Superior Court

This Court has jurisdiction over appeals from the Magistrate Division. V.I. CODE ANN. tit. 4, § 125 (1997) (providing that appeals from the Magistrate Division shall be heard in the Superior Court, unless otherwise provided by law). On appeal, the Court has the authority to review *de novo* the Magistrate's ruling. FED. R. CIV. P. 72(b)(3) (requiring the judge to "determine de novo any part of the magistrate judge's disposition that has been properly objected to" and allowing the judge to "accept, reject, or modify the recommended disposition; receive further evidence; or return the

[2] The Court had the authority to dispense with all evidence and enter a Judgment against Henry since she did not appear. V.I. CODE ANN. tit. 28, § 785. However, the Court decided to hear testimony from the available witness before rendering a decision.

matter to the magistrate judge with instructions").[3] Accordingly, the Court held a trial *de novo* in this matter on March 11, 2010.

B. Jurisdiction of the Magistrate Division to Hear the Matter in the First Instance

The Court also finds that the Magistrate Division had jurisdiction to hear this matter. V.I. CODE ANN. tit. 4, § 123(a)(4) provides that the Magistrate Division has jurisdiction to "hear forcible entry and detainer and landlord and tenant actions." The Court concludes that Plaintiff in this case has properly stated a claim under the forcible entry and detainer provisions of the Code. V.I. CODE ANN. tit. 28, §§ 784-95.

In order to regain possession of property, parties are entitled to bring either a typical civil action or a claim for forcible entry and detainer. FED actions are designed to provide a quick resolution to uncontested claims to possession.[4] If a plaintiff brings a claim styled as an FED action, however, the court must assure itself that the controversy is properly considered an FED claim. The kinds of matters that may be heard in an FED proceeding are quite limited. *Estate of Thomas Mall. Inc. v. Terr. Ct. of the Virgin Islands*, 923 F.2d 258, 264 (3d Cir. 1991) ("[The FED] statute provides a summary proceeding, with time requirements substantially shorter than those provided in ordinary civil actions and with the issues sharply restricted. But speedy adjudication . . . comes at a price. The price is that the scope of an FED proceeding is very limited."). A court faced with an FED-styled action should "hear evidence until it is able to determine, based on the evidence, whether [the defendant] has raised a facially bona fide and good faith defense to the

[3] The Federal Rules of Civil Procedure are made applicable to matters before this Court by Superior Court Rule 7, where not inconsistent with the Rules of the Superior Court.

[4] V.I. CODE ANN. tit. 28, § 785 provides that a summons must be issued and returned within three days after the filing of an FED complaint. A hearing on the matter must be scheduled within three days thereafter.

claim for possession." *Virgin Islands Port Auth. v. Joseph*, 49 V.I. 424, 431 (V.I. 2008) (quoting *C.M.L. Inc. v. Dunagan*, 904 F.2d 189, 190-91 (3d Cir. 1990) (internal quotations omitted)); *Barnes v. Weber*, Civ. No. ST-08-CV-379, 2008 V.I. LEXIS 19 (Super. Ct. Dec. 16, 2008). Only if the court is satisfied that the defendant has produced "sufficient evidence to establish" a "facially bona fide and good faith claim of right" to possession, should the court dismiss the FED action. *Joseph*, 49 V.I. at 431.

The Court is satisfied that this controversy is properly considered an FED action. Dennery provided evidence that Henry entered peaceably onto her property, but retained possession by force after a properly served notice to quit. The proceedings before the Court have not raised any colorable defenses, nor has Henry provided any evidence disputing Dennery's testimony regarding the lease between them. *Estate of Thomas Mall,* 923 F.2d at 264. Henry has not provided any evidence to establish a "facially bona fide and good faith claim of right" to possession of the property. *Joseph*, 49 V.I. at 431. Although it appears that the Magistrate had some question as to whether there was a lease, it is clear from the evidence produced on appeal that there was an oral lease agreement whose terms remain undisputed. Therefore, this controversy constitutes a proper action for forcible entry and detainer, and the Magistrate Division had jurisdiction to hear it.

