DUGAN v. BROWNE.

4-2870

Opinion delivered March 13, 1933.

1. LANDLORD AND TENANT—ABANDONMENT BY TENANT.—A tenant could not vacate on account of the landlord's failure to furnish service agreed upon without notice thereof and reasonable opportunity to remedy the condition.
2. LANDLORD AND TENANT—ABANDONMENT BY TENANT.—In the absence of any substantial failure on the landlord's part to furnish agreed services, a tenant could not abandon the premises on account of the landlord's failure to furnish services which

the tenant could have supplied at small expense and for which he could have taken credit on the rent account.

3. LANDLORD AND TENANT—ABANDONMENT OF LEASE—INSTRUCTION. —An instruction to find for the landlord for rent unless the jury should find that the landlord failed to provide the service agreed *held* improperly refused under the evidence; such alleged failure being the only ground on which the tenant claimed a right to abandon the lease.

4. LANDLORD AND TENANT—ABANDONMENT OF LEASE—INSTRUCTION. —Where the tenant justified his abandonment of his lease upon the ground that the landlord failed to furnish agreed service, it was error to refuse to instruct the jury to find for the plaintiff for the agreed rent if the service furnished was reasonable, taking into consideration the general character of the building, and its occupants, the profession or business of its occupants, the use to which it was being put, and the demands upon it by daily use.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment against appellant in a suit as landlord to recover rent claimed to be due under a lease contract with appellees.

Appellant brought suit in the circuit court against Paul Z. Browne and others for rent alleged to be due under a lease contract, the cases being consolidated by order of the court and consent of the parties for hearing.

She alleged ownership of a certain office building known as the Dugan-Stuart Building in the city of Hot Springs, Arkansas; that she had entered into a lease with appellee, leasing to him certain rooms in the building for a period of 2 years for a monthly rental of $65 per month; that she had performed each and every covenant or agreement to be performed by her, and had been paid by appellee 10 monthly rental payments, which included the rent for October, 1930; that 14 monthly payments, beginning in November, 1930, and including December, 1931, had not been paid, and appellee was indebted to her in the sum of $910, with interest, for which she prayed judgment, etc. A copy of the lease was exhibited with the complaint.

Appellee answered, admitting the execution of the lease and that he had paid the 10 monthly payments, but

denied that he was indebted to appellant in any sum for the unexpired term of the lease; and set up as a defense that he had long occupied the building as a tenant from month to month without a lease thereof, notwithstanding that he had applied for a lease of same; that he might make some improvements at his own expense if the term was sufficiently long to justify it, but that appellant had refused to execute a lease, and, having no assurance of continued occupancy, he was unable to make the improvements; that he executed a contract for a lease on certain offices in a building to be erected and known as the Medical Arts Building in Hot Springs, and, when appellant received information of such contract, she demanded that he either execute the lease to her as set out in the complaint or vacate the offices; alleged that he was a regular practicing physician in the city of Hot Springs at the time of the execution of the lease to appellant; that there was no other suitable building in the city where he could obtain offices during the construction of the Medical Arts Building without great loss, and the plaintiff, taking advantage of said conditions, "required the defendant to execute said lease, notwithstanding that up until such time the plaintiff had persistently refused to execute any lease to the defendant and other tenants of her said building"; that in the lease plaintiff agreed to furnish the necessary heat, light, water, elevator and janitor service during the term of the lease; that she had failed to furnish such service from its execution to the time of the surrender of possession of the premises and thereby breached the contract and compelled the defendant to remove from the building; and that the plaintiff had refused from the time the defendant vacated the offices to rent same to other tenants, although she had had opportunity to do so.

The testimony shows the renting of the offices by the tenants, and that plaintiff attempted to furnish the heat, light, water, elevator and janitor service in accordance with the contract; that there were occasional failures to keep the service up as well as some of the tenants desired it should be done, but that very little complaint was made on that account, most of the service being sup-

plied on the tenants' own motion at their own expense, which was negligible, and, finally, that all the tenants removed from the building to the Medical Arts Building, where they had already rented office space, upon its completion, without any notice whatever to appellant lessor or any complaint showing dissatisfaction in any way with the service rendered, and that there was no greater failure of furnishing first-class service after the leases were executