

**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
v.	)	
	)	
MEDINA HENRY,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on remand from the Supreme Court of the Virgin Islands.¹ In *Henry v. Dennery*,² the Supreme Court of the Virgin Islands reversed the Order entered on March 25, 2010 after a default hearing granting restitution of the premises to Plaintiff Cecilia Dennery. After hearing testimony and other evidence presented during the trial, this Court concludes that Dennery is entitled to immediate restitution of her premises because Defendant Medina Henry was a licensee on Dennery's premises from May 26, 2009 until July 2, 2009 and had no claim of possession after that time.

FACTS

On May 19, 2009, Plaintiff Cecilia Dennery gave Defendant Medina Henry a ride home after meeting her at a funeral. During the ride home, the two engaged in a discussion of Henry's current living arrangements. Henry informed Dennery that she had just moved into an apartment in Tutu. It is undisputed that Dennery made Henry an oral offer to stay at the efficiency that Dennery owns, located at 10-22 Estate Mariendahl. The efficiency had no stove and had never been rented out before.

The specific terms of the oral offer, however, are disputed. Henry testified that Dennery's offer allowed her to stay at the efficiency on a "long term basis," rent free, so long as she cut the grass, painted and did other property maintenance. Conversely, Dennery testified that she offered Henry the opportunity to stay at the efficiency for \$300.00 per month in rent, plus property maintenance, including painting, mowing the lawn, and otherwise cleaning the outdoor area of the premises.

¹ Gregory Thorpe, Esq., is counsel for Plaintiff Cecilia Dennery. David Bornn, Esq., is co-counsel for Plaintiff Cecilia Dennery. The Defendant Medina Henry appears in this matter *pro se*.

² 55 V.I. 986 (2011).

Henry further testified that she accepted Dennery's offer to stay at the efficiency rent free, on a long term basis. In reliance upon this offer, Henry claims that she terminated the lease and turned off the electricity at the Tutu apartment where she had just moved. Furthermore, Henry testified that she worked hard at Dennery's efficiency for three days as she prepared to move in by cleaning and unpacking boxes.

Dennery testified that on May 22, 2009 she orally withdrew the offer that she made to Henry upon observing Henry engaging in erratic behavior. Nonetheless, Henry showed up at Dennery's efficiency on May 25, 2009 prepared to move in. Despite previously revoking her offer to Henry, Dennery allowed Henry to move in. Dennery testified that at the time that Henry moved in, they made an oral agreement that Henry could stay at the apartment rent-free while she looked for another apartment and that Henry would move out by July 2, 2009. Dennery further testified that she left St. Thomas on or about May 25, 2009. Upon leaving, Dennery spoke with Henry and Henry informed her that she did not plan on moving out on July 2, 2009 and would remain on the premises indefinitely.

In an attempt to assist Henry in leaving the premises, Dennery testified that she provided Henry with a money order in the amount of \$600.00. According to both parties, \$240.00 of the \$600.00 was for compensation for the cleaning and unpacking that Henry did over three days at Dennery's efficiency, in preparation for moving in. The remaining \$360.00 of the \$600.00 was to be used to help Henry with the expenses associated with moving out of Dennery's efficiency on July 2, 2009. Dennery made clear by letter and by writing on the actual money order, that Henry agreed to vacate the premises by July 2, 2009 by cashing the money order. Henry cashed the money order after reviewing it. Henry testified that she cashed the money order based on the advice of "authorities" who told her to use the money to replace the goods that were lost or damaged when Dennery disconnected the electricity at the efficiency.

Dennery's property manager, Keith Snell, also testified during the hearing. He testified that Dennery had been his client for seven years. He further testified that as property manager, his job is to procure tenants, collect rent, and perform repairs. He testified that it was customary for Dennery to inform him when she had entered into a leasing agreement to rent out a unit on the property, so that he could begin collecting rent. Snell stated that Dennery never informed him that she had entered into a leasing agreement with Henry.

PROCEDURAL HISTORY

On June 30, 2009, Dennery served Henry with a thirty-day notice to quit. Henry remained on the premises beyond the thirty-day period. On August 3, 2009, Dennery commenced a Forcible Entry and Detainer action. A trial was held before Magistrate Kathleen Mackay on August 25, 2009. On September 15, 2009, Magistrate Mackay found that Dennery's notice to quit was insufficient because Henry was a tenant at will and must be given a ninety-day notice to quit. Dennery filed a Motion for Reconsideration of this ruling. Dennery went on to serve another thirty-day Notice to Quit on Henry on October 14, 2009.

