

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

CROWN BAY MARINA, L.P.,	)	Case No. ST-2015-RV-5
	)	(ST-2015-CV-273)
Petitioner/Plaintiff,	)	
	)	PETITION FOR REVIEW
v.	)	
	)	
GOURMET GALLERY	)	
CROWN BAY, INC.,	)	
	)	
Respondent/Defendant.	)	

MEMORANDUM OPINION AND ORDER

Before this Court is Plaintiff/Petitioner's Brief on Review, which was filed on November 25, 2015. Defendant/Respondent filed a memorandum of law in opposition to the Brief on December 24, 2015. Plaintiff/Petitioner filed a response to Defendant/Respondent's memorandum of law on January 7, 2016. Plaintiff/Petitioner seeks reversal of a magistrate judge's oral order dismissing Plaintiff/Petitioner's forcible entry and detainer ("FED") action due to lack of subject matter jurisdiction. This Court will deny Plaintiff/Petitioner's request. However, this Court will remand this matter to the Magistrate Division of the Superior Court so it can hold that allegations concerning tax liens against the pertinent leases premises are outside the scope of an FED action.

JURISDICTION

Magistrates judges of the Superior Court of the Virgin Islands may preside over forcible entry and detainer actions.¹ This Court has jurisdiction to review a magistrate judge's decisions pursuant to Superior Court Rule 322. A magistrate judge's findings of facts are reviewed for clear error.² Legal findings, statements of law and the application thereof are given plenary review.³

BACKGROUND

This matter concerns an FED action brought by Plaintiff/Petitioner Crown Bay Marina, L.P. (herein "Crown Bay") against its tenant, Defendant/Respondent Gourmet Gallery Crown Bay Marina, Inc. (herein "Gourmet Gallery"). Crown Bay claims Gourmet Gallery failed to pay rent and common area maintenance ("CAM") charges by the first of the month, as required by the parties' Lease. Furthermore, Crown Bay alleges Gourmet Gallery failed to discharge tax liens against the pertinent premises, also as required by the Lease.

This matter came on for an evidentiary hearing before a magistrate judge on April 7 and 14, 2015. During the evidentiary hearing, Mr. Zakaria Suid, Gourmet Gallery's president and personal guarantor, testified. At the conclusion of the evidentiary hearing, the magistrate judge granted Gourmet Gallery's oral motion to dismiss for lack of subject matter jurisdiction. The magistrate judge found that Gourmet Gallery raised a colorable defense as to when the Lease

¹ 4 V.I.C. § 123(a)(6).

² SUPER. CT. R. 322.3(b).

³ *Id.*

provides that Gourmet Gallery is in default for late payment of rent. As a result, the magistrate judge granted Respondent's oral motion and dismissed the underlying matter. The magistrate judge issued a written order memorializing the oral order on August 24, 2015. Crown Bay filed a Motion for Reconsideration. On September 3, 2015, the magistrate judge denied the Motion.

Crown Bay appealed the magistrate judge's decision⁴ and presents the following two issues for this Court's review in its Brief:

"Whether the Magistrate erred in finding a colorable defense which required construction of the lease agreement between the parties[.]"

"Whether the Magistrate erred in not finding that Defendant's failure to pay Virgin Islands taxes resulting in unauthorized liens upon the premises was an independent lease default[.]"

STANDARD FOR FED ACTIONS

An FED action is a summary action initiated by a landlord to peaceably recover possession of real property. An FED action is available when a tenant "fails or refuses to pay any rent due on the lease or agreement . . ." or "continues in the possession of any premises at the expiration of the time limited in the lease . . ."⁵ "Generally, the jurisdiction of the Court in FED cases is confined to determining the issue of peaceable possession and does not extend to (a) an adjudication of title or (b) the right to possession; nor can the justice adjudicate a right of possession that depends on an equitable interest in the premises or inquire into equitable rights and give relief to which the party might be entitled in equity."⁶ Once a defendant in possession of the premises "raises a colorable defense requiring construction of an agreement between the property owner and the party in possession, an FED action will not lie."⁷ A colorable claim 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)."⁸ Therefore, presenting a colorable defense is not a heavy burden.

I. Gourmet Gallery Presented a Colorable Defense Regarding When It Is in Default of Its Duty to Pay Rent under the Lease.

a. The Magistrate Judge Did Not Commit Reversible Error by Not Providing Crown Bay's Attorney an Opportunity to Cross-Examine Zakaria Suid.

Crown Bay avers that, "[h]ad Crown Bay been given a reasonable opportunity to cross-examine Mr. Suid and offer appropriate rebuttal evidence, the Court would have found that Defendant lacked credibility and genuine support for its alleged colorable defense."⁹ While this

⁴ This Court notes there are two other FED actions between the parties with Case Nos. ST-15-CV-263 and ST-15-CV-683 that have been stayed pending resolution of this appeal.

⁵ 28 V.I.C. § 789.

⁶ *Police Benevolent Ass'n v. Domino Oil Co.*, 2015 V.I. LEXIS 68, at *3 (V.I. Super. Ct. June 17, 2015) (quoting *V.I. Cmty. Hous., L.P. v. Rivera*, 50 V.I. 179, 182-183 (V.I. Super. Ct. 2008)).

⁷ *Id.*

⁸ *Claim, Colorable Claim*, BLACK'S DICTIONARY 282 (9th Ed. 2009).

⁹ Br. on Review 8.

Court's review of the magistrate judge's conclusions of law is plenary, an appellate court must defer to a trial court's determinations of a witness's credibility as long as a rational person could agree with the assessment of the trial court.¹⁰ In addition, this Court will not question whether a party or a witness truly believes in his legal arguments or interpretation of the Lease. While a witness's credibility can be attacked to demonstrate that an assertion of fact is not true, whether Suid "genuinely support[s]" his interpretation of the Lease is irrelevant. Suid testified and Gourmet Gallery's counsel represented that he believes the Lease provides a grace period of up to the 16th day of a month to pay rent. In addition, Gourmet Gallery argued through its attorney that the Lease provides an additional ten (10) days during which Gourmet Gallery would incur an interest charge but could cure a contract breach and, consequently, not be in default.¹¹ While a party should be given an opportunity to offer evidence to rebut assertions of fact, it does not have a right to rebut a person's nonexpert opinion. Suid, through his counsel, represented that he reads the Lease as allowing him until the 16th day of a month plus ten (10) additional days to pay rent, late fees, and interest before being in default.¹² This Court accepts that Suid genuinely believes in his interpretation of the Lease, regardless whether it has any merit.

Furthermore, upon review of the transcript for the evidentiary hearing, this Court finds that the magistrate judge conducted ample inquiry into Suid's position as to when rent for Gourmet Gallery is due and when it is past due i.e., in default. The magistrate judge herself questioned Suid.¹³

b. Crown Bay Articulated a Sensible Interpretation of the Lease that Requires a Court to Engage in Contract Analysis Beyond that Permitted in an FED Action.

The underlying matter involves a dispute over when is rent due. During the evidentiary hearing, Crown Bay correctly pointed out that Section 4.2 of the Lease provides that rent is due on the first day of each month. Crown Bay appears to argue that the magistrate judge's analysis of the Lease should have attended with a reading of Section 4.2. However, Sections 19.1 and 19.2 provide that Crown Bay may retake possession of the premises if Gourmet Gallery does not "cure" any breach within 15 (fifteen) days. During the evidentiary hearing, Gourmet Gallery argued that Sections 19.1 and 19.2 create a 15-day "grace period" during which it can pay rent and avoid being in material breach of the Lease.¹⁴ In addition, Section 24.1 states the landlord can assess a late fee of five (5%) percent. Section 24.1 further provides that "[f]ailure to pay such after charge upon demand therefor shall be an event of default hereunder." The magistrate judge pointed out that Section 24.1 might allow for payment of rent after the 16th day as long as the late fee and any interest are paid upon the landlord's demand.¹⁵

¹⁰ *Moore v. Walters*, 61 V.I. 502, 508 (V.I. 2014).

¹¹ Transcript of Evidentiary Hearing Held on August 14, 2014 at 213-214, *Crown Bay Marina, L.P. v. Gourmet Gallery Crown Bay, Inc.*, Case No. ST-15-CV-273.

¹² *Id.* at 219.

¹³ *Id.* at 201, 209.

¹⁴ *Id.* at 203 to 229.

¹⁵ *Id.* at 232.

A court should avoid interpreting a contract in a manner that nullifies a provision.¹⁶ This Court finds that the Lease contains contradictory language requiring a court to engage in contractual analysis beyond that allowed in an FED action. As this Court noted above, the burden of presenting a colorable defense is light. During the evidentiary hearing, Gourmet Gallery presented a reasonable interpretation of the Lease that allows a tenant to pay rent past the first of the month and not be in default. This Court does not adopt Gourmet Gallery's interpretation of the Lease or hold that Gourmet Gallery will prevail in an eviction action. This Court merely agrees with the magistrate judge that Gourmet Gallery presented a colorable defense.

Crown Bay asserts "[d]ismissal resulted from the Magistrate's apparent acceptance of Defendant's contrived misinterpretation of the Lease . . ."¹⁷ Crown Bay misunderstands the colorable defense standard and the magistrate judge's role. The record does not demonstrate that the magistrate judge agreed with or adopted Gourmet Gallery's reading of the Lease. Instead, the magistrate judge "found that the Defendant raised a colorable defense which required the construction of the lease . . ."¹⁸ The magistrate judge, within the limited scope of an FED action, did not construe the Lease for or against either party.

II. Crown Bay's Claim Alleging Gourmet Gallery Failed to Discharge Tax Liens Is Outside the Scope of an FED Action. However, the Magistrate Judge Should Have Affirmatively Dismissed This Claim.

Crown Bay argues that Gourmet Gallery's alleged failure to pay the pertinent taxes was an independent lease default allowing the magistrate judge to order restitution of the premises. In other words, Crown Bay avers that the magistrate judge erred by dismissing the whole case when it could have retained jurisdiction of claims for which Gourmet Gallery did not present a colorable defense. Sections 18.2 and 18.3 of the Lease require Gourmet Gallery to pay property taxes assessed on the premises and Section 26.2 requires Gourmet Gallery to prevent or discharge any liens attached to the premises. Crown Bay alleges Gourmet Gallery failed to discharge tax liens.¹⁹

An FED action is available to a landlord "[w]hen the tenant or person in possession of any premises fails or refuses to pay any rent due" or "any person continues in the possession of any premises at the expiration of the time limited in the lease . . ."²⁰ Section 18.3 allows Crown Bay to opt to pay outstanding taxes assessed against the pertinent premises and charge said amount as rent to Gourmet Gallery. However, the record does not reveal that Crown Bay paid the outstanding taxes and charged the amount as rent. Because the claim regarding the tax liens does not concern rent, it is outside the scope of an FED action. While it heard testimony on an irrelevant issue, this Court determines the magistrate judge did not err by failing to find Gourmet Gallery's alleged failure to pay taxes was an independent lease default.

¹⁶ *Guardian Gen. Ins., Ltd. v. Caribbean Food Servs., Inc.*, 2016 V.I. LEXIS 215, at *7 (V.I. Super. Ct. Oct. 24, 2016) (citing *Weary v. Long Reef Condo. Ass'n*, 57 V.I. 163, 175 (V.I. 2012) (Hodge, C.J., dissenting in part) ("Any such reading which renders contract provisions pointless, superfluous, or ineffective violates basic notions of contract interpretation, and leads to an absurd result which should not be entertained"))).

¹⁷ Br. on Review 8.

¹⁸ Order, Case. No. ST-15-CV-273 (Aug. 24, 2015).

¹⁹ Compl. ¶ 13.

²⁰ 4 V.I.C. § 123(a)(6).

However, the magistrate judge made no finding or ruling on the claim concerning tax liens and, instead, decided to dismiss the entire FED action because Gourmet Gallery presented a colorable defense regarding the claim for late rent payments.²¹ Quoting *Barnes v. Weber*,²² the magistrate judge reasoned that “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.”²³ (emphasis added). The Superior Court in *Barnes v. Webner* quoted an opinion issued by the U.S. Court of Appeals for the Third Circuit in *Estate of Thomas Mall, Inc. v. Territorial Court of V.I.*²⁴

This Court finds that the magistrate judge interpreted *Barnes* too literally. It appears that the Magistrate read the phrase “as soon as” as dictating that the magistrate judge should dismiss an entire FED action immediately after a colorable defense is offered without considering other claims in a complaint. The magistrate judge properly concluded it lost subject matter jurisdiction over the claims regarding default due to late payment of rent. However, its application of precedent set by *Estate of Thomas Mall, Inc.* was to be too blunt. It does not logically follow that, because some claims involved subject matter outside the jurisdiction of the Magistrate Division of the Superior Court, then all claims should have been dismissed. Instead, the magistrate judge should have considered whether the claim concerning tax liens was outside the scope of an FED action.