III. DISCUSSION

A. There Was an Oral Lease Agreement Between Dennery and Henry

The Court finds that there was an oral lease agreement between Dennery and Henry. RESTATEMENT (SECOND) OF PROPERTY: Landlord and Tenant § 2.1 (1977) (stating than an oral lease is valid if its initial period does not exceed the period specified in the statute of frauds, and if

a party can establish through evidence the relevant terms, including the identity of the parties, the identity of the premises, the term of the lease, and the rent to be paid); V.I CODE ANN. tit. 28, § 241(a) (establishing that only leases for periods of a year or more are governed by the statute of frauds). Dennery testified that she and Henry agreed that Henry could rent part of her property at 10-22 Estate Mariendahl in exchange for rent, part of which was to be paid in cash, and part of which was to be paid in services. She also established that the parties did not specify how long the lease would last. Because neither party specified a term for the tenancy, and rent was due each month, the Court finds that Henry had a month-to-month periodic tenancy. RESTATEMENT (SECOND) OF PROPERTY: Landlord and Tenant § 1.5(d) (1977) ("Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy is presumed.").

B. The Notice to Quit Was Sufficient

In matters involving a month-to-month periodic tenancy, courts have interpreted title 28, sections 752 and 790 to require a thirty-day notice to terminate. *See, e.g., Virgin Islands Housing Auth. v. Edwards*, 30 V.I. 3, 5 (Terr. Ct. 1994) ("Virgin Islands case law has interpreted 28 V.I.C. §§ 752 and 790 to impose a thirty day termination notice for month to month, periodic tenancies."); V.I. CODE ANN. tit. 28, §§ 752, 790. Dennery established through her testimony that Henry agreed to pay her rent on a monthly basis. Therefore, Dennery was required to provide only a month's notice to quit. *Id.* Consequently, Dennery's notice to Henry, which was served on Henry on October 14, 2009, and which required Henry to leave the premises by November 15, 2009, was

adequate notice.[5] Because Henry received adequate notice, and because the facts establish that Henry retained possession of Dennery's home by force, Dennery is entitled to restitution of her property. V.I. CODE ANN. tit. 28, § 782(a) ("[W]hen an entry is made [upon any premises] in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover possession thereof."); V.I. CODE ANN. tit. 28, § 789(a) (stating that the failure to pay rent due, or to deliver possession of the premises for three days after a demand for possession is made, shall be deemed unlawful holding by force within the meaning of § 782).

C. The Court Will Lift the Stay of Execution

In addition to affirming the Judgment below, the Court will also lift the stay of execution entered by Magistrate Smith on December 31, 2009. Magistrate Smith stayed the execution of the December 28, 2009 Judgment contingent upon Henry providing to Dennery an undertaking with two sureties for the payment of Six Hundred Dollars ($600.00). The Order also states that if Henry fails to so provide, "the stay shall, without further Order of the Court, be lifted and Plaintiff may proceed to execute on the Judgment." More than two months after the stay was entered, there is no evidence that Henry ever complied with the Order. Accordingly, the Court will lift the stay and Dennery may immediately proceed to execute on the Judgment.

CONCLUSION

Defendant Medina Henry held a month-to-month periodic tenancy pursuant to an oral lease

[5] Although the record reflects that Magistrate MacKay determined that Henry did not receive adequate notice to quit, that Order was issued in a different case and is not before this Court. However, the Court will note that the notice found in this Order to constitute sufficient notice was served on October 14, 2009. Magistrate MacKay's Order was dated September 15, 2009, and was possibly referring to a different notice to quit. In any case, the Court finds that Henry was entitled only to a thirty-day notice to quit.

agreement with Plaintiff Cecilia Dennery. After Dennery issued a properly served and adequate notice to quit, Henry forcibly retained possession. Therefore, Dennery is entitled to immediate restitution of her premises. The matter will be remanded to the Magistrate Division for further proceedings consistent with this Order.

Accordingly, it is hereby

ORDERED that the Judgment in this matter entered by Magistrate Smith on December 28, 2009, is **AFFIRMED**; and it is further

ORDERED that the stay entered by Magistrate Smith on December 31, 2009, is hereby **LIFTED**; and it is further

ORDERED that this matter is **REMANDED** to the Magistrate Division for further proceedings consistent with this Order; and it is further

ORDERED that copies of this Order shall be directed to the parties.

DATED: March 25, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST: **VENETIA H. VELAZQUEZ ESQ.**
Clerk of the Court

BY: _____
ESTRELLA GEORGE
Court Clerk Supervisor 3/26/2010