

No. 35736 - *SER Rhonda Bay v. Hon. Brenda K. Marshall, Magistrate.*

No. 35737 - *SER Ashleigh & Daniel Jurkovich v. Hon. Jason Bennett, Magistrate*

FILED

May 3, 2011

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., concurring:

I agree with the Court's ruling and write separately to expand on the issue raised in footnote one of the majority opinion. After reviewing this issue, it is clear that a tenant found to be in wrongful occupation of residential rental property, whose tenancy has expired, may not remain in possession of the rental property throughout the pendency of his appeal.

Magistrate Brenda Marshall entered an order of "Possession/Removal: Wrongful Occupation of Residential Rental Property" against Rhonda Bay following a hearing in magistrate court brought by Ms. Bay's landlord. The magistrate awarded immediate possession of the rental property to the landlord. Ms. Bay argued that the magistrate erred when ruling that Ms. Bay was not permitted to remain in possession of the rental property throughout the pendency of her appeal. During oral argument before this Court, counsel for Ms. Bay stated that she no longer sought to occupy the rental property. This issue is therefore moot but since it frequently arises in magistrate and circuit courts throughout the state, I will address Ms. Bay's argument.

Ms. Bay argued that the magistrate's ruling that she could not remain in possession of the rental property during the pendency of her appeal violated the automatic

stay provision set forth in *W.Va. Code* § 50-5-12(a), whose last sentence states “[t]he filing or granting of an appeal shall automatically stay further proceedings to enforce the judgment.” This statute must be read in conjunction with *W.Va. Code* § 55-3A-1 *et seq.*¹, entitled “Remedies For Wrongful Occupation of Residential Rental Property” (hereinafter “Wrongful Occupation Act”). The Wrongful Occupation Act was passed in 1983 “to provide the landlord with a quick procedure to remove a hold-over tenant[.]” *Criss v. Salvation Army Residences*, 173 W.Va. 634, 638, 319 S.E.2d 403, 407 (1984).

The controlling language of the Wrongful Occupation Act that governs the issue before us is found in *W.Va. Code* § 55-3A-3(g), which states:

¹ *W.Va. Code* § 55-3A-1(a) states:

(a) A person desiring to remove a tenant from residential rental property may apply for such relief to the magistrate court or the circuit court of the county in which such property is located, by verified petition, setting forth the following:

(1) That he is the owner or agent of the owner and as such has a right to recover possession of the property;

(2) A brief description of the property sufficient to identify it;

(3) That the tenant is wrongfully occupying such property in that the tenant is in arrears in the payment of rent, has breached a warranty or a leasehold covenant, or has deliberately or negligently damaged the property or knowingly permitted another person to do so, and describing such arrearage, breach, or act or omission; and

(4) A prayer for possession of the property.

In the event an appeal is taken and the tenant prevails upon appeal, the relief ordered by the appellate court shall be for monetary damages only and shall not restore the tenant to possession if the term of the lease has expired, absent an issue of title, retaliatory eviction, or breach of warranty. *During the pendency of any such appeal, the tenant is not entitled to remain in possession of the property if the period of the tenancy has otherwise expired.*

(Emphasis added).

In the present case, Ms. Bay and her landlord had a month-to-month verbal tenancy agreement. The landlord was required to give her a full rental period's notice to vacate, which he did. Therefore, Magistrate Marshall found that Ms. Bay was in wrongful occupation of the premises and awarded monetary damages against her. Ms. Bay was not permitted to remain in possession of the property during the pendency of her appeal because her tenancy had expired.

The Wrongful Occupation Act does not permit a tenant found to be in wrongful occupation of residential rental property, whose tenancy has expired, to remain in possession of the property during the pendency of his appeal. The Act was passed to provide a landlord with a quick mechanism to remove a hold-over tenant. To allow a tenant to remain in possession pending the appeal would defeat the purpose of the Act and would create an incentive for a tenant to delay the appellate process. The Wrongful Occupation Act does not even permit a tenant in a wrongful occupation proceeding to seek a continuance without paying rent into court as it becomes due. *W.Va. Code* § 55-3A-3(d), states, “[i]f a continuance is granted upon request by a tenant, the tenant shall be required to pay into court

any periodic rent becoming due during the period of such continuance.”

In view of the purpose of the Wrongful Occupation Act and the plain language of *W. Va. Code* § 55-3A-3(g), a tenant found to be in wrongful occupation of residential rental property, whose tenancy has expired, may not remain in possession of the property during the pendency of his appeal.