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

YACHT HAVEN USVI, LLC, Plaintiff, vs. HUBBLY BUBBLY, LLC, Defendant.	CIVIL NO. ST-12-CV-327 ACTION FOR FORCIBLE ENTRY AND DETAINER

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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: July 30, 2012)

Summary

A court can proceed with trial in a forcible entry and detainer (FED) action until it is presented with sufficient evidence to demonstrate a "colorable" claim of one or more certain recognized defenses. In this matter, the Court found that sufficient evidence had been introduced to raise a "colorable" claim that the lease had not expired, as alleged by the plaintiff, but had actually been extended through the exercise of an option. Therefore, midway through trial, the Court ceased hearing additional testimony and will now dismiss this action for want of subject-matter jurisdiction.

Facts

Yacht Haven USVI, LLC ("Yacht Haven"), as landlord, and Hubbly Bubbly, LLC ("Hubbly Bubbly"), as tenant, entered into a written agreement on March 10, 2009 (the "Lease") for the lease of certain real property known as Building R, Space No. 6 and Space No. 1B in Yacht Haven Grande, Estate Thomas, King's Quarter, St. Thomas, U.S. Virgin Islands (the "Premises").[1] Section 1.2 of the original Lease provided that the term of the tenancy shall expire at midnight on December 31, 2015, and Section 1.3 provided for a procedure in which Hubbly Bubbly could exercise an option to extend the term. On July 1, 2011, however, the Parties

[1] Plaintiff's Exhibit 1.

entered into the First Amendment to Lease Agreement (the "First Amendment").[2] Among other provisions, Sections 1.2 and 1.3 of the Lease were amended. Section 1.2 was amended to change the expiration date of the Lease to midnight on April 30, 2012. Section 1.3 was amended so as to provide for two option terms, the first of which could extend the expiration date to December 31, 2015. Among other conditions, Amended Section 1.3 provided that "[t]he First Option Term must be exercised in writing no later than 30 days prior to the expiration of the Lease (as amended herein) and no earlier than 120 days prior to the expiration of the Lease."

On July 30, 2009, the Parties entered into the Revocable License Agreement (the "License") granting Hubbly Bubbly the rights to operate Kiosk No. 2, also located in Yacht Haven Grande, Estate Thomas, King's Quarter, St. Thomas, U.S. Virgin Islands (the "Kiosk").[3] A portion of paragraph 3 of the Revocable License Agreement governing the status of the Kiosk between Yacht Haven and Hubbly Bubbly reads as follows: "NO LEASEHOLD. This Agreement is not a lease and does not create, transfer or convey a leasehold interest or any tenancy . . . . Licensee acknowledges that Licensee is not a tenant and does not have the rights of a 'tenant' under United States Virgin Islands law."

By letter dated September 16, 2011, counsel for Hubbly Bubbly wrote to counsel for Yacht Haven and clearly indicated that Hubbly Bubbly was exercising the first option under Section 1.3.[4] Apparently after receiving no acknowledgement, counsel for Hubbly Bubbly sent an e-mail to counsel for Yacht Haven on December 1, 2011 that referred to the September 16, 2011 letter and asked for a response.[5] Counsel for the Hubbly Bubbly sent a similar e-mail on January 19, 2012 after apparently not receiving a sufficient response.[6] Hubby Bubbly continued to occupy the Premises and the Kiosk after April 30, 2012. On May 29, 2012, counsel for Yacht Haven directed a Notice of Default to the principals of Hubbly Bubbly and its counsel. Also on May 29, 2012, counsel for Yacht Haven directed a Notice to Quit[7] to counsel for Hubbly Bubbly. Hubbly Bubbly presently still occupies the Premises and the Kiosk.

Discussion

Yacht Haven first seeks to recover possession of the Premises. It alleges that Hubbly Bubbly unlawfully held the Premises by force through its continued possession after "[t]he Lease expired at midnight on April 30, 2012, without being renewed or extended."[8] While Yacht Haven alleges that the Lease expired on April 30, 2012 at midnight, evidence was presented that indicates that Hubbly Bubbly attempted, whether successfully or unsuccessfully, to renew the Lease pursuant to Section 1.3 of the Lease, as modified by the First Amendment. These attempts were made through the September 16, 2011 notice as well as the December 1, 2011 and January 19, 2012 e-mails. Having admitted evidence of Hubbly Bubbly's attempt to exercise the option, the Court must now determine whether it still maintains subject-matter jurisdiction.

