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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

LANDLORD AND TENANT—RELAXATION OF ABANDONMENT REQUIREMENT FOR CONSTRUCTIVE EVICTION, DURING CRITICAL HOUSING SHORTAGE.

Majen Realty Corporation v. Glotzer[1]

In an action for two months back rent, defendant asserts as set off or defense a claim of constructive eviction by reason of the plaintiff's failure to make prompt repair of damage to the apartment caused by fire which deprived the defendant for all practical purposes of the entire use of the apartment during the first month and

1. 61 N. Y. S. (2d) 195 (N. Y. City Ct. 1946).

partial use during the second month, although at no time had the defendant abandoned the premises. In denying full recovery of rent to the plaintiff, the court took judicial notice of the critical housing shortage existing in New York City and relaxed the rule that there must be an actual abandonment under the defense of partial constructive eviction.

The great weight of authority is to the effect that to constitute constructive eviction, some act of a permanent character must be done by the landlord or paramount title holder with the intention and effect of depriving the tenant of the full beneficial enjoyment of the premises, to which the tenant yields.[2]

It has been remarked that "the propositions that there can be retention of demised premises, and an eviction, are logically and legally contradictory"[3] and further that it would be unjust to permit the tenant to remain in possession and escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right.[4]

Although it is true that the courts usually speak of a particular act or series on the part of the landlord as constituting a constructive eviction *vel non* without any reference to the subsequent relinquishment of possession by the tenant, this is not a strictly accurate mode of expression, since parting with the possession is as much a part of the eviction when the tenant leaves as a result of the landlord's interference with his enjoyment as when he is forcibly ousted, he being in theory ousted by the landlord in the former case as in the latter.

The court in the instant case unequivocally recognizes this doctrine[5] and asserts that the rule should still prevail where a market of available apartments or dwelling accommodations exists. It points out however "that rule rests upon the reasoning that if the premises in face were not fit for occupancy, the tenant would not have retained possession but would have moved elsewhere, and his remaining in the premises belies any claim that they were not fit and habitable."[6] After setting

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2. Warren v. Wagner, 75 Ala. 188 (1883); Hayner v. Smith, 63 Ill. 430 (1872) (where right to obtain power from belt was appurtenant to room leased, landlord's act of disconnecting belt from source of power with intent of stopping tenant's business); Royce v. Guggenheim, 106 Mass. 201 (1870); Brown v. Holyoke Water Power Co., 152 Mass. 463, 25 N. E. 966 (1890) (where store was leased with vacant lot in rear, landlord's act of excavating lot for creation of building darkened tenant's premises); Skally v. Shute, 132 Mass. 367 (1881); Doyle v. Lord, 64 N. Y. 432 (1876); see also Bannister Real Estate Co. v. Edwards, 282 S. W. 139 (Mo. App. 1926); Jackson v. Eddy, 12 Mo. 209 (1848) . For additional decisions see annotation, (1921) 20 A. L. R. 1370 .

3. Mortimer v. Brunner, 19 N. Y. Super. Ct. (6 Bosw.) 653 (1860. It is said in Koehler v. Schneider, 15 Daley 198, 203, 4 N. Y. Supp. 611 (1889), that the statement that a tenant while remaining in possession, cannot assert an eviction, "is only another way of saying that one cannot raise the defense of eviction unless he has been evicted."

4. Legier v. Deveneau, 98 Vt. 188, 126 Atl. 392 (1924).

5. Two Rector Street Corp. v. Bein, 226 App. Div. 73, 234 N. Y. Supp. 409 (1st Dept. 1929), is cited in support of this proposition.

6. Majen Realty Corporation v. Glotzer, instant case at 196.

up what the court regards as the basis for the rule of abandonment, it justifies an exception by reasoning that "where there are no living accommodations available elsewhere or there is such a scarcity of them that impels the legislature to declare a public emergency to exist because of such a condition, the reason upon which the rule is based disappears, and the rule should therefore be relaxed."[7]

The decision, however, is not as adverse to the landlord as might appear from the language used, for the court's final determination was that "because of the non-use and inability to use a portion of the premises, under present existing conditions, that will be considered a surrender of possession of that portion constituting a partial constructive eviction" therefore the court will ". . . make an allowance for diminished facilities and services accorded the tenant through the neglect of the landlord" and "allow an abatement or offset to the extent of diminished services and facilities, which it finds to be three-fourths of the February rent and one-half of the March rent."[8]

