

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

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ALPHEUS LIVINGSTON,
Plaintiff

vs.

PRIME FOODS & SUPPLY CORP.,
Defendant

vs.

BETH PAULA KIMELMAN and ALTONA, INC.,
Third-Party Defendants

CIVIL NO. 23/1983

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BRUCE and/or BENJAMIN KIMELMAN
c/o Altona, Inc.
171A Altona and Welgunst
St. Thomas, Virgin Islands
(Third-Party Defendants)

MEMORANDUM OPINION AND ORDER
(December 30, 1983)

FEUERZEIG, J.

Plaintiff, Alpheus Livingston, has filed a motion for summary judgment, asking for judgment on his complaint and dismissal of the defendant Prime Foods and Supply Corporation's counterclaim. The motion will be denied because there are two material issues of fact that must be resolved by the court before it can grant judgment on either the complaint or counterclaim.

First, the affidavit of Elliot Silverman, president of the defendant Prime Foods, creates an issue of fact as to the actual rent being charged for the premises at 171 Altona when the defendant acquired the property from the third-party defendant Altona, Inc. Specifically, there is an issue of fact as to whether the services of the plaintiff were part of the consideration or rent that was being charged for the premises.

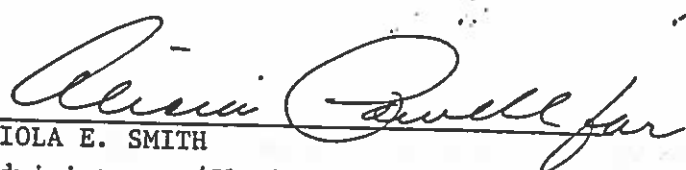
Even assuming that the property was subject to the rent control law at the time it was acquired by Prime Foods, there is a second issue of fact, and that is whether there was a knowing and intelligent waiver by the plaintiff of the benefits of the rent control law.

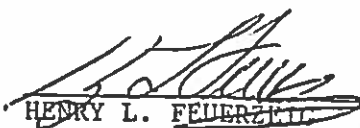
The court is mindful of its decision in Marcelly v. Mohan, 16 V.I. 575 (Terr. Ct. 1979), where it stated, "Any attempt to waive [the procedural rights of the rent control law] would thwart public policy. The court, therefore, holds that the attempt by the parties to contract away such rights is unenforceable." Marcelly, though, must be limited to its facts and insofar as it suggests that there can never be a waiver that decision is overruled. As this court stated in Francis v. Moolenaar, Civil No. 546-82 (Terr. Ct., Div. St.T. & St.J., June 16, 1983), (order denying motion for summary judgment), the rent control law cannot be used as a sword and a shield and in appropriate circumstances there may be a knowing and intelligent waiver. The burden of establishing that waiver, of course, must rest with the landlord in order to preserve the public policy purposes of the rent control law.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied.

ATTEST:


VIOLA E. SMITH
Administrator/Clerk of the Court


HENRY L. FEUERSTEIN
Judge of the Territorial Court