The V.I. Supreme Court has emphasized that “a court can never exercise its discretion to simply ignore a claim that a party has brought squarely before it.”²⁵ Therefore, after dismissing the claims for which it did not have subject matter jurisdiction, the magistrate judge should have continued to address the other claims presented in Crown Bay’s Complaint. Finding that magistrate judge improperly dismissed claims unrelated to Gourmet Gallery’s colorable defense, this Court will remand this matter to the magistrate judge and order it to hold that Crown Bay’s claim regarding the tax liens is dismissed because it is outside the scope of an FED action.

III. The Court Will Not Address the Propriety of the Magistrate Judge’s Decision to Allow Gourmet Gallery to Present Evidence Regarding the Exclusive Use Clause.

During the evidentiary hearing, Gourmet Gallery presented evidence and testimony by Suid regarding an alleged violation of the Lease’s exclusive use clause. Gourmet Gallery claims that Crown Bay violated the exclusive use clause by leasing space to a business called Scoops & Brew. The Court recognizes that this dispute is the subject of *Gourmet Gallery Crown Bay, Inc., et al. v. Crown Bay Marina, L.P.*, Case No. ST-2014-CV-513. Gourmet Gallery discusses Case No. ST-2014-CV-513 in its pleading at length.

²¹ See Order, Case No. ST-15-CV-273 (Sept. 3, 2015); see also Record of Proceedings of Hearing Held on August 14, 2014 (stating the magistrate judge reserved ruling on Defendant/Respondent’s Motion for Directed Verdict on the VIBIR Tax Liens, which was filed on August 13, 2014).

²² 50 V.I. 167, 172 (V.I. Super. Ct. 2008).

²³ Order (Sept. 3, 2015).

²⁴ 923 F.2d 258, 264 (3d Cir. 1991).

²⁵ *Bryan v. Fawkes*, 61 V.I. 416, 476 (V.I. 2014) (citing *Garcia v. Garcia*, 59 V.I. 758, 771 (V.I. 2013)); accord, *AustinCasares v. Safeco Ins. Co. of Am.*, 81 A.3d 200, 208 n.11 (Conn. 2013) (“[A] trial court abuses its discretion when it fails to exercise its discretion”).

However, the parties' claims in Case No. ST-2014-CV-513 are not presented as issues for review in Crown Bay's Brief for Review. The record does not reveal that the magistrate judge ruled on whether the parties' dispute over the exclusive use clause provided Gourmet Gallery a colorable defense for not paying rent in full or on time. This Court's review of the magistrate judge's proceedings is limited to the issues presented in Crown Bay's Brief on Review. Therefore, the Court will not determine whether Case No. ST-2014-CV-513 precluded Crown Bay from pursuing an FED action.

Because it will deny Crown Bay's Brief on Review, this Court will deny as moot Gourmet Gallery's Motion to Strike Petitioner's Brief. Accordingly, it is hereby

ORDERED that Petitioner's Brief on Review is **DENIED**; and it is further

ORDERED that Respondent's Motion to Strike Petitioner's Brief is **DENIED as moot**; and it is further

ORDERED that this matter is **REMANDED** to the Magistrate Division of the Superior Court; and it is further

ORDERED that the magistrate judge presiding over *Crown Bay Marina, L.P. v. Gourmet Gallery Crown Bay, Inc.*, Case No. ST-2015-CV-273 is directed to amend the August 24, 2015 Order dismissing Petitioner's FED action and hold that Paragraph 13 of the Complaint, which alleges Defendant/Respondent failed discharge tax liens against the pertinent leased premises, is outside the scope of an FED action pursuant to Title 28, § 789 of the Virgin Islands Code; and it is further

ORDERED that all other outstanding motions in this matter are **DENIED as moot**; and it is further

ORDERED that this Order does not deny as moot any motions pending before the Magistrate Division of the Superior Court in Case No. ST-2015-CV-273, such as Defendant/Respondent's Motion for Costs (filed on September 17, 2015); and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to Attorney Joseph B. Arellano and Attorneys Gordon C. Rhea and Campbell C. Rhea of Gordon C. Rhea, P.C., counsel for Defendant/Respondent; and Attorney Matthew Duensing, counsel for Plaintiff/Petitioner.

Dated: August 2, 2017

ATTEST:

Estrella H. George
Clerk of the Court

By: *[Signature]*

Lori Boynes-Tyson
Chief Deputy Clerk

Denise M. Francois
DENISE M. FRANCOIS

Judge of the Superior Court of the Virgin Islands

8 / 3 / 2017