

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

Lloyd Bouschor v. Sault Tribe Facilities Management

APP-12-05

Decided May 16, 2013

BEFORE: FINCH, HARPER, KRONK, JUMP, and MCKERCHIE Appellate Judges.

OPINION AND ORDER

Kronk, Appellate Judge, who is joined by Appellate Judges Finch, Harper, Jump and McKerchie.

As explained more fully in the discussion below, this Court remands the matter to the Tribal Court for reconsideration consistent with this opinion.

Factual and Procedure Background

On July 1, 1996, the Appellant and Appellee entered into a rental agreement for a family residence located at 2293 Shunk Rd. The rental agreement between Appellant and Appellee provided that Appellant would pay Appellee \$400 per month in rent. Based on the transcript of the Landlord Tenant Hearing held on November 19, 2012, it appears that Appellant failed to pay all of the rent due in 2011, as \$107 of outstanding rent payments remained from 2011. Moreover, Appellant failed to make rent payments the first eight months of 2012. On October 15, 2012, Appellee discovered that the rented premises in question were vacant. Also on October 15, 2012, Appellee filed a complaint with the Tribal Court alleging that Appellant “had abandoned the premises and owed outstanding money damages in the amount of \$3,337.00.” *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 3 (Nov. 19, 2013). Appellee determined that Appellant owed a total of \$3,337.00 in outstanding rent. Moreover, Appellee also sought to recover \$898.82 for maintenance costs related to cleaning up the property following Appellant’s abandonment. Accordingly, Appellee sought to recover \$4205.82 from Appellant. On November 19, 2012, the Tribal Court held a hearing on the matter. On the same day, the Tribal Court entered a money judgment against Appellant for \$4205.82.

Appellant appeals from the Tribal Court’s money judgment entered against him. Specifically, Appellant cites to Tribal Code Section 82.114(c) and (d) as the basis of his appeal. Tribal Code Section 82.114(c) allows for an appeal when “[a]ny ruling, order, decision or abuse of discretion which prevented a fair hearing or trial.” Tribal Code Section 82.114(d) allows for an appeal where there is “[i]nsufficient evidence to support the verdict, decision, order or judgment of the jury or Tribal Court.” Considering the Appellant’s appeal in totality, Appellant alleges that the Tribal Court did not possess the necessary facts to justify its decision. Also, Appellant would like permission to remove an out building that remained on the property following his abandonment.

Given neither party requested oral argument, this Court did not hear oral argument in the matter and therefore decides the matter based on the record provided this Court.

Jurisdiction and Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the Tribal Court. Tribal Code Section 82.109.

In matters involving a finding of fact by the Tribal Court, this Court will review to determine whether the Tribal Court's determination was "clearly erroneous." Tribal Code Section 82.124(1). "In applying the clearly erroneous standard of review, the Court will determine whether it is left with a 'definite and firm conviction' that the trial court made an error in its findings of fact." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008). According to Tribal Code Section 82.124(5) "[a] conclusion of law shall be reviewed by the Court of Appeals without deference to the Tribal Court's determination, i.e., review is *de novo*." Given the Tribal Court's judgment in this matter does not appear to include any factual findings, the Tribal Court's judgment was a conclusion of law (i.e. the remedy assessed) and this Court will apply the *de novo* standard of review.

It is also important to note that this Court may consider issues not raised before the Tribal Court if such consideration is necessary to avoid a "miscarriage of justice". Tribal Code Section 82.125(1).

DISCUSSION

The record in this matter is scant. Based on a review of the transcript from the November 19, 2012 hearing, it appears that the Tribal Court focused on the damages requested. Also, some consideration was given to the Appellant's desire to obtain his out building that was left at the property when he abandoned the premises. Notably, at two points during the November 19, 2012 hearing, Appellant indicated that he did not contest the damages sought by Appellee. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 11 (Nov. 19, 2013).

Accordingly, this Court must consider whether the Tribal Court's conclusions of law were supported by the record in front of it. In resolving this question, the Court first considers the law on abandonment and estoppel. Second, because Appellant failed to contest the amount of damages requested by Appellee at the November 19, 2012 hearing, no arguments were preserved on appeal to this Court. Therefore, this Court must decide whether a miscarriage of justice would occur should it fail to consider the above mentioned arguments. Tribal Code Section 82.125(1).

Abandonment

The facts in this case are troublesome. Based on the transcript of the November 19, 2012 hearing in this matter, it would appear that the Appellee allowed the Appellant to persist in nonpayment of rent for over 8 months (the \$107 of non-paid rent in 2011 in addition to the 8 months of non-paid rent in 2012). Yet, despite clear notification and eviction procedures spelled out in both the rental agreement between Appellant and Appellee and Tribal Code Section 83, Appellee failed to take any steps to mitigate its damages until it filed a complaint in the Tribal Court on October 15, 2012. This seems like an exceptionally long period of time to allow damages to accrue.

Tribal Code Section 83.303(5) provides that nonpayment of rent is evidence of abandonment. Given Appellant failed to pay rent for such a long period of time, the question arises as to when the Appellant abandoned the property. Second, a question arises as to when the Appellee should have been aware of the abandonment. The rental agreement between the parties stipulates that Appellee may bring eviction proceedings within one month of nonpayment of rent. It may therefore be that Appellee should have been aware of Appellant's abandonment after one month of nonpayment. In some jurisdictions, a landlord has the duty to mitigate damages once a tenant abandons the property.