While the Motion for Reconsideration was pending, Dennery filed a second FED action in the Superior Court. On December 16-17, 2009, the matter was heard before Magistrate Alan

Smith. Magistrate Smith concluded that there was no lease agreement between the parties and that Henry did not have a right to possession of the premises. 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.³ On December 17, 2009, Henry appealed Magistrate Smith's ruling to the Superior Court. On January 4, 2010, following receipt of Dennery's appeal to the Superior Court, Magistrate Smith stayed the enforcement of the Judgment of restitution 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 fails to give the undertaking, "the stay shall, without further Order of the Court, be lifted, and Plaintiff may proceed to execute on the Judgment." There is no record of Henry providing the undertaking as ordered by the Court. Magistrate Smith's ruling regarding the restitution of the premises is the subject of the current appeal.

With respect to the Superior Court appeal, the Court sitting in its appellate capacity held a trial *de novo* on March 11, 2010. On March 25, 2010, the Court issued a Memorandum Opinion and Order which affirmed Magistrate Smith's December 28, 2009 Judgment of Restitution and lifted the stay that was entered by Magistrate Smith on December 31, 2009. A few weeks after this Court's March 25, 2010 Memorandum Opinion and Order, on April 21, 2010, the Court authorized the Superior Court Marshals to remove Ms. Henry from the premises. On December 29, 2011, the Supreme Court reversed the Order of this Court dated March 25, 2010. Subsequently, after receiving the Opinion of the Supreme Court, Henry once again took possession of the premises in December 2011, although she was never given a key.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction over appeals from the Magistrate Division.⁴ On appeal, the Court reviews the Magistrate's conclusions of law *de novo* (plenary review), and the Court reviews the findings of fact for clear error.⁵ On remand from the Supreme Court of the Virgin Islands, the Court held a trial *de novo* in this matter on March 21, 2012. The authority for conducting the trial *de novo* comes from both the remand order itself which implicitly authorized the trial *de novo*, and from an attempt to clarify the record pursuant to Super. Ct. R. 322.3(c). To the extent that the trial *de novo* may be inconsistent with Rule 322.3, the Court finds that the trial was necessary to properly comply with the remand from the Supreme Court in *Henry v. Dennery*.

During the time that Henry's appeal to the Supreme Court was pending, the Superior Court adopted Rule 322. Rule 322.3 specifically is a limitation on how the Superior Court conducts appeals from the Magistrate Division.⁶ Under the Rule, the record consists of only the exhibits and other evidence admitted before the magistrate, the transcript of proceedings, and the orders

³ On January 25, 2010, Magistrate Mackay denied Dennery's Motion for Reconsideration in the original FED action, reasoning that the grant of restitution by Magistrate Smith in the second case mooted the issue.

⁴ V.I. Code Ann. tit. 4, § 125 (Supp. 2011) states, "All appeals from the Magistrate Division, except as otherwise provided for in this chapter, must be filed in the Superior Court or to the Supreme Court, if appealable to the Supreme Court as provided by law."

⁵ Super. Ct. R. 322.3(b)(1), (2).

⁶ Super. Ct. R. 322.3.

being appealed. Rule 322 is explicitly retroactive; it applies equally to current proceedings and future proceedings. This Court is now presented with the question of whether it was improper to conduct a trial *de novo* after Rule 322's promulgation during Henry's Supreme Court appeal. The Court concludes that, although the trial *de novo* was not in accordance with Rule 322, any error in holding a new trial was harmless. The trial did not prejudice either party and the Court will affirm the decision of the Magistrate Division and find that Dennerly is entitled to restitution of the premises regardless of whether the Court considers the full record or only the record from the Magistrate.

The Court finds that it is not improper to consider the full record developed at the most recent trial, notwithstanding Rule 322. The Supreme Court addressed similar circumstances in *Browne v. Gore*.⁷ In *Browne*, Rule 322 was promulgated while a petition for internal review of a magistrate decision was pending. The judge, acting under the mistaken belief that Rule 322 did not apply, issued a ruling on the merits without a briefing schedule or any additional opportunity for the parties to be heard. The Supreme Court reversed and remanded with instructions to comply with Rule 322.

