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NOTICE OF TERMINATION REQUIRED TO TERMINATE A PERIODIC TENANCY IMPLIED UNDER A VOID LEASE

Darling Shops Delaware Corporation v. Baltimore Center Corporation[1]

The plaintiff, the Baltimore Center Corporation, after giving less than a three-month notice to quit, brought a summary proceeding to recover possession of the premises occupied by the defendant under two void or unenforceable leases. The predecessor in title of the plaintiff, the

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[1] 60 A. (2d) 669 (Md. 1948).

Cumberland Realty Company, executed on November 16, 1937, a written instrument purporting to lease for a period of ten years to the defendant, Darling Shops, a stock room in the premises it then owned in Cumberland, Maryland. The term stipulated for was from February 1, 1938 to January 31, 1948 at an annual rent of $8,500 payable in equal monthly installments. By a subsequent writing, dated May 9, 1940, the Cumberland Realty Company, plaintiff's predecessor, leased additional space in the same premises for seven years and nine months, the term commencing May 1, 1940 and expiring January 31, 1948 at the same date as specified in the prior lease. Under this supplemental agreement, an annual rent of $1,500 was payable monthly in equal installments. Neither of these leases was executed, acknowledged, and recorded in compliance with the Maryland statutory provisions[1a], and neither was effectual, therefore, to pass any estate to the defendant. At the beginning of each of the two terms, the defendant entered into possession of the premises and thereafter paid the monthly installments of rent in conformity with the provisions of both leases. In May, 1944, the plaintiff acquired title to the premises occupied by the defendant through a conveyance from the Cumberland Realty Company. On November 14, 1947, less than three months before the expiration of the stipulated terms, the plaintiff notified the defendant that it expected the tenant to surrender possession and vacate the premises on January 31, 1948, in accordance with the provisions of the leases. Subsequently, the defendant failed to quit, and its tender of the rents after January 31, 1948 was refused by the landlord. On February 2, 1948, the plaintiff instituted a summary proceeding before the trial magistrate to recover possession of the premises under the provisions of Article 53 of the Code. The magistrate rendered a judgment in favor of the defendant, and, on appeal by the plaintiff to the Circuit Court for Allegany County, this judgment was reversed, and a judgment of restitution was entered for the plaintiff. On petition by the defendant, with the assent of the plaintiff, the Court of Appeals granted *certiorari,* and subsequently reversed the judgment of the Circuit Court.

[1a] Md. Code (1939) Art. 21, Sec. 1, cf. Schultz v. Kaplan, 56 A. (2d) 16 (Md. 1947), noted (1948) 9 Md. L. Rev. 190; cases cited therein; Hyatt v. Romera, 58 A. (2d) 899 (Md. 1948); Saul v. McIntyre, 57 A. (2d) 272 (Md. 1948); Saul v. McIntyre (second appeal); Baltimore Daily Record, March 2, 1949 (Md. 1949), for treatment of the status of renewable term leases for terms of seven years or less.

The case presented two questions, the first of which was a determination of the nature of the defendant's tenancy. The Court, speaking through Chief Judge Marbury, held that the defendant was a tenant from year to year.

From an examination of Article 21, Section 1, it is at once manifest that the leases, executed by the Cumberland Realty Company to the defendant, were inoperative to convey an estate for years, for the statute declares that: "No estate . . . above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided . . ." Since the leases did not comply with the statute, the Court, in order to ascertain the nature of the tenancy under which the defendant held, reviewed the background and development of the concept of an *implied in fact* periodic tenancy.

Originally, at common law, a tenant who entered into possession under a void or unenforceable lease became at once a mere tenant at will, whose holding either the landlord or tenant could terminate at any time without notice. The courts soon realized that such an indefinite and uncertain arrangement worked a hardship on both parties, and they took advantage of any circumstance which seemed to evince an intention that reasonable notice of termination would be required. In time, a six-month notice was held to be necessary. To find the nature of the tenancy thus created, the courts used the period for which the rent was measurable, under the terms of the unenforceable or void lease, as a criterion in determining the particular kind of holding which resulted from the tenant's entry into possession and subsequent periodical payments of rent. Where the tenant was placed in possession and thereafter paid periodic rent, an *implied in fact* periodic tenancy arose.[2] If the rent reserved to the landlord by the terms of the unenforceable lease was calculated or measurable on an annual basis, then, as in this case, the tenancy was from year to year, notwithstanding the fact that such rent was payable by the month.

