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Landlord and Tenant--Restrictive Covenants (Congressional Amusement Corporation v. Weltman, 55 A.2d 95 (Mun. Ct. of App. D.C. 1947))

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of emergencies, and designed to protect existing tenancies.[10] This need for strict construction is also based on the premise that the emergency laws are a stricture on the common law, and that liberal interpretations should therefore be avoided.[11]

It should also be noted that the issue of the good faith of the plaintiff in seeking possession is a basic factor.[12] In the instant case that fact was decided favorably for the plaintiff by the jury. Good faith would seem to assume additional importance in view of the obvious possibilities for unscrupulous schemes in cooperative arrangements with the present housing conditions.

In general it would seem that the holding of the District of Columbia court, while being just under the circumstances, cannot be treated as conclusive of the fact that stockholders should be deemed owners or landlords of portions of the property held by the cooperative corporation, even under the statutory definitions cited.

D. J. C.

LANDLORD AND TENANT—RESTRICTIVE COVENANTS.—A Washington, D. C. corporation leased a store upon the defendant's covenant "that he will use said premises for the sale of alcoholic beverages and other items usually associated with the sale of liquor for 'Off Sale' [Off Premises] consumption and for no other purpose whatsoever." Defendant subsequently discontinued the operation of the liquor store. The plaintiff corporation brought action for possession on the grounds that the covenant had been violated by the discontinuance, and further alleged that, since the store was in a parking center, its non-use constituted waste. The corporation's motion for summary judgment was denied; and, when it elected to stand on its motion, judgment was given to the defendant. Plaintiff appealed. *Held,* the covenant was restrictive and not mandatory. It was for the litigants to adopt language that would have clearly shown the intent to impose upon the defendant the duty of continuing in possession. *Congressional Amusement Corporation v. Weltman,* 55 A. 2d 95 (Mun. Ct. of App. D. C. 1947).

The plaintiffs argue that the agreement implicitly meant not only that it would not be used for any other purpose, but that it must be *used.* They contend that an unoccupied store is just as undesirable

[10] Reconstruction Syndicate v. Sharpe, 186 Misc. 897, 61 N. Y. S. 2d 176 (Mun. Ct. 1946).
[11] Kristal v. Steinberg, 188 Misc. 500, 69 N. Y. S. 2d 476 (Mun. Ct. 1947).
[12] Richelieu Realty Co. v. Mangin, 187 Misc. 440, 63 N. Y. S. 2d 381 (Sup. Ct. 1946).

as one used for other purposes. In deciding against this argument, the court followed a well settled rule that has few exceptions.[1]

The problem first arose in a New Jersey case in which the court said that the clause " . . . nor to use for any other purpose than a saloon and dwelling" was clear—it merely meant that a different use was prohibited; there was no compulsion to use continually.[2]

In *Henry Rahr's Sons Co. v. Buckley*,[3] the covenant " . . . premises to be used for the purpose of hotel and saloon and bathing grounds. . . . It is further understood that if the party of the second part [the lessee] . . . shall use such premises or any part thereof contrary to the conditions herein contained . . . this lease shall be void as to the party of the second part, and the party of the first part [the lessor], or his legal representatives shall be entitled to possession of said premises." Again, though the wording was even stronger than in the principal case, the court held that not using for any purpose is not using contrary to the conditions of the lease. And so it has been in almost every case of this type that has received appellate consideration.[4]

These decisions are predicated on the belief that if the parties to the agreement desired that there would be a forfeiture in the event that the premises were not occupied, it was for them to unequivocally state such in the contract. This reasoning, when viewed by itself, is sound; however, there are two classes of exceptions to the general rule that weaken its logic.

It has been held that where there is *actual* waste as a result of the non-use, recovery of the premises is allowed.[5] Similarly the tenant binds himself to occupy when the rent is based upon a percentage of the sales or profits.[6] Both of these flow from the courts' construction of the contracts which found that from a reading of the entire instruments the parties must have meant that the premises were to be occupied.

