

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

AMBER LEILA JONES and SHERRY L. MENNETT,	:	MAY TERM, 2004
	:	
	:	NO. 01396
Plaintiffs,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 080577
ANTHONY BATTISTA,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 9<sup>th</sup> day of December 2005, upon consideration of the Motion for Summary Judgment of defendant Anthony Battista, the Cross-Motion for Summary Judgment of plaintiff Sherry L. Mennett, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion filed contemporaneously herewith, it is hereby **ORDERED** that Battista's Motion is **DENIED** and Mennett's Motion is **GRANTED**.

It is further **ORDERED** that within twenty (20) days of the date of entry of this Order, in accordance with Paragraph 11 of the Lease and Option Agreement between the parties, Battista shall deliver a deed to Mennett and Mennett shall assume a portion of the mortgage with respect to certain property known as 1935 Manning Street, Philadelphia, Pennsylvania.

The parties shall proceed to trial on their remaining claims against one another.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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	:	
Defendants.	:	

**OPINION**

This action involves a dispute over the ownership of certain real property located at 1935 Manning Street (the “Property”). On June 14, 2000, plaintiff, Sherry L. Mennett (“Mennett”) sold the Property to defendant Anthony Battista (“Battista”) pursuant to a written Agreement of Sale. *See* Complaint, ¶ 13; Ex. D. Also in June, 2000, Battista leased the Property to Mennett pursuant to a written Lease and Option Agreement (the “Lease”). *See id.* Ex. F.

The Lease provided that Mennett was to pay monthly rent in an amount equal to the monthly mortgage payment due on the Property. *See id.*, Ex. F, ¶ 3. Although Mennett made some rental payments initially, she eventually ceased to do so. *See* Motion for Summary Judgment (“MSJ”), ¶ 7; Response to MSJ, ¶ 7. On July 22, 2002, Battista informed Mennett by letter that he was terminating the Lease due to her nonpayment of rent and her failure to maintain liability insurance as required in the Lease. *See* MSJ, Ex. C. On December 10, 2002, also by letter, Mennett attempted to exercise her option to purchase half of the Property pursuant to the terms of the Lease. *See* Response to MSJ, Ex. G.

Mennett then filed this action in which she requested the following relief: 1) specific performance of the option provisions of the Lease; 2) an accounting for all monies due to her as a

result of her exercise of the option; 3) damages for unjust enrichment resulting from Battista's alleged breach of the Lease; 3) damages for his breach of the Lease. *See* Complaint. Battista has counterclaims for monies he alleges are due to him under the parties' agreement(s). Battista has now moved for summary judgment<sup>1</sup> on all of Mennett's claims in which he argues that she no longer has any rights under the option provisions of the Lease due to her admitted default in payment of the rent.<sup>2</sup> Mennett has cross-moved on her claim for specific performance of the option provisions of the lease.

In response to Battista's Motion, Mennett argues that the lease does not expressly state that her failure to pay rent is grounds for default or termination of the Lease. In making this argument, she points to the provision entitled "Term of Lease," which provides only that

The lease term shall expire in ten (10) years from the date of this agreement, or upon the delivery of a deed conveying one-half interest in the premises pursuant to the option to purchase set forth in paragraph 11.

*See* Complaint, Ex. F, ¶ 2. Nowhere does the Lease state that Battista has the right to call a default, terminate the Lease, or otherwise extinguish Mennett's rights under the Lease due to her failure to fulfill her obligations under the Lease. At most, the Lease provides that

[Mennett] covenants and agrees with [Battista] that in consideration of [Battista] paying rent when due, she shall peaceably and quietly use, occupy and possess the premises for the full term of this lease . . .

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<sup>1</sup> Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999).

<sup>2</sup> Battista also claims that Mennett is in default for failure to maintain liability insurance for the Property, as required under the Lease. *See* MSJ, ¶ 9; Complaint, Ex. F, ¶ 7. However, Mennett claims that she did maintain such insurance in amounts in excess of what was required under the Lease. *See* Response to MSJ, ¶ 9; Complaint, Ex. G (a "Renewal Declaration" indicates that Mennett had liability insurance from May 9, 2002 through May 9, 2003, at least). Therefore, the issue of whether she maintained liability insurance is clearly a disputed issue of material fact that cannot be resolved until trial.

*See id.*, Ex. F, ¶ 1. Since the Lease does not expressly provide a remedy to Battista in the event of Menett’s failure to pay rent, he is left with only those remedies provided at law.

Except to the extent the parties to a lease validly agree otherwise, if there is a breach of the tenant’s obligation to pay the rent reserved in the lease, the landlord may:

- (a) recover from the tenant the amount of the rent that is due; and
- (b) terminate the lease if the rent that is due is not paid promptly **after a demand** on the tenant for the rent . . .