In *Browne*, the court ruled on the merits without providing the parties with an additional opportunity to be heard. In this case, this Court granted an additional opportunity to be heard, beyond what the parties were entitled. This case is not simply an appeal from the Magistrate Division but also a remand from the Supreme Court of the Virgin Islands, and this Court made the decision to hold a new trial in light of the Supreme Court's opinion.⁸ Although the Supreme Court's remand does not give specific instructions as to how this Court should proceed subsequent to Henry's appeal, the Supreme Court's intentions are implicit in its ruling. The Supreme Court states, "[t]he Superior Court erred by holding a trial *de novo* without Henry, because Henry did not receive proper notice of the trial. Accordingly, the [judgment is] reversed and the matter is remanded to the Superior Court for proceedings consistent with this opinion."⁹ Because the error consisted of conducting the trial without Henry, conducting the trial with Henry present and allowing Henry to defend is most consistent with the Supreme Court's opinion.

Unlike *Browne*, in this case, concerns of equity and judicial economy both favor consideration of the full record developed during the *de novo* trial of March 25, 2012. To not consider the full record developed at the second trial would be a waste of judicial resources and would be inequitable to the parties. This is not a case of the Court ignoring a procedural rule and thereby prejudicing a party, as was the issue in *Browne*.¹⁰ Both parties indicated that they preferred a trial *de novo*, and now to treat the trial as though it never happened would be a great disservice to the parties who have already invested considerable time and expense in the matter.

Rule 322.3(c) also allows the Superior Court to hold a hearing

⁷ *Browne v. Gore*, S. Ct. Civ. No. 2011-0012, 2012 WL 4195994 (V.I. Sept. 19, 2012).

⁸ *Henry v. Dennerly*, 55 V.I. 986 (2011).

⁹ *Id.*

¹⁰ Again, unlike *Browne*, both parties in the instant case were given the opportunity to brief the issues after the trial. The parties also had the opportunity to brief the issues surrounding Rule 322 and the trial *de novo*.

only where deemed helpful or necessary to clarify the evidence of record or the issues presented, although the reviewing judge may not admit additional evidence in any case on review. Hearings are deemed helpful where . . . clarification of issues or facts are required given the state of the case record . . .

The Court finds this case is exactly the type of case requiring clarification of issues and facts. Moreover, although it appears to the Court that Dennery and Henry have testified to the same basic facts every time this case has gone to trial, the Court required clarification on all the circumstances with a focus on the facts surrounding Dennery's original offer and rescission.

Further, upon examination of the record at the Magistrate Division, this Court finds that it would have ultimately ordered the same relief whether the appeal had been conducted based upon the record, or whether the appeal was conducted by holding a trial *de novo*, as was done here. Although the Court did take additional evidence at the trial, that evidence largely clarified the record from the Magistrate proceeding. Upon review of the evidence, the Magistrate found and concluded, as does this Court, that there was no lease in existence and that Henry did not have a right to possession of the premises. In any case, Dennery is entitled to full, immediate restitution of the premises. Accordingly, if the Court did err by not following Rule 322 and instead holding a trial, such error is harmless because it did not affect the outcome of the case. For this reason and the other reasons stated above, it is not improper for the Court to consider the record from the March 25, 2012 trial in rendering its decision.

JURISDICTION OF THE MAGISTRATE DIVISION

The Court finds that the Magistrate Division had jurisdiction to hear this matter. The Magistrate Division has jurisdiction to "hear forcible entry and detainer and landlord and tenant actions."¹¹ The Court concludes that Dennery has properly stated a claim under the forcible entry and detainer provisions of the Virgin Islands Code.

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.¹² However, if a plaintiff brings a claim styled as an FED action, the Court must assure itself that the controversy is properly considered an FED claim. In FED proceedings, "the issues are restricted to disputes that do not raise a colorable claim of right under a lease agreement, or issues of damages, or for collection of unpaid rents."¹³ A Court faced with an FED 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

¹¹ V.I. Code Ann. tit. 4, § 123(a)(6) (Supp. 2011).