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[1] For the exceptions see notes 5 and 6 *infra*.

[2] McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840 (1898), *modified on other grounds*, 61 N. J. Eq. 208, 48 Atl. 25 (1901).

[3] 159 Wis. 589, 150 N. W. 994 (1915).

[4] Majestic Co. v. Orpheum Circuit, 21 F. 2d 720 (C. C. A. 8th 1927); Goldberg v. Pearl, 306 Ill. 436, 138 N. E. 141 (1923); Bruns & Schaffer Amusement Co. v. Conover, 111 N. J. L. 257, 168 Atl. 304 (1933); Burdick v. Fuller, 199 App. Div. 94, 191 N. Y. Supp. 442 (3d Dep't 1921); Dougan v. H. J. Grell Co., 174 Wis. 17, 182 N. W. 350 (1921).

[5] The plaintiff in the principal case unsuccessfully attempted to bring the case within the holding of Asling v. McAllister-Fitzgerald Lumber Co., 120 Kan. 455, 244 Pac. 16 (1926).

[6] Mayfair Operating Corp. v. Bessemer Properties, Inc., 150 Fla. 132, 7 So. 2d 342 (1942); Sinclair Refining Co. v. Giddens, 54 Ga. App. 69, 187 S. E. 201 (1936); Sinclair Refining Co. v. Davis, 47 Ga. App. 601, 171 S. E. 150 (1933); Selber Bros., Inc. v. Newstadt's Shoe Stores, 194 La. 654, 194 So. 579 (1940); Cissna Loan Co. v. Baron, 149 Wash. 386, 270 Pac. 1022 (1928).

It is extremely difficult to reconcile these decisions with the reasoning of the general rule, for there seems to be no adequate reason why the parties are not to be charged with providing for such contingencies when they contracted, as they were so charged in the principal case.[7] It is equally probable that they would and should foresee that there would be waste or loss in rent and profits in the event of non-occupancy as they would and should foresee the many other fact situations upon which the other actions were brought. On the other hand, if the rule is too stringent and there are valid reasons for relaxing it as to waste and percentage rents then there are comparable reasons for relaxing it in diverse situations such as that presented in the principal case.

M. F. B., JR.

PROPERTY—INJUNCTION—RIGHT OF WAY—ADVERSE POSSESSION—STATUTE OF FRAUDS.—Plaintiff and defendants own adjoining parcels of land. These two pieces of property were owned by one individual in 1891. Subsequently, he subdivided the parcel and sold the one now held by the plaintiff, retaining for himself the piece now owned by defendants. This original owner continued to live on the property, now defendants', for thirty years, during which time he never claimed any right to use the path or driveway in the rear of plaintiff's house. When he wished to use the path he asked the permission of plaintiff's predecessor in title, and an oral arrangement was made whereby he had the permission to use it as long as he did not interfere with the owner's use. This arrangement existed until the original owner conveyed the property to another predecessor of defendants' title, in 1923, who continued to use the plaintiff's path or driveway for the same purposes, without any claim of right or interest in the driveway. None of the deeds in defendants' chain of title contain any grant of, or reference to, this right of way now claimed by defendants.

Plaintiff erected a barricade across the land in dispute and the defendants tore the barricade down three times. Plaintiff now brings action against defendants for an injunction restraining defendants from using lands in the immediate rear of plaintiff's house as a right of way and for damages. *Held,* judgment for plaintiff, granting an injunction and recovery of damages for repair of barricade. *Cobb v. Avery,* — Misc. —, 75 N. Y. S. 2d 803 (Sup. Ct. 1947).

The defendants based their defense upon two premises. They claimed that they had acquired a right of way across the premises of

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[7] Yet the court arbitrarily said in the principal case that the result would be different if it had fallen into either of the exceptions. Congressional Amusement Corporation v. Weltman, 55 A. 2d 95, 96 (1947).