IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BEVERLY HANNIBAL,	:	
Plaintiff	:	DOCKET NO. 14-00,599
	:	
vs.	:	
	:	
CHRISTIAN FREY and	:	
MICHELE FREY,	:	
Defendants	:	REPLEVIN

O P I N I O N AND O R D E R

This matter comes before the Court on Plaintiff's Motion for a Write of Seizure pursuant to Pa. R.C.P. Rule 1075.1. A hearing was held on April 2, 2014.

Findings of Fact

The parties entered a residential rental agreement with Plaintiff Beverly Hannibal as tenant ("Tenant") and Defendants, Christian Frey ("Landlord") and Michele Frey, as landlords. On February 10, 2014, a constable executed an order of possession of the rental property ("property") in favor of the landlord. The tenant vacated the property on February 7, 2014. At the time tenant vacated the property she removed the majority of her personal property but still had a lot of personal property there.

From the beginning there was communication and negotiation for the retrieval of tenant's personal property. On February 10, 2014, tenant's attorney emailed the landlord advising him that tenant had not removed all of her personal property from the residence and that the tenant wanted to make arrangements to retrieve her personal property. The tenant's attorney specifically advised the landlord that she "was putting the landlord on notice that the property was not abandoned as tenant intended to retrieve it." *See, Defendant's Exhibit ("Def. Ex.") 1.* On February 11, 2014, the tenant's attorney emailed the landlord advising him that the tenant intended to go to the residence the next day to remove items and to clean. *See, Def. Ex. 1.* In

that same email, the tenant's attorney further advised the landlord that the tenant would come back Monday if she was unable to remove everything. *See, Def. Ex. 1*. The next day, on Wednesday, February 12, 2014, the tenant returned to the property to remove her personal property. On that date, the tenant removed smaller items but did not remove the larger items. On February 14, 2014, tenant's attorney acknowledged that tenant needed the landlord's permission to enter the property and that the property had been posted with a "no trespassing" sign. *See, Plaintiff's Exhibit ("Pl. Ex.") E*. The tenant texted the landlord on Friday, February 14, telling him she was not able to get all of her stuff out of the apartment on Wednesday, February 12. She indicated she would be back on Monday (February 17) or Tuesday (February 18) to get the rest of her stuff and she would call him to confirm. *See, Pl. Ex. A.*

Tenant texted the landlord on February 18, telling him she would be in Williamsport tomorrow, Wednesday, February 19 to get the rest of her stuff. She asked the landlord to call her to confirm. *See, Pl. Ex A.* The landlord replied by text on February 18, telling tenant he was unavailable the next day. He advised tenant he had changed the locks and moved her property to storage. He advised her there was still a lot of property and that she would need a large truck or U-Hall to move the property. *See, Pl. Ex. A.* The tenant returned to the property the following Monday or Tuesday to retrieve the larger items. However, the landlord was not present and the tenant was unable to get into the property to retrieve any items. The locks had been changed. Tenant never got back into the property after February 12, 2014. Tenant has not retrieved the remainder of her personal property.[1] The landlord did not notify the tenant of where her belongings were being stored.

[1] The tenant listed the personal property she seeks to retrieve as follows: an air conditioner, bedroom set, storage bin, shower curtain rods, vanity, personal items in bathroom medicine cabinets and vanity, bathroom rugs, window blind, 2 mirrors, portable closet, blinds, bed frame and mattress, blinds, desk and chair, lamp, bed frame, blinds, angora lavender full length winter coat, blinds, microwave oven, cabinet, turkey plat, dishes, plate holders, book

Shortly thereafter, the landlord started imposing payment conditions for the retrieval of the personal property. By text on February 22, 2014, landlord advised tenant that tenant would have to pay $552.87 for removal, storage, new locks, constable fee, and outstanding water bill before she could get her property. *See, Pl. Ex. A.* On February 27, 2014, tenant's attorney emailed landlord and proposed retrieving her property on Thursday, March 6, 2014. *See, Pl. Ex. C.* On February 28, 2014, landlord responded by email stating that tenant "needs to pay for the removal and storage of her property, the constable fee for the order for possession, the changing of the locks and her outstanding water bill before I will open the storage unit." *See, Pl. Ex. C.* In that same email, landlord stated that "I will agree to accept the sum of $1,000 in lieu of proceeding with an action against her [tenant], and upon payment of that sum, I will provide her with her personal property." *See, Pl. Ex. C.*

By letter dated March 4, 2014, landlord advised tenant's attorney that if tenant "pays the $552.87 that I quoted her before, then I will release her property; I will forgo any additional storage fees." *See, Pl. Ex. D.* Alternatively, the tenant could sue for conversion. *See, Pl. Ex. D.* By email dated March 6, 2014, landlord advised tenant's attorney that, at the very least, the tenant must pay the costs of removal and storage. *See, Def. Ex. 3.* But he did not state what those costs were. On March 12, 1014 (the 30th day after execution of the order for possession), the tenant filed the instant action for replevin, conversion and unfair trade practices. In his responsive pleading filed on March 28, 2014 and at the hearing, landlord indicated for the first time that the removal and storage costs imposed were $280 as of the end of March, 2014.[2]

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case, electric heater, living room blinds, ironing board, floor fan, dining room blinds, razor motor scooter, 12 speed bike, wall mirror, oak dresser with mirror, ironing board, mattress, desk and chair, leather computer chair. *See, Tenant's Exhibit "B."* Tenant valued the total replacement cost of the items as $4,152.00. *See, Tenant's Exhibit "B."*

[2] The landlord stored the property at his garage for $75 per month and paid three workers to remove the personal property and put it in storage.