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[2] Plaintiff's Exhibit 3.
[3] Plaintiff's Exhibit 2.
[4] Plaintiff's Exhibit 4.
[5] Defendant's Exhibit 1.
[6] Defendant's Exhibit 2.
[7] *See* V.I. CODE ANN. tit. 28, § 790 (1996).
[8] Complaint at ¶ 8.

The FED court's jurisdiction is limited. In a recent opinion, the Virgin Islands Supreme Court explained as follows:

> Where a tenant is retaining possession by force, relief is available in a summary FED proceeding only if there "is an undisputed oral or written lease agreement, and rent is due and owing thereon; or [t]here is an undisputed oral or written lease which has expired." Conversely, "a FED cause of action will not lie where [t]itle to the premises is in question; or [w]here there is proved to the Court to exist a *bona fide* question of the existence of a lease at law or in equity, which has not yet expired. [citation omitted]."[9]

Furthermore, in an FED action,

> [t]he trial court 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. If 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 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.[10]

Other courts have also described the limits of the FED court's subject-matter jurisdiction. The Third Circuit has stated that "[a]s 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."[11] Furthermore, the jurisdiction is limited to "the adjudication of issues that '[do] not raise a *colorable* claim of right under a lease agreement . . . .'"[12]

Although these are limited examples, this Court notices that other courts have seemingly using the terms "bona fide and good faith" and "colorable" interchangeably.[13] This Court further recognizes that the terms have very different meanings. The terms "bona fide" and "good faith" are synonymous and address the intentions of a party. A defense or claim is "facially bona fide

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[9] *V.I. Port Authority v. Joseph*, 49 V.I. 424, 427-28 (Sup. Ct. 2008) (*quoting C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 191 (3rd. Cir. 1990)) (emphasis added).
[10] *Id.* at 431 (emphasis added).
[11] *Estate Thomas Mall, Inc. v. Territorial Court of the V.I.*, 923 F.2d 258, 264 (3d Cir. 1991) (*citing Iron Mountain & H.R. Co. v. Johnson*, 119 U.S. 608, 612 (1887)) (emphasis added).
[12] *Four Winds Plaza Corp. v. White*, 50 V.I. 520, 528 (D.V.I. App. Div. 2008) (*quoting Floyd v. Hoheb*, 38 V.I. 62, 64-65 (Terr. Ct. 1997)).
[13] *E.g. Joseph*, 49 V.I. at 430. "We do find merit . . . in the [landlord's] final assertion that the trial court should have heard evidence in the FED action until it determined whether [the tenant's] defenses were *bona fide or colorable. Id.* (emphasis added). *See also Barnes v. Weber*, 50 V.I. 167, 175 (Super. Ct. 2008).

> The Defendants have sufficiently shown through the facts before the Court that title to the premises is in question and that there is a *bona fide* question of the existence of a lease at law or in equity that has not expired. [citation omitted] Since the Defendants have raised a *colorable* defense which requires construction of the agreement between them and the property owner, these issues cannot be sorted out in an FED proceeding. *Id.* (emphasis added).

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 . . . (4) absence of intent to defraud or seek unconscionable advantage."[14] A "colorable claim", on the other hand, is "[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)."[15]

It is intuitive to the Court that it should determine whether Hubbly Bubbly has introduced evidence of a "colorable" claim or defense and not necessarily of one that was "bona fide" or brought "in good faith". The intentions of Hubbly Bubbly are not important here. In other words, for example, it is irrelevant whether or not Hubbly Bubbly had "honesty in belief or purpose" when it raised the defense that it has exercised the option and therefore the Lease has not expired. Rather, it is critical for the Court to determine whether Hubbly Bubbly's defense is "legitimate" based on the facts and law. Therefore, the Court will not concern itself with whether Hubbly Bubbly's defense is "bona fide and in good faith" but will only address whether it is "colorable."