The general rule, however, in cases of partial actual eviction by the landlord is that the court will not apportion the landlord's wrong, thus the landlord cannot recover any of the rent. Many decisions so holding are set out in early annotations[9] and are supported by later cases.[10] These assert that an act which deprives the tenant of the use and enjoyment of a portion of the leased premises constitutes a partial eviction which may be relied upon by the tenant in an action for the rent without surrendering possession of the balance of the premises. Thus, where without the consent of the tenant the landlord entered upon the leased premises and made repairs, it was held to constitute a partial eviction suspending the rent, the lease not giving such authority to the landlord.[11] A Michigan case[12] points out that in an action to recover rent where there has been a partial eviction by the landlord the tenant may remain in possession during the remainder of the term without paying rent, for the law will not aid the landlord in collecting the rent of the portion reserved because neither party to a lease can apportion the rent. It is submitted that this rule is applicable in cases of constructive partial eviction as well as in cases of actual partial eviction.[13]

Under that reasoning, which apparently the majority of the American jurisdictions and New York[14] has followed in the past, it would appear that the court would not apportion the rent on the theory that it could no more alter the terms of the lease than either party could. However the court reaches an entirely different conclusion and states that "The local area office of the Office of Price Administration

7. *Id.* at 197.
8. *Ibid.*
9. See annotation in (1921) 20 A. L. R. 1372.
10. Franks v. Rogers, 156 Ark. 120, 245 S. W. 311 (1922); Ravet v. Garelick, 221 Mich. 70, 190 N. W. 637, 28 A. L. R. 1331 (1922); Lewis v. Minneapolis Invest. Co., 190 N. W. 70 (Minn. 1922).
11. Harperly Hall Co. v. Joseph, 187 N. Y. Supp. 120 (1st Dept. 1921).
12. Ravet v. Garelick, 221 Mich. 70, 190 N. W. 637, 28 A. L. R. 1331 (1922).
13. 2 Tiffany, *Landlord and Tenant* (1912) § 185e.
14. Seigel v. Neary, 38 Misc. 297, 77 N. Y. Supp. 854 (1st Dept. 1902).

would be authorized . . . to reduce the maximum rent for any diminution of services or facilities, and there is no reason why the court cannot similarly make an allowance for diminished facilities and services accorded the tenant through the neglect of the landlord, which constitutes a statutory violation, such as here is found to exist."

There are various reasons for failure to leave the premises that have been recognized by the courts as justifying the tenant in continuance of possession, although he interposes a claim of constructive eviction,[15] one of which is the claim that the tenant remained in possession waiting for repairs. In *Hartenbauer v. Brumbaugh*[16] it was held that the lessee did not waive her right to claim an eviction by remaining a few months in order to give the landlord an opportunity to remedy the condition complained of as constituting an eviction. In *Krausi v. Fife*,[17] in holding that five months continued occupancy after the plumbing became defective was not excessive, the court said that "The tenant was entitled to a reasonable time within which to abandon the premises." It has moreover been held that notwithstanding the fact that the landlord did not promise to improve conditions, continued occupancy by the tenant may not be unreasonable if it appears that he believed that there was a fair prospect of improving conditions through his own affirmative act."[18] Yet even under the authority of these cases, actual abandonment must subsequently follow before the claim of constructive eviction can be interposed.

Apparently the court in relaxing the requirement of abandonment for a defense of constructive eviction in an action for rent, and in permitting an apportionment of the rent, found it justifiable to do so to reach an equitable conclusion under unprecedented shortages affecting both parties.

EUGENE E. ANDERECK

15. Hartenbauer v. Brumbaugh, 220 Ill. App. 326 (1920) (sickness or physical disability); Laffey v. Wookhull, 256 Ill. App. 325 (1930); Rome v. Johnson, 174 N. E. 716 (Mass. 1931) (time for finding new location); Minneapolis Co-Op Co. v. Williamson, 51 Minn. 53, 52 N. W. 986 (1892) (reaccuring or cumulative causes for abandonment); Heilbrun v. Aaronson, 116 N. Y. Supp. 1096 (1909); Siebold v. Heyman, 120 N. Y. 105 (1909); Batterman v. Levenson, 102 Misc. 92, 168 N. Y. Supp. 197 (2d dept. 1917); Graecen v. Barker, 130 N. Y. Supp. 141 (1911); Marks v. Dellaglio, 56 App. Div. 299, 67 N. Y. Supp. 736 (1st Dept. 1900) (promise by landlord to remedy conditions); Cowie v. Goodwin, 9 C. & P. 376, 173 Eng. Rep. R. 877 (1840).

16. 220 Ill. App. 326 (1920).

17. 120 App. Div. 490, 105 N. Y. Supp. 384 (2d Dept. 1907).

18. New York State Investing Co. v. Wolf, 84 Misc. 66, 145 N. Y. Supp. 945 (1st Dept. 1914), where the period of occupancy was two months.