The tenant is low income and cannot afford to pay the replacement value of her property or pay costs of litigation. Tenant's only source of income is her social security disability payments in the monthly amount of $741. In May 2012, tenant was diagnosed with terminal cancer and has undergone treatment. The tenant's ability to work is limited by her health conditions. The tenant has two daughters, age 15 and 12. Tenant's rent at her new residence is $750 per month. Tenant requires assistance from a friend in order to pay her rent and provide for her two children. Tenant has gone to Careerlink, OVR and sent resumes out in the hopes of supplementing her social security income with employment income. Tenant proceeded in the matter in forma pauperis pursuant to Pa. R.C.P. No. 240(d) upon certification by her attorney from North Penn Legal Services who represents her for free and believes she is unable to pay the costs.

Discussion

The Landlord raises two issues in opposition to the relief sought by tenant.

First, Landlord argues that tenant has lost her possessory interest in the property and cannot prevail in replevin of the property.

Second, Landlord argues that if the Court grants tenant's Writ of Seizure for possession of her property, tenant must deposit with the Court a bond in the amount double the value of the property as alleged in tenant's Complaint pursuant to Pa. R. Civ. Pro 1075.3, "Writ of Seizure, Bond."

First, the Court does not believe under the facts of this case that it could be found that tenant has given up her possessory interest in the property.

On February 10, 2014, the day the Writ of Possession was executed by the Constable, tenant's attorney notified the Landlord in regard to the property she had not yet removed that

"the property was not abandoned as tenant intended to retrieve it." *See, Def. Ex*. 1. Two days later, on February 12, 2014, tenant returned to the property and started to take her property out of the premises.

Tenant texted Landlord on February 14, 2014, telling him she would be back on Monday, February 17, 2014 or Tuesday, February 18, 2014, to obtain the remainder of her property. *See, Pl .Ex*. A.

On February 18, 2014, the Landlord texted tenant that he was not available on Wednesday, February 19, 2014. He also advised tenant that he had moved her remaining property into storage and changed the locks on the apartment. The Landlord did not notify tenant as to the location of the property. *See*, *Pl .Ex.* A.

Shortly thereafter Landlord imposed payment conditions before he would allow tenant to pick up the property. By text of February 22, 2014, Landlord informed tenant that she would have to pay $552.87 for his removal, storage costs, new locks, constable fees and outstanding water bills, before he would return the property to tenant. *See, Pl .Ex.* A.

On February 28, 2014, Landlord emailed tenant's attorney and reiterated these demands before he would allow tenant to retrieve her property. In the same email Landlord offered to settle all his claims against tenant for the sum of $1,000.00, indicating upon payment he would provide tenant with her property. *See, Pl .Ex.* C.

Tenant, who is indigent, did not pay these costs and on March 12, 2014, the 30th day after the order of possession, February 10, 2014, tenant's attorney filed her complaint including her request for a writ of seizure for tenant to obtain her property.

Landlord relies on the Landlord and Tenant Act found at 68 P.S. §250.505a (2014), which he refers to as Act 129, to argue that tenant has abandoned her property. §250.505a is

entitled “Disposition of Abandoned Personal Property.” The statute in subsection (b) indicates a tenant shall have ten days after eviction to contact a landlord regarding tenant’s interest to remove any personal property left on the premises. If the Landlord is so notified he is to retain the property at a site of landlord’s choosing for thirty days. The Act further provides a tenant shall be required to pay costs related to storage and removal of property. The Act indicates that after the appropriate time period has expired (10 or 30 days), the landlord may dispose of the property.

Tenant here has acted within the 10-day period placing landlord on notice that she would obtain her property. Well within the 30-day period, tenant has started to pick up her property. She was endeavoring to pick up the remainder of her property within the 30-day period when on or about February 22, 2014 she was notified by landlord that she would have to pay him $552.87, for removal fees, storage, constable fees, costs of new locks and outstanding water bills.

The tenant unfortunately is indigent and she did not pay the requested fee, and she was not allowed to pick up her property.

The Court does not believe it can treat this as an abandonment of her property under Act 129 and thus the Court cannot find tenant has abandoned her property or lost her possessory interest in the property.

The Landlord will still have a right to seek any damages from tenant including removal and storage fees for the property.

For these reasons the Court finds that tenant has established the probable validity of her claim for return of her personal property.

The second issue raised by Landlord the Court believes to be an even more difficult issue.