Based on a cursory review of Tribal Code Section 83, it appears that tribal law does not directly speak to whether landlords have a duty to mitigate following abandonment. Tribal Code Section 83.104 does allow for the consideration of foreign law when tribal law or the rental agreement in question does not specifically speak to the issue in question.

Accordingly, it is appropriate to look at the laws of other jurisdictions. Given leasehold law is generally governed by the states, this Court looks to state law for some guidance on the duty to mitigate following abandonment. In Michigan, abandonment does not exonerate a tenant from paying rent, as “[a] tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and the mere vacating of the premises during the term or while the tenancy exists will not exonerate him from such payment.” *Huntington v. Parkhurst*, 87 Mich. 38, 49 N.W. 597 (1891). However, it appears that many jurisdictions now place a duty to mitigate damages on the landlord once abandonment has occurred. In *Sommer v. Kridel*, 378 A.2d 767 (1977), the Supreme Court of New Jersey considered whether landlords must mitigate damages following abandonment. In concluding that landlords did have a duty to mitigate, the court explained that there was an upward trend in jurisdictions requiring a duty to mitigate, that such mitigation was consistent with the duty to mitigate under contracts law and that such a duty to mitigate was consistent with modern notions of equity and fairness.

Appellee allowed for damages to accrue for an excessive period of time (over 8 months). Based on the record in this matter, it appears that Appellee did not take any steps to mitigate Appellant's damages. Accordingly, several questions remain. First, did Appellee have a duty to mitigate following Appellant's abandonment? Resolution of this question requires consideration of the governing tribal law as well as state and federal law which may be persuasive on this

question. Second, if Appellee did have a duty to mitigate, when was Appellee reasonably made aware of Appellant's abandonment? Notably, if Appellee did have a duty to mitigate damages, such mitigation would likely not apply to the maintenance costs requested by Appellee.

Estoppel

In addition to the potential duty to mitigate damages following abandonment, this case also raises equitable concerns related to estoppel. Estoppel is an equitable doctrine that arises in a wide variety of contexts. Generally speaking, estoppel prevents an actor from succeeding on a claim against another when his or her actions contributed to the problem of which the actor complains. Black's Law Dictionary (revised 4th ed.) explains that "[a]n 'estoppel by acts and declarations' is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself."

As previously discussed and as mentioned in Appellant's notice of appeal, Tribal Code Section 83 and the rental agreement between the Appellant and Appellee provide detailed guidance on the steps to be followed by Appellee when the Appellant failed to pay rent. Specifically, the rental agreement at page five provides that "[o]n the 25th day of your payment period if your rent has not been paid a court date will be set seeking you [sic] lawful eviction and judgment for arrearage and court cost." Rather than following the procedures established in the rental agreement between Appellant and Appellee, Appellee allowed Appellant to persist in his nonpayment of rent for over 8 months. Accordingly, the question arises as to whether Appellee's failure to follow the established eviction procedures outlined in the rental agreement induced Appellant to alter his position (i.e. continue to not pay rent) in a way that was injurious to himself.

Abandoned Property

In his appeal, Appellant requests permission to recover the "out building" that was left at the property when he abandoned the property. The rental agreement between the Appellee and Appellant provides that "[t]enant [Appellant] agrees that if, upon vacating the premises, he leaves any personal property in or about the premises without the written permission of landlord, said personal property shall be deemed abandoned to the landlord and shall be disposed of by the landlord as landlord sees fit, and tenant here by releases landlord of any liability therefore." Sault Ste. Marie Tribe of Chippewa Indians Rental Agreement, 4 (July 1, 1996). Accordingly, on the basis of the rental agreement, Appellant forfeited his ownership in the out building when he abandoned it on the property. However, the Tribal Court asked that the parties cooperate, if possible, to ensure that Appellant receive the out building. Assuming the out building is still viable, the parties are encouraged to effectuate the Tribal Court's request. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 12 (Nov. 19, 2013).

Miscarriage of Justice

Generally, appellate courts avoid consideration of issues that are not raised below and preserved for appeal. In the present matter, Appellant did not raise any of the arguments discussed above during the November 19, 2012 hearing. In fact, he did quite the opposite. As previously discussed, Appellant did not contest the amount of damages requested at oral argument. *Sault Tribe Facilities Management v. Lloyd Bouschor*, File No. LT-12-133, Transcript of Landlord Tenant Hearing, 11 (Nov. 19, 2013). Accordingly, based on the principle that appellate courts should avoid considering arguments that were not raised below and the fact that Appellant did not contest the requested damages, it would be easy to affirm the Tribal Court's decision in this matter.

However, Tribal Code Section 82.125(1) provides that "unless a miscarriage of justice would result the Court of Appeals will not consider issues that were not raised before the Tribal Court." This Court may therefore depart from the general rule regarding issues preserved for appeal where a "miscarriage of justice" would otherwise occur. It seems that this may be such a case. Given Appellant appears *in pro per* and the damage award against him is substantial, appellate review of relevant legal arguments is appropriate to ensure that a "miscarriage of justice" does not occur.

ORDER

For the reasons explained above, this matter is remanded to the Tribal Court for a determination consistent with the issues raised above. First, the Tribal Court should determine at what point Appellee reasonably should have been aware of Appellant's abandonment. Second, the Tribal Court should determine whether Appellee had a duty to mitigate following Appellant's abandonment. Third, the Tribal Court should determine whether the doctrine of estoppel precludes Appellee from collecting damages in this case.

It is SO ORDERED.