

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

VIRGIN ISLANDS HOUSING AUTHORITY,)	
)	ST-10-CV-405
Plaintiff,)	
vs.)	ACTION FOR FORCIBLE ENTRY,
)	DETAINER, AND RESTITUTION
PAT E. THOMAS,)	
)	
Defendant.)	
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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: December 30, 2010)

Summary

A forcible entry and detainer (FED) action cannot proceed if the tenant presents either a “facially bona fide and good faith” or “colorable” defense involving a claim to title or possession. Virgin Islands Housing Authority’s (VIHA) seeks restitution of premises for non-payment of rent. Thomas withheld rent and retained possession because VIHA allegedly breached the implied warranty of habitability. Thomas failed to present sufficient evidence to demonstrate that her defense is bona fide and in good faith or colorable. Judgment will be granted to VIHA.

Facts

Patricia Thomas, a Virgin Islands Housing Authority tenant since 1980, has resided in Building 18, Apartment 325, Tutu High Rise (“apartment” or “unit”) since 1995 or 1996. About a year after moving in, the unit was damaged by fire and she had to move out while it was renovated. Following renovation, she returned to the unit. At some point thereafter, holes began to appear in the walls of every bedroom and vermin began coming in under the doors and through the

holes in the walls. In 1998 she wrote a letter to VIHA complaining about the condition of the unit and requested that she be moved to another unit. Despite her complaint and request, VIHA did not move her to another unit and did not satisfactorily repair the unit. Even though Thomas did not write to VIHA again, she continued to voice her concerns to management at her annual recertification meetings.

On November 1, 2009, Thomas signed a new one-year lease for the apartment. On or about February 12, 2010, VIHA served Thomas with a Notice of Termination. The Notice demanded that she pay delinquent rent in the amount of \$2,587.00 or vacate the apartment on or before Friday, February 26, 2010.¹ Thomas did not pay the delinquent rent and did not vacate the apartment. VIHA filed this action on July 20, 2010. Trial was set for September 7, 2010 and Thomas was served with the summons and complaint on July 28, 2010.

Approximately six months after receiving the Notice, and shortly before the trial date, Thomas took her complaint about the condition of her apartment to a member of the Virgin Islands Legislature and requested his help. In response to her complaint, the Senator sent members of his staff to Thomas' unit where they took photographs. Based on Thomas' complaint, his staffs' visit and their photographs, the Senator wrote a letter, dated September 2, 2010, to VIHA. In his letter the Senator alleged that Thomas' apartment was not habitable. On September 10, 2010, VIHA offered, and Thomas accepted, another unit. Shortly after receiving the keys, Thomas inspected the unit. While doing so, she observed a roach on the floor, an uncovered electrical breaker box, and noted that the back porch was close enough to the ground for a person to climb up. On September 20, 2010, Thomas refused the apartment. Thomas has not paid any rent since November 2009, now owes over \$8,000.00 in unpaid rent, and continues to occupy the apartment.

This case went to trial on November 23, 2010. At that time, Thomas moved for the Court to dismiss for lack of jurisdiction. I took that motion under advisement. I proceeded to hear sworn testimony and consider the exhibits duly submitted into evidence. I then took the entire matter under advisement.

Discussion

The court's role in FED actions

In *Virgin Islands Port Authority v. Joseph* the Supreme Court of the Virgin Islands held that the trial court in an FED action "should hear evidence until it is able to determine, based on the evidence, whether [the tenant] has raised a facially bona fide and good faith defense to [the landlord's] claim for possession."² The Court also instructed that "[i]f the trial court determines that there is insufficient evidence to support such a defense, it should proceed with the FED summary proceeding. If the trial court determines that [the tenant] has presented sufficient

¹ See Virgin Islands Housing Authority Dwelling Lease Agreement, Part II, Section IV A.3. authorizing 14 day Notice of Termination

² *Virgin Islands Port Authority v. Joseph*, 49 V.I. 424, 431 (V.I. S. Ct. 2008).

evidence of a facially bona fide and good faith claim of right to possession of the premises, the court should dismiss the matter, and [the landlord] may thereafter file an ordinary civil action.”³ Our courts have also indicated that an FED action cannot continue once “a colorable claim of right under a lease agreement . . .” as to title or possession is raised.⁴ Therefore, I must conduct a two-step analysis.⁵ First, I must determine whether Thomas’ evidence is sufficient to establish a facially bona fide and good faith defense. If it is not, I must then determine whether the evidence is sufficient to establish that Thomas has a colorable claim of right under the lease. If the evidence is sufficient to establish either a facially bona fide and good faith defense or a colorable claim of right under the lease, the FED action must be dismissed. If the evidence is not sufficient, the FED action can proceed.

Tenant’s right to withhold rent

Since Thomas contends that she withheld rent because VIHA breached the warranty of habitability, I must, as a threshold issue, determine whether withholding rent under such circumstance is a viable defense in an FED action. In the Virgin Islands, “the implied warranty of habitability permits a tenant to raise the landlord’s breach of the warranty as an affirmative defense if the landlord brings an eviction proceeding against a tenant for failure to pay rent”⁶ Therefore, Thomas has the right to raise breach of warranty as an affirmative defense in an FED action.

Thomas’ defense is not facially bona fide and in good faith

The terms “bona fide” and “good faith” are synonyms and address the intentions of a party. A defense is “facially bona fide and [in] good faith” when it rests on “(1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable standards of fair dealing . . . or (4) absence of intent to defraud or seek unconscionable advantage.”⁷ The facts presented indicate that part (4) of the definition would be out of context in this case and should not apply. The facts do, however, require that I review the evidence to determine whether Thomas has a bona fide and good faith defense under parts (1), (2) and (3) of the test. Based on my analysis of facts, Thomas failed to show that she has a “facially bona fide and good faith” defense.

Under part (1) of the test, the evidence must be sufficient to show that Thomas had an honest belief or purpose in mind when she stopped paying rent. The evidence does not support

³ *Id.*

⁴ *Four Winds Plaza Corp. v. White*, 50 V.I. 520, 528 (D.V.I. App. 2008) (quoting *Floyd v. Hoheb*, 38 V.I. 62, 64-65 (V.I. Terr. Ct. 1997)); *C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 190 (ed. Cir. 1990). See also *Estate of Thomas Mall, Inc. v. Territorial Court of the Virgin Islands*, 923 F.2d 258, 264 (3d. Cir. 1991 (“As soon as a defendant in possession in an FED action raises a colorable defense requiring construction of an agreement between the property owner and the party in possession, an FED action will not lie.”) (quoting *C.M.L., Inc.*, 904 F.2d at 190)).

⁵ See *Virgin Islands Port Authority*, 49 V.I. at 430. The Virgin Islands Supreme Court found merit in the “assertion that the trial court should [hear] evidence in [an] FED action until it determine[s] whether [the tenant’s] defenses [are] bona fide or colorable.” *Id.* (emphasis added).

⁶ *Miller v. Christian*, 27 V.I. 363 (3d Cir. 1992).

⁷ *Blacks Law Dictionary* 762 (9th ed. 2009).

Thomas' claim that she had an honest belief or purpose in mind when she stopped paying rent because she (a) made no protest when she signed a one-year lease from November 1, 2009 through October 31, 2010, (b) offered no evidence that she signed the lease with the knowledge that she had a lawful right to withhold her rent because of the condition of her apartment, and (c) did not present any evidence that, after receiving the notice to quit, she refused to pay the rent for the purpose of inducing VIHA to make the needed repairs. Without such evidence, I cannot find that Thomas' decision to withhold rent from November 2009 through February 2010 was based on the honest belief that she had the right to do so or that she did so for the purpose of inducing VIHA to repair her unit.

Under part (2) of the test, the evidence must be sufficient to show that Thomas was faithful in her duties or obligations. Her primary duty, like any other tenant, was to pay monthly rent to VIHA. Thomas' failed to fulfill this obligation. If, as she contends, she stopped paying rent because VIHA breached the implied warranty of habitability, Thomas had a duty to put VIHA on "proper notice" and to "deposit . . . rental payments as they [became] due . . . in an interest-bearing escrow account . . ." ⁸ She did neither.

With respect to part (3) of the test, Thomas had a duty to deal fairly, which included giving notice, depositing her rent in escrow and filing a grievance, as she had a right to do under the Notice. She did none of these things. Rather, she waited until six months after receiving the Notice to take any action at all. A tenant cannot knowingly sit on rights and then assert them for the first time after she is given notice to quit.

Therefore, the evidence is not sufficient to establish that Thomas has a facially bona fide and good faith defense based on VIHA's breach of warranty of habitability.

Thomas' defense is not colorable

Under *Joseph, Dunagan, Estate of Thomas Mall* and *Four Winds Plaza Corp.*, another type of valid defense to an FED is one that is "colorable."⁹ Once "a colorable claim of right under a lease agreement . . ." is raised, the FED court loses jurisdiction.¹⁰ The bona fide and good faith requirement deals with a party's intent; the "colorable" requirement, on the other hand, addresses the merits of the defense. While our courts have not defined the threshold for "colorable" in FED actions, it is, as in other contexts, "low."¹¹ This low threshold, however, does not mean that a colorable claim of right under a lease can be "based solely on allegations in the complaint and the arguments of counsel."¹² In this case, regardless of the merits of her claim that VIHA breached the implied warranty of habitability, Thomas never testified that she took any of the actions required by law to establish her defense. As discussed above in the bona fide and good

⁸ *Hagglund v. American Motors Inn*, 18 V.I. 376, 379 (citing Restatement (Second) of Property, Landlord and Tenant §§ 5.4(2), 11.3).

⁹ *Estate of Thomas Mall*, 923 F.2d at 264; *Virgin Islands Port Authority*, 49 V.I. at 430; *Four Winds Plaza Corp.*, 50 V.I. at 528.

¹⁰ *Four Winds Plaza Corp.*, 50 V.I. at 528 (quoting *Floyd* 38 V.I. at 64-65).

¹¹ See *Green v. Fornario*, 486 F.3d 100, 106 (3d Cir. 2007).

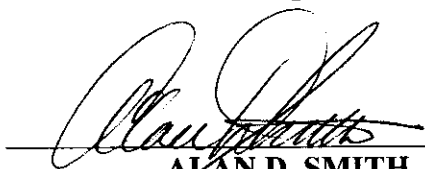
¹² *Virgin Islands Port Authority*, 49 V.I. at 429.

faith analysis, when withholding rent after a landlord's breach, the law requires that the tenant put the landlord on notice of the withholding and escrow the rent. The evidence does not show that Thomas did either. Therefore, I cannot find that Thomas has a colorable defense.

Conclusion

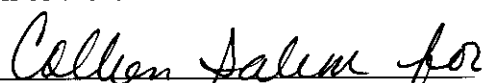
Under Virgin Islands law, an FED court is required to hear evidence until it can conclude that a claim to title or possession is either "bona fide and [in] good faith" or "colorable." Thomas claimed the right to withhold rent and still maintain possession after an alleged VIHA breach of the implied warranty of habitability. A facially bona fide and good faith defense requires some evidence to show that Thomas (a) honestly believed she had a right to withhold rent or that she did so for the purpose of forcing VIHA to repair her apartment, (b) was faithful in the exercise of her duties or obligations, or (c) dealt fairly with VIHA. Thomas' evidence is not sufficient to show that any one of these requirements was met by her. Her defense is not colorable unless she complied with the procedure, as required by law, of putting the VIHA on notice of rent withholding and then depositing the rent in escrow. Again, she did neither. Therefore, Thomas' defense is not facially bona fide and in good faith nor is it colorable. Judgment for restitution of premises to VIHA will be entered.

DATED: December 30, 2010



ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

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

By: 
HYACINTH M. LOCKHART
Senior Deputy Clerk 12/30/2010