¹² V.I. Code Ann. tit. 28, § 785 (1996) 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.

¹³ *Floyd v. Hoheb*, 38 V.I. 62, 64 (Terr. Ct. 1997); *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.") (emphasis added).

the claim for possession.”¹⁴ Jurisdiction in an FED action is not divested merely because a defendant *argues* that a question of title, legal or equitable, is involved.¹⁵

The Court is satisfied that this matter was properly filed as an FED action. As the Court will describe in more detail, the facts revealed that Henry entered Dennery’s property in a peaceable manner, and then proceeded to retain possession by force after receiving a properly served notice to quit. In addition, as noted earlier, FED actions are restricted to disputes that do not raise a colorable claim of right under a leasing agreement, disputes that do not involve issues of damages, and disputes that do not involve a collection of unpaid rents.¹⁶ Here, Henry did not provide any colorable defenses with respect to a claim of right under a lease agreement, issues of damages, or collection of unpaid rents. During the trial, the Court heard credible testimony which established that the parties did not enter into an oral or written lease agreement. Therefore, the case does not require construction of a lease agreement. Further, this matter is not a claim for damages or unpaid rents. Accordingly, this controversy constitutes a proper action for forcible entry and detainer, and the Magistrate Division had jurisdiction to hear it.

DISCUSSION

A. The parties did not enter into an oral or written leasing agreement.

Dennery and Henry did not enter into an oral or written leasing agreement. In the Court’s Memorandum Opinion dated March 25, 2010, the Court determined that the parties had entered into a month-to-month tenancy. However, the testimony given at the Court’s March 21, 2012 trial and a reexamination of the record from the Magistrate Division has caused the Court to reconsider its position on that point. During the 2012 trial, both Dennery and Henry testified that on May 19, 2009, Dennery made Henry an oral offer for Henry to stay at the efficiency that she owns. The Court finds the testimony of Dennery credible with respect to the terms of the offer being that of \$300.00 per month in rent, plus property maintenance. Further, the Court is satisfied that the oral offer made to Henry by Dennery, was orally revoked on May 22, 2009. This conclusion is supported by the testimony of Dennery’s property manager, Keith Snell, who testified that he was never notified by Dennery that the property had been rented, as the custom was for Dennery to notify Snell of rentals so that he could collect rent. It is also supported by the fact that Henry cashed a money order from Dennery explicitly recognizing that Henry would have to move out by July 2, 2009. Under the Restatement, “an offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.”¹⁷ Accordingly, the oral revocation made by Dennery to Henry on May 22, 2009 was sufficient to revoke Dennery’s offer made on May 19, 2009.

With respect to part performance of an offer that could constitute acceptance, the Restatement says, “acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a

¹⁴ *Virgin Islands Port Auth. v. Joseph*, 49 V.I. 424, 431 (2008) (quoting *C.M.I. Inc. v. Dunagan*, 904 F.2d 189, 190-91 (3d Cir. 1990)).

¹⁵ *C.M.I. Inc.*, 904 F.2d at 190.

¹⁶ *Floyd*, 38 V.I. at 64.

¹⁷ Restatement (Second) of Contracts § 42 (1979).

return promise.”¹⁸ Here, a part of the offer made by Dennery to Henry included painting, mowing the lawn, and otherwise cleaning the outdoor area of the premises. During the trial, Henry testified that she cleaned the inside of the apartment in preparation to move in, thereby performing under the contract, or more accurately, accepting the terms of the contract by part performance. However, Henry’s cleaning of the apartment in preparation to move in does not constitute part performance of an offer which required her to pay rent and perform outdoor maintenance of the premises. In addition, both parties agree that Henry never paid any rent prior to or after the date that Dennery revoked the oral offer. Accordingly, the Court finds that Dennery’s May 19, 2009 offer to Henry was revoked on May 22, 2009 and that Henry did not accept Dennery’s offer through part performance prior to revocation.