As already stated, a claim is "colorable" when it can be considered legitimate or reasonable based on the facts and law. In various non-FED contexts, courts have shed further light on the meaning of this term and the threshold that must be reached before a claim can be considered "colorable". For example, "[t]o determine whether a claim is colorable, we ask whether 'it is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.'"[16] Likewise, "[a] claim is colorable . . . when it has some legal and factual support . . . ."[17] Finally, very simply stated, the threshold is "low" to show that a claim is colorable.[18] The Court finds these definitions persuasive and will consider them when determining whether sufficient evidence has been admitted to raise a colorable claim.

Here, Hubbly Bubbly asserts that it properly exercised the option to extend the Lease and therefore cannot be unlawfully holding the Premises by force since the Lease has not expired. Both the September 16, 2011 notice and the December 1, 2011 e-mail were clearly sent outside of the 30 to 120-day range set forth in Section 1.3. The January 19, 2012 e-mail, however, fell within this range. Therefore, there are two issues the Court might have to address if it was to determine whether Hubbly Bubbly properly exercised the option. First, is whether Hubbly Bubbly's January 19, 2012 e-mail was simply a reminder of the September 16, 2011 notice or whether it constituted a new notice to Yacht Haven. If the Court was to conclude the former, the Court would then need to determine whether this early notice was adequate notice and whether Hubbly Bubbly successfully exercised the option. Although this Court has limited jurisdiction and will not decide this issue, it recognizes that other courts have distinguished between early and late exercise of options. Those courts have concluded that the policies for generally

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[14] BLACK'S LAW DICTIONARY 762 (9th ed. 2009).
[15] *Id.* at 282.
[16] *Pareja v. Attorney Gen. of U.S.*, 615 F.3d 180, 186 (3d Cir. 2010) (*quoting Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n. 10 (2006)).
[17] *Hackman v. Valley Fair*, 932 F.2d 239, 243 (3d. Cir. 1991) (*quoting* American Bar Association, *Annotated Model Rules of Professional Conduct*, Rule 3.1, at 201 (1984)).
[18] *See Green v. Fornario*, 486 F.3d 100, 106 (3d Cir. 2007).

disallowing the enforcement of a late exercise are not applicable to instances of early exercise.[19] Therefore, based on the evidence and a reasonable interpretation of the law, the Court concludes that Hubbly Bubbly has raised a "colorable" claim as to the existence of a lease in that the claim has both a factual and legal basis and is not wholly insubstantial or frivolous. Accordingly, the Court does not have subject-matter jurisdiction regarding recovery of the Premises.

Yacht Haven next seeks to recover possession of the Kiosk. Yacht Haven alleges that "[u]nder the terms of the License, Defendant was permitted to operate [the Kiosk] on the Property."[20] The Court immediately notes the language in paragraph 3 of the License, stating that the License is not a lease. As explained above, the FED court only has jurisdiction when there is an undisputed *lease* or an undisputed expired *lease*.[21] Although the language in paragraph 3 is not dispositive as to whether a license or a lease actually exists,[22] the Court finds it sufficient to raise a "colorable" claim as to the existence of a lease governing the Kiosk. Therefore, the Court will also dismiss all claims relating to the Kiosk for want of subject-matter jurisdiction.

Conclusion

The Court proceeded with trial until it was presented with sufficient evidence to demonstrate a "colorable" claim as to the existence of a lease between Yacht Haven and Hubbly Bubbly. Specifically, adequate evidence was presented to show that the Lease did not expire on April 30, 2012 at midnight, as alleged in the Complaint, but may have been extended to December 31, 2015 pursuant to Section 1.3 of the Lease, as modified by the First Amendment. Likewise, the language in the Revocable License Agreement, explicitly stating that there is no lease agreement as to the Kiosk, is sufficient for the Court to find a "colorable" claim as to the existence of a lease. Therefore, as this FED court does not have jurisdiction to resolve these issues, it must dismiss the Complaint.

DATED: July 30, 2012

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 7/30/2012

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[19] *See Goodyear Tire & Rubber Co. v. Kin Properties, Inc.*, 647 A.2d 478, 481-82 (N.J. Super. Ct. App. Div. 1994). *See also Cutshaw v. Campbell*, 3 Tenn. App. 666 (1925).

[20] Complaint at ¶ 8.

[21] *Joseph*, 49 V.I. at 427-28 (*quoting Dunagan*, 904 F.2d at 191) (emphasis added).

[22] *See generally* 49 AM. JUR. 2D *Landlord and Tenant* § 20.