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Article 16

Landlord and Tenant--Constructive Eviction (Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. 1946))

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to this rule requires that the lack of knowledge must be without negligence or fault of the party seeking to be excused.[5] Applying the general rule to this case, it would appear that the case should have gone to the jury, in order to determine whether the plaintiff was negligent in failing to discover the policy.

Section 164, subdivision 3(n)14, of the New York Insurance Law provides that no action shall be maintained on a policy unless brought within two years from the expiration of the time within which proof of loss is required by the policy. Whether ignorance as to the existence of the policy will excuse the beneficiary from filing proofs of loss within ninety days after the date of the loss, as required by Section 164, subdivision 3(g)7, of the New York Insurance Law, is a question that has not as yet been squarely met in the New York courts. It has been held that although the ten- or twenty-day period after the accident, within which notice must be given,[6] may be extended by necessity (the notice may be given as soon as reasonably possible)[7] the period within which proof of loss must be filed may not be extended. The filing of the proof of loss within that period is an absolute condition precedent to the plaintiff's right to recover on the policy, unless the policy expressly states that such failure to comply will be excused if shown to be not reasonably possible.[8]

In the case at hand, since the insurance contract did not adopt this language which would overcome the strictness of the rule, the period within which proof of loss should have been filed was not extended. It terminated ninety days after the loss, at which time the two-year period of limitation commenced to run, and having run out, the plaintiff is barred from bringing an action.

W. C. B.

LANDLORD AND TENANT — CONSTRUCTIVE EVICTION. — The premises involved, an apartment in a multiple dwelling unit, were extensively damaged by a fire. The landlord in this action seeks to

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(1897); McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 Atl. 112 (1898); Munz v. Standard Life and Accident Ins. Co., 26 Utah 69, 72 Pac. 182 (1903).

[5] Schanzenback v. American Life Ins. Co., 58 S. D. 528, 237 N. W. 737 (1931).

[6] N. Y. INSURANCE LAW § 164, subds. 3(d), 4.

[7] Walterman v. Mutual Benefit Health and Accident Assn., 260 App. Div. 478, 23 N. Y. S. (2d) 158 (1st Dep't 1940); MacKay v. Metropolitan Life Ins. Co., 281 N. Y. 42, 46, 22 N. E. (2d) 154, 156 (1939).

[8] Trieger v. Commercial Travelers Mut. Accident Assn., 122 Misc. 159, 202 N. Y. Supp. 410 (Sup. Ct. 1923); *see* Titus v. Travelers Ins. Co., 268 App. Div. 802, 49 N. Y. S. (2d) 203 (2d Dep't 1944); Trippe v. P. F. Society, 140 N. Y. 23, 35 N. E. 316 (1893).

enforce payment of the rent for the two months subsequent to the fire. The defendant tenant remained in possession and occupancy of the premises. Due to the unrepaired fire damage his use and occupation was limited to a portion of the premises. The tenant, appearing in his own behalf, interposed a counterclaim for property damage. The counterclaim was dismissed without prejudice and, on the trial, the tenant was permitted to assert as an offset or defense a claim of constructive eviction. *Held,* judgment granted to plaintiff landlord for the rent with an abatement for the diminished facilities and services given the tenant. *Majen Realty Corp. v. Glotzer,* — Misc. —, 61 N. Y. S. (2d) 195 (Mun. Ct. 1946).

At the common law the destruction of a building or other part of leasehold premises by fire had no effect upon the tenant's obligation to pay the rent reserved.[1] The common law rule on this point has been changed by statute in New York and in many other jurisdictions. The New York statute provides that when a leased building is destroyed or so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee may, if the destruction or injury occurred without his fault or neglect, surrender the premises to the landlord and be free from liability for the rent subsequent to the surrender.[2]

The requisite of actual abandonment has long been held as indispensable to the sufficiency of a defense of constructive eviction.[3] This requirement stems from the very nature of the claim. The tenant, in setting up a defense of constructive eviction, says, in effect, that some act or omission of the landlord has so affected his use and enjoyment of the premises as to render them untenantable. The bare fact of retention and continued occupancy, however, unequivocally belies the contention that the premises were rendered uninhabitable. The court readily conceded the soundness and vigor of the general rule which requires actual abandonment for a defense of constructive eviction. Taking judicial notice of the critical housing situation, however, it declared that the rule was subject to relaxation when, as here, the tenant's retention of the premises could be explained on the basis of the impossibility of obtaining living quarters elsewhere in the event of surrender. Thus the court concluded that continuance of possession and occupancy *in this particular case* did not belie the claim that the premises were untenantable. Having established the sufficiency of the defense of constructive eviction, notwithstanding the want of the element of actual abandonment, the

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[1] *See* Kingsbury v. Westfall, 61 N. Y. 356 (1875); WALSH, THE LAW OF PROPERTY (2d ed., 1927).

[2] N. Y. REAL PROPERTY LAW § 227.