The Court, in its opinion, compared this *implied in fact* periodic tenancy with the tenancy which is created when a lessee in possession under a valid lease holds over after the expiration of his specified term and continues to pay the stipulated rent which the landlord accepts. While it is true, as the Court pointed out, that in each instance the tenant impliedly holds subject to the terms of the lease,

[2] Cook v. Boehl, 53 A. (2d) 555 (Md. 1947); Hyatt v. Romero, 58 A. (2d) 899 (Md. 1948).

excepting the provision as to the duration of the term, the factors which give rise to each of these types of tenancies are different and distinguishable. By entering into possession under a void or unenforceable lease, the tenant becomes a tenant at will immediately, and, upon his payment of rent as provided in such lease, he becomes an *implied in fact* periodic tenant from year to year, quarter to quarter, month to month, or week to week, depending upon the period for which the rent was measurable in that lease. But a tenant who holds over after the expiration of the term designated in the valid lease becomes a mere tenant at sufferance.[3] The landlord may treat such tenant as a trespasser, or he may elect to hold him as a periodic tenant from year to year if the expired lease was for a term of a year or more, irrespective of the period for which the rent was measurable.[4] The duration of the term in the lease which expired, not the rent period, determines the period of an *implied in law* periodic tenancy.[5]

The second and vital question presented by the case was whether an *implied in fact* periodic tenancy automatically terminates without notice at the expiration of the term stipulated in the void or unenforceable lease. After a review and analysis of the authorities, the Court held that notice was necessary to terminate such a tenancy. According to the English view, a tenancy from year to year which is created by an entry into possession under an invalid lease is terminable by notice during the term specified in such lease, but without notice to quit at the expiration of that term.[6] This doctrine has been cited with approval in at least one jurisdiction in this country.[7] The rationale of this rule was enunciated, as the Court mentioned in the opinion, in an 1828 English decision in which it was said that an unnecessary multiplicity of notices to quit would result from a contrary holding.[8] The Court refused to adopt this view on the ground that it was not founded upon sound logic. Furthermore, the English rule could not prevail in the face of the clear requirement of

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[3] 32 Am. Jur., Landlord and Tenant, Sec. 75 (1941); Tiffany, Landlord and Tenant (1910) Sec. 208.

[4] Hall v. Myers, 43 Md. 446 (1875); Gressitt v. Anderson, 51 A. (2d) 159 (Md. 1947); Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 152 A. 434, 71 A. L. R. 1443 (1930).

[5] See 108 A. L. R. 1466 (1937); 32 Am. Jur., Landlord and Tenant, Sec. 942 (1941).

[6] Martin v. Smith, L. R. 9 Ex. 50 (1874).

[7] Coudert v. Cohn, 118 N. Y. 309, 23 N. E. 298, 7 L. R. A. 69, 16 A. S. R. 761 (1890).

[8] Doe dem Tilt v. Stratton, 4 Bing. 446, 130 Eng. Rep. 839 (1828).

the local statute which provides that: ". . . in case of tenancies [except farm tenancies] from year to year in the counties, a notice in writing shall be given three months before the expiration of the current year of the tenancy . . ."[8a] Compliance with this provision by the landlord is thus made an express condition precedent to his bringing of the summary proceeding to recover possession.

If the Court had followed the rule laid down in the English cases and held that this *implied in fact* periodic tenancy terminated automatically without notice at the end of the term stipulated in each of the void or unenforceable leases, then it would have decided that the defendant was a tenant from year to year, except that, during the last year of the specified terms, it was a tenant for a year. Such a ruling would be tantamount, in the language of Chief Judge Marbury, to holding that, "while the lease is void and unenforceable, and the tenant by operation of law holds from year to year, nevertheless, the lease is valid during the last year to create a tenancy for years. This no case has decided." The conclusion reached by the Court follows inevitably from the fact that while a void or unenforceable lease is evidence of the incidents which affect the holding, it does not control the nature of the tenancy. Under the English doctrine, the termination of the holding at the end of the specified term is necessarily one of the incidents which attaches to the *implied in fact* tenancy from year to year, and the tenant, therefore, has notice from the lease.

The decision of the Court recognizes that, if either party had sought and obtained the enforcement of these leases against the other party as agreements to lease, "then the tenancies would have been for a term of years, terminating at the expiration of such terms, without notice". Since the leases were not so enforced, an *implied in fact* periodic tenancy from year to year was created and was terminable only by giving the three-month notice required by the statute.[9]

In his dissenting opinion, Judge Markell stated that there was no reason for departing from the rule of the English cases in regard to the matter of notice of termination, and that, by so doing, injustice resulted to the

[8a] Md. Code Supp. (1947) Art. 53, Sec. 7.

[9] *Ibid.* See also Rowland v. Cook, 179 Wash. 624, 38 P. (2d) 224, 101 A. L. R. 180 (1934), which stated that, if a lessee enters into possession and pays rent under an unenforceable lease, the periodic tenancy which is thereby created is terminable on statutory notice.

plaintiff. Hence, he felt that these leases were not void but only unenforceable and that, since they were performed by the parties themselves, the tenancy should not be considered as a holding from year to year. Having voluntarily performed its contract, the lessor ought not to be placed in a worse position than if the lease had been specifically enforced.

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[1] 58 A. (2d) 643 (Md. 1948).
[2] 58 A. (2d) 649 (Md. 1948).