Pa. R. Civ. Pro. 1075.3, entitled, "Writ of Seizure.Bond," requires a party obtaining a writ of seizure to post a bond double the value of the property averred in the complaint. The complaint alleges the value of the property to be $4,152.00. Thus, the bond amount would be $8,204.00, with security approved by the Prothonotary. *See*, Rule 2075.3(b). Under the rule if plaintiff fails to maintain the right to possession of the property after a final hearing, the plaintiff shall pay to the party entitled thereto the value of the property and all costs, fee and damages sustained by reason of the issuance of the writ. The purpose of the bond is to insure such payment.

Legal Services, who represents the Plaintiff tenant, contends that their client, who is proceeding *in forma pauperis* under Pa. R. Civ. Pro. 240 and is indigent, has no means to provide a bond and that the bond requirement should be waived or found to be inapplicable because of Plaintiff's *in forma pauperis* status under Rule 240.

Based on plaintiff's testimony it appears to the Court that she is indigent as she is on Social Security Disability and supports two children. Her disability payment is exceeded by her current monthly rent. Although she claims she has terminal cancer she is making efforts to find employment.

Pa. Rule Civ. Pro. 240, entitled, "*In Forma Pauperis,"* per subsection (f)(1) and (2), notes that a party permitted to proceed *in forma pauperis*, shall not be required to;

> (1) "Pay any cost or fee imposed or authorized by Act of assembly or general rule which is payable to any court or Prothonotary or any public officer or employee, or
> (2) Post bond or other security for costs as a condition for commencing an action or proceeding or taking an appeal."

Landlord argues that the bond requirement of Rule 1075.3 does not come within Rule 240(f)(2) because the bond under Rule 1075.3 is not a condition for commencing her action.

Thus, Landlord argues that the Rule 240(f) preclusion is not so broad as to apply to the bond required for a writ of seizure as in this case.

While this is an arguable position it does not seem to the Court that the result would be consistent with the purpose of Rule 240(f).

The Court believes that the bond requirement here falls under the provision of subsection (f)(1) as a cost or fee imposed or authorized by Act of Assembly or general rule payable to any court or prothonotary. It might also be argued under subsection (f)(2) that a bond here would be encompassed as part of the costs "as a condition of commencing an action."

It would seem to be an absurd result to excuse an indigent from paying a $60.00 filing fee, while requiring an indigent to post a more than $8,000.00 monetary bond to obtain relief.

The Court also notes that the purpose for posting a bond in a replevin action would be to protect a defendant who would be found to be the owner of the property.

The Court can imagine potential cases where a petitioner obtains a writ of seizure in replevin to obtain property, but after a final hearing a respondent produces additional evidence to establish ownership of the disputed property. However, in a case like this, where a landlord has no real interest in personal property, other than holding the property to extract payment from an indigent tenant, it seems highly unlikely that the landlord could prevail at a final hearing as the owner of the property.[3] It thus seems to the Court that the purpose of the bond requirement would not seem applicable in this particular case.

While the Landlord has a valid claim for all removal and storage fees, along with other damage claims, such can be raised in Landlord's counterclaim.

[3] The Court further notes that the Landlord in this instance has no real interest in the personal property that requires protection by a bond where he has described the property as "primarily rubbish" and that he believed the property had "very little value." See, Pl. Ex. D.

Accordingly, the Court grants the Writ of Seizure in favor of tenant. Counsel shall arrange for return of the property to tenant, without prejudice to any and all claims Landlord may assert against the tenant.

Order and Writ of Seizure

AND NOW, this _____ day of April, 2014, the court GRANTS Petitioner tenant's request for a writ of seizure. The personal property of tenant shall be returned to tenant per arrangements made by counsel in this matter.

If the parties cannot arrange return of the property, Petitioner plaintiff may proceed pursuant to Pa. R.Civ. Pro. 1354 directed to the Sheriff.

Pursuant to the attached opinion, tenant is not required to obtain a bond or if a bond is needed by the Prothonotary it may be of a nominal value to be signed by Plaintiff tenant.

The Court agrees with the Landlord that the issue concerning the bond requirement presents a controlling issue of law in which reasonable minds can differ. This Court thus has no objection to an immediate appeal by the Landlord provided the property is returned to tenant. The Court certifies this issue for an interlocutory appeal pursuant to 42 Pa. C.S. § 702(b).[4]

[4] While we believe the bond issue presents a controlling question of law, our only hesitation for certification is whether an immediate appeal pursuant to 42 Pa. C.S. § 702(b) materially advances the ultimate termination of the matter. If the Superior Court accepts certification of this issue, this Court would plan to retain jurisdiction of the other claims and counterclaims of the parties so these matters would not be delayed. If the replevin count is the only matter subject to the appeal, with all other counts and claims proceeding in the Court of Common Pleas, we would see no prejudice to any of the parties.

Either party may Praecipe the Court to schedule a final hearing on the replevin matter if no appeal is taken or granted.

Either party may Praecipe the Court for further conference to obtain a scheduling order as to all other claims or counterclaims raised by the parties to this action.

BY THE COURT,

_____ _____

Date Kenneth D. Brown, Senior Judge

cc: Jennifer L. Heverly, Esq.
Christian Frey, Esq.