

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

VIRGIN ISLANDS HOUSING AUTHORITY,	)	
	)	
Plaintiff,	)	ST-10-CV-501
vs.	)	
	)	FORCIBLE ENTRY,
EVELYN PHIPPS AND ALL OCCUPANTS	)	DETAINDER AND
OF OHC, BLDG. 22, APT. 244,	)	RESTITUTION
	)	
Defendants.	)	
	)	

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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: January 12, 2011)

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 ("VIHA") seeks restitution of premises for non-payment of rent. Evelyn Phipps, Yvonne Phipps and other occupants claim that due to difficult financial circumstances, a provision in their lease exempts them from paying rent in full. The Phippses' evidence is sufficient to show that their defense requires interpretation of the lease. Therefore, their defense is "colorable", and this action must be dismissed for lack of jurisdiction.

Facts

The Phippses moved into Oswald Harris Court, Building 22, Apartment 24, St. Thomas, Virgin Islands, which is owned by VIHA, sometime in 1997. The monthly rent for the Apartment at that time was \$332.00 and apparently remained at that rate until January 1, 2007 at which time it increased to \$718.00. Sometime in 2008, the monthly rate for the Apartment increased again to \$893.00. After that rent increase, the Phippses failed to pay the \$893.00 monthly rent, which resulted in VIHA issuing a 30-day Notice of Termination on September 11, 2008. After receiving the notice, the Phippses requested an informal grievance hearing, which was conducted on October 1, 2008. At that time, Yvonne Phipps

explained that \$893.00 was not affordable because Evelyn Phipps was bedridden and required a paid caretaker, medicine, and other needs. VIHA reviewed the Phippses' rent calculation with them, explained how the calculation was made, and ensured it was correct. This did not satisfy the Phippses, who wanted the rent reduced. The hearing officer admitted that neither she, nor the area manager, had the authority to settle the matter and that the Phippses should have the opportunity to present the hardship to a top-level staff member. After the Phippses received a second termination notice on May 20, 2009, Yvonne Phipps twice wrote to VIHA asking for someone with decision making power to hear and review her grievance and hardship request. This request was never granted.

This FED action was commenced on September 9, 2010. On September 24, 2010, the Phippses filed a motion to dismiss for failure to state a claim. The case was heard on November 23, 2010. The Court heard argument on the Defendant's motion and the sworn testimony of parties witnesses, after which the parties' exhibits were admitted and the matter was taken under advisement.

Discussion

The hardship provision and asserted defense

At trial, the Phippses' argued that the following provision of the lease between VIHA and Evelyn Phipps, found in Part II(I)(E) and entitled "Exemptions from Minimum Rent Charge", applies and constitutes a facially bona fide or colorable defense to VIHA's claim for possession. It reads as follows:

VIHA has established \$50.00 as its minimum rent. An exemption may be granted if a Family believes the imposition of minimum rent would create a financial hardship, which may include the following:

1. The Family has lost eligibility for or is awaiting an eligibility determination for a Federal, state, or local assistance program, including legal aliens entitled to receive assistance under the Immigration and Nationality Act;
2. The Family would be evicted because it is unable to pay the minimum rent;
3. The Family income is decreased because of changed circumstances, including loss of employment;
4. A death has occurred in the Family; or
5. Other situations as may be determined by VIHA.

If a Family requests a hardship exemption and VIHA reasonably determines that the hardship is temporary, an exemption will not be granted. The Family may not be evicted during the ninety (90) day period beginning the month following the Family's request. If VIHA determines the financial hardship is long term, VIHA will exempt the Family from the minimum rent so long as the hardship continues. VIHA will conduct a recertification every ninety (90) days during the period the financial hardship exists.

If VIHA determines either a temporary qualifying hardship exists or that no qualifying financial hardship exists, VIHA will offer Tenant a repayment agreement for any back rent owed from the beginning of the suspension of payment of the minimum rent. The repayment agreement, which must be signed by the head of

household and co-head of household or spouse, shall require that the back rent be paid in six (6) equal instalments and that failure to make timely payment is grounds for eviction.

The Phippses contend that their financial situation is worthy of an exemption under this provision. They further argue since that this contention results in the terms of the lease becoming disputed and requiring interpretation, this FED Court lacks jurisdiction.

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."¹ 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 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."² 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.³ Therefore, if the evidence is sufficient to establish either a facially bona fide and good faith or a colorable claim of right under the lease, the FED action must be dismissed.⁴ If the evidence is not sufficient, the FED action can proceed.

Colorable defense

The "colorable" defense requirement 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."⁴ 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."⁵

The Third Circuit has held that the FED court only has jurisdiction when there "is an undisputed oral or written lease agreement . . ."⁶ and not when "there is a lease between the parties, the meaning of which is in dispute" and "requires construction."⁷ Put simply, "[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."⁸

The Phippses offer the defense that under Part II(I)(E) of the lease, their financial hardship affords them rights to exemption from minimum rent and continued possession of the

¹ *Virgin Islands Port Authority v. Joseph*, 49 V.I. 424 (V.I. S. Ct. 2008).

² *Id.*

³ *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)). See also *C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 190 (3d Cir. 1990); *Estate of Thomas Mall, Inc. v. Territorial Court of the Virgin Islands*, 923 F.2d 258, 264 (3d Cir. 1991).

⁴ See *Green v. Fornario*, 486 F.3d 100, 106 (3d Cir. 2007).

⁵ *Virgin Islands Port Authority*, 49 V.I. at 429.

⁶ *Estate of Thomas Mall*, 923 F.2d 264 (quoting *Inter Car Corp.*, 21 V.I. 157, 159 (Terr. Ct. 1984)).

⁷ *Id.* at 265.

⁸ *Id.* at 264 (quoting *Inter Cap Corp.*, 21 V.I. at 159).

Apartment. The Phippses further argue that, since they made multiple requests to VIHA for an exemption and VIHA never considered the facts nor rendered an official decision, VIHA has breached an implied contractual covenant of good faith and fair dealing by failing to timely respond to such requests. VIHA disagrees and argues that the Phippses were required to continue paying rent even if hopeful that the rate may be reduced sometime in the future. VIHA also explains that, per an internal VIHA admission policy not reference in the lease, this provision only applies to certain tenants, which do not include the Phippses.

Here, since there is clearly disagreement as to the meaning of the lease provision, the Court is not presented with an “undisputed” lease and must now determine whether construction of the language is required. The interpretation of this lease provision would directly impact whether the Phippses were required to continue making full rental payments in spite of their financial circumstances and whether they are still entitled to possession of the Apartment. Similarly, since the language appears to be silent as to the procedure and rights of parties after inaction by VIHA, additional construction may be necessary. This Court does not have the jurisdiction to construe this lease and must therefore dismiss.

Facially bona fide and in good faith defense

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.”⁹ Having determined that the Phippses claim is a colorable one that requires interpretation of the lease, the Court need not, for purposes of this case, decide whether their claim is “bona fide and [in] good faith”.

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 an [in] good faith” or “colorable.” The Phippses claim that, due to a financial hardship, they are entitled to an exemption from minimum rent under a provision of their lease. The Court has sufficient evidence to find this to be a colorable defense, requiring the construction of a disputed lease. Therefore, this matter will be dismissed for lack of jurisdiction. VIHA may then file an ordinary civil action.

Dated: January 12, 2011


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 ____/____/____

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