Restatement (Second) Property: Landlord and Tenant § 12.1 (1977) (emphasis added).<sup>3</sup> *See Elizabethtown Lodge No. 596 v. Ellis*, 391 Pa. 19, 24, 137 A.2d 286, 289 (1958) (in a commercial lease situation, the court held that “in Pennsylvania we have consistently followed the strict common law rule that, unless a demand for rent is expressly waived by the terms of the lease, a demand by the lessor is absolutely essential to work a forfeiture thereof for nonpayment of rent.”); 68 P.S. § 250.501(a) (“A landlord desirous of repossessing real property from a tenant . . . may notify, in writing, the tenant to remove from the same at the expiration of the time specified in the notice under the following circumstances, namely (1) upon the termination of a term of the tenant, (2) or upon forfeiture of the lease for breach of its conditions, (3) or upon the

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<sup>3</sup> Likewise, with respect to a tenant’s failure to perform some other condition of the lease, such as the duty to maintain liability insurance, the landlord may not terminate the lease without first requesting that the tenant cure the default.

Except to the extent the parties to a lease validly agree otherwise, if the tenant fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the landlord is deprived of a significant inducement to the making of the lease, if the tenant does not perform his promise within a reasonable period of time **after being requested to do so**, the landlord may:

- (1) terminate the lease and recover damages; or
- (2) continue the lease and obtain appropriate equitable and legal relief, including
  - (a) recovery of damages, and
  - (b) recovery of the reasonable cost of performing the tenant's promise.

Restatement (Second) Property: Landlord & Tenant, § 13.1 (1977) (emphasis added). *See also Cambria-Stoltz Enterprises v. TNT Investments*, 747 A.2d 947, 951 (Pa. Super. 2000) (“forfeitures are strongly disfavored . . . and a provision [in a commercial lease] will not be construed to result in a forfeiture unless no other reasonable construction is possible;” however, the court found the lease’s express forfeiture provision was enforceable against the tenant who failed to comply with the liability insurance provisions of the lease).

failure of the tenant, **upon demand**, to satisfy any rent reserved and due”) (emphasis added).

Battista has proffered no evidence that he made any demand upon Mennett to cure her alleged breach in payment of the rent, or that she expressly waived her right to receive a demand to cure before her rights under the Lease were forfeited.<sup>4</sup> Until Battista made such a demand (and Mennett failed to comply with it), Battista was not entitled to terminate the Lease. Therefore, his attempt to do so was invalid.

Since the Lease was not validly terminated by Battista, Mennett is correct that she was in a position to exercise the option provision of the Lease. That provision simply states that

[a]t any time during the term of this Lease, [Battista] hereby gives and grants to [Mennett] the exclusive option of purchasing a one-half fee simple interest in the [Property] for the payment of One (\$1.00) Dollar and the assumption of one-half of the balance of principal and interest remaining on the mortgage and mortgage note with Worlds Savings dated June 14, 2000, as of the time [Battista], at his cost and expense, delivers to [Mennett] a duly executed and acknowledged fee simple deed as tenants in common in proper statutory form for recording.

Complaint, Ex. F, ¶ 11. There is no express language in the Lease making Mennett’s option rights contingent upon her performance of her obligations as tenant under the Lease.<sup>5</sup> See Owens Illinois, Inc. v. Lake Shore Land Co., Inc., 457 F. Supp. 896 (W.D. Pa. 1978), *aff’d*, 610 F.2d 1185 (3d Cir. 1979) (“the law of Pennsylvania is clear that an option in a lease is treated as an entirely separate agreement and without express language in the contract that default in the lease shall prevent securing of specific performance of the option, such default will be no bar”). See also Village Beer & Beverage, Inc. v. Vernon D. Cox & Co., 327 Pa. Super. 99, 107, 475 A2d 117, 121 (1984) (“where an act or event mentioned in a contract is not expressly made a

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<sup>4</sup> The Lease does provide that the rent “shall be payable without demand on the 15<sup>th</sup> day of each month.” Complaint, Ex. F, ¶ 3. However, this waiver of demand before the rent comes due does not act as a waiver of a subsequent demand to cure a default in payment of rent, which is required before a forfeiture can be had.

<sup>5</sup> In the primary case relied upon by Battista, the Lease expressly stated that the tenant’s right of first refusal could be exercised only “if the Tenant be not in default under the terms of this Lease,” so it is clearly distinguishable from the present action. See Gateway Trading Co., Inc. v. Children’s Hospital of Pittsburgh, 438 Pa. 329, 265 A.2d 115 (1970).

condition precedent, it will not be so construed unless such clearly appears to be the intention of the parties.”) “Therefore, [Mennett’s] default in performance of one of the covenants in the Lease ([i.e.], the punctual payment of the rent installments) does not terminate the option [to purchase the Property], particularly where, as here, the Lease itself has not been terminated because of the default.” R. Whitson Carter, Ltd. v. Mored, Inc., 12 Pa. D. & C. 3d 569, 574 (Berks Co. 1979). Because Mennett properly exercised the option within the term of the Lease, Mennett is entitled to receive from Battista the deed described in the Lease, and she is obligated to assume a portion of the mortgage loan.

### **CONCLUSION**

For all the foregoing reasons, Battista’s Motion for Summary Judgment is denied, and Mennett’s Cross-Motion for Summary Judgment is granted.<sup>6</sup>

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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<sup>6</sup> In granting plaintiff’s Motion, the court does not reach or decide the issue of whether Mennett has \$103,900 in equity in the Property or not.