[3] Two Rector Street Corporation v. Bien, 226 App. Div. 73, 234 N. Y. Supp. 409 (1st Dep't 1929); Boreel v. Lawton, 90 N. Y. 293 (1882); Edgerton v. Page, 20 N. Y. 281 (1850).

court then reflected that, in the case at hand, the tenant's defense would be valid in the absence of the inclination on its part to permit waiver of the requirements of the general rule in regard to constructive eviction. In support of this contention the court advances the theory that a tenant need not allege abandonment of premises and is not required to pay rent, even for the part he retains and uses when he has been constructively evicted from the other part. Two cases are cited as representing authority for this rule.[4] It is submitted that the cases referred to as authority do not sustain the theory advanced by the court. The cases relied upon by the court concededly do establish that a tenant shall not be required to pay rent for even the part he retains when he has been evicted from the other part. However, the authority for the rule emphatically points out that a partial eviction to work a relieving of the rent obligation in favor of the tenant must be *actual* partial eviction as distinguished from a *constructive* partial eviction. The partial eviction relied upon in the instant case is based on the landlord's negligence. By statute in New York, the landlord is burdened with the duty of keeping the premises in good repair.[5] His failure to repair within a reasonable time after the fire denied the tenant the use and enjoyment of a part of the premises and consequently, as to that portion, constituted an eviction. The circumstances of the eviction, however, unmistakably stamp it as constructive in nature. Walsh, in his text on Real Property, states that "cases of so-called constructive eviction arise where the tenant is forced to quit the premises because of a wrongful act of the landlord's such as the maintenance of a nuisance on an adjoining property, or the breach of some duty owed by the landlord to the tenant which so interferes with his possession as to force him, acting as a reasonable man, to move from the premises." [6]

Since it appears that the court was in error in regard to its theory that a constructive eviction from a portion of the premises will permit a tenant to retain the remainder and pay a proportionate part of the rent, it follows that the tenant's defense in the case at hand could be sustained only by the relaxation of the general rule as originally contemplated by the court. Even if it were to be conceded that the court considered the partial eviction to be actual rather than constructive, it is submitted that the judgment rendered on those conclusions would in itself be contrary to authority. It was expressly decided in one of the cases the court relies upon that where there has been a partial eviction (actual), basic rules of law demand that the tenant be held wholly free of the obligation to pay rent from the time of the partial eviction to the time of the restoration of the

[4] City of New York v. Pike Realty Corp., 247 N. Y. 245, 160 N. E. 359 (1928); Christopher v. Austin, 11 N. Y. 216 (1854).

[5] N. Y. MULTIPLE DWELLING LAW §§ 78, 80.

[6] WALSH, THE LAW OF PROPERTY (2d ed. 1927) § 188-a; *cf.* Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716 (1890).

premises.[7] The underlying reason for this rule has been explained as being that the landlord's denial of the use and enjoyment of a part of the premises is a wrongful act and, since the law will not permit a wrongdoer to apportion his own wrong, the tenant will not be held liable even for that portion of the premises retained and occupied.[8] The judgment here does violence to that principle by determining the value of that portion of the premises which were denied to the tenant, subtracting it from the total rent, and awarding the remainder to the landlord. In effect the judgment permits the landlord to recover on a *quantum meruit* basis even though, because of his wrongful act, the law precludes a recovery on the agreement itself.

It is submitted that the law of this state as interpreted by the higher tribunals is *contra* to the rule of decision herein. No criticism is offered as to the actual result reached by the court. The judgment is no doubt a fair adjustment of the differences between the parties and may be classified under the heading of practical justice. The query is directed rather at the means employed to serve that end. The *Pike*[9] case clearly settles the rule of decision applicable to a case wherein the tenant has been constructively evicted from a portion of the premises by a wrongful act of the landlord. It establishes that, in such a case, the tenant must pay the rent reserved, and seek damages for that portion of the premises, the use and enjoyment of which was denied to him by the landlord's wrongful act or omission by interposition of a counterclaim based upon a breach of either express or implied covenants of quiet enjoyment contained in the lease.

P. S. C., JR.

LIFE INSURANCE—RIGHTS OF BENEFICIARY—SURRENDER OF POLICY FOR CASH VALUE BY INCOMPETENT INSURED.—On May 13, 1944, the insured changed the beneficiary in accordance with the right reserved in each policy and substituted his own estate for the plaintiff, his widow, as beneficiary. On May 15, 1944, he surrendered the policies in accordance with the provisions thereof, and received a full cash surrender value. On May 13, and May 15, 1944 and thereafter until his death, the insured was insane and lacked mental capacity to perform any legal act. Defendant had no notice of in-

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[7] City of New York v. Pike Realty Corp., 247 N. Y. 245, 160 N. E. 359 (1928).

[8] Two Rector Street Corporation v. Bien, 226 App. Div. 73, 234 N. Y. Supp. 409 (1st Dep't 1929); Fifth Avenue Building Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579 (1917).

[9] City of New York v. Pike Realty Corp., 247 N. Y. 245, 248, 160 N. E. 359, 361 (1928).