B. Henry had the status of a licensee when Dennery allowed her onto the premises.

As mentioned above, Henry and Dennery did not, at any time, enter into an oral or written leasing agreement. Accordingly, when Dennery allowed Henry to stay at the efficiency on May 26, 2009, Henry assumed the status of licensee. “A license in real property is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein.”¹⁹ “A license ordinarily may be revoked without notice and without cause, because a license is personal, and a licensee has no possessory interest in the property.”²⁰ “If the parties to a license do not define the term for a license when it is created, a license for a purpose performable within a limited period generally is limited in duration to a reasonable time.”²¹

Here, when Henry appeared at the efficiency on May 26, 2009, Dennery by virtue of her oral statements, granted Henry a license to remain on her property. In other words, Dennery gave Henry permission to use and enjoy her property for a certain limited time period. By virtue of her oral statements, Dennery defined the term of the license as being from May 26, 2009 until July 2, 2009. After July 2, 2009 the license expired, and Henry no longer had Dennery’s permission to remain on the property. The testimony put forth by the parties confirms that the parties both agreed that Henry would leave the premises by July 2, 2009. This fact is evidenced by the conversation that Dennery testified to having with Henry when she initially allowed Henry to move in and the money order provided to Henry from Dennery, which stated that by cashing the money order, Henry agreed to leave the premises by July 2, 2009. Henry cashed the money order. In addition, Keith Snell, the property manager on the property, testified that Henry was to leave the premises on July 2, 2009. Accordingly, the Court finds that Dennery granted Henry a license to use and enjoy her property for the period of May 26, 2009 to July 2, 2009.

C. Henry held the status of licensee and was entitled to a three-day notice to quit.

Because Henry held the status of a licensee, she was entitled to a three-day notice to quit before Dennery could bring an action for forcible entry and detainer. Pursuant to the Virgin Islands Code, “when a forcible entry is made upon any premises, or when an entry is made in a

¹⁸ *Id.* § 50.

¹⁹ 25 Am. Jur. 2d *Easements and Licenses* § 117 (West 2012).

²⁰ *Id.* § 122.

²¹ *Id.*

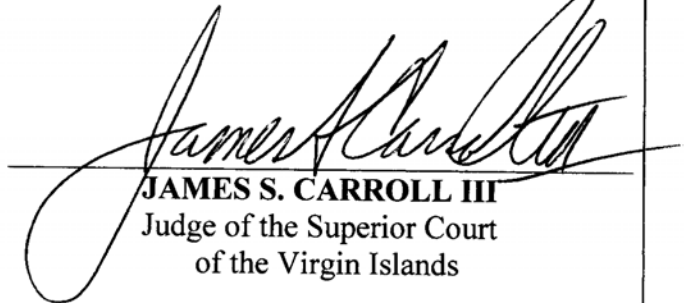
peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.”²² One is considered to be unlawfully holding property by force if that person “continues in the possession of any premises at the expiration of the time limited in the lease or agreement under which such person holds.”²³ Further, an action for the recovery of the possession of the premises may occur when “the notice to quit has been served upon the tenant or person in possession for the period of three days before the commencement thereof.”²⁴

Here, Dennery and Henry entered into a licensing agreement on May 26, 2009 that expired on July 2, 2009. As a result, Henry entered peaceably onto the property. After the licensing agreement expired on July 2, 2009, Henry was a trespasser on Dennery’s property. Accordingly, Henry was not entitled to a notice to quit longer than three days since she was not a lessee. Instead, Henry was entitled to a three-day notice to quit due to her status as a licensee whose license for use and enjoyment of the premises had expired. Furthermore, Dennery issued Henry an adequate and properly served notice to quit on October 14, 2009 and Henry forcibly retained possession by refusing to leave at the expiration of her allotted time. Therefore, Dennery is entitled to immediate restitution of her premises.

CONCLUSION

Dennery and Henry never entered into a leasing agreement of any kind. Instead, the two entered into a licensing agreement with a fixed time period before expiration. Once the licensing agreement expired, Henry was a trespasser on Dennery’s premises. Dennery properly served Henry with an adequate notice to quit. Therefore, Dennery is entitled to immediate restitution of her premises. Accordingly, the Court will affirm Magistrate Smith’s December 28, 2009 Judgment.

DATED: October 25, 2012


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

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

BY: 

DONNA D. DONOVAN

Acting Court Clerk Supervisor 10/26/2012

²² 28 V.I.C. § 782.

²³ *Id.* § 789(a)(2).

²⁴ *Id.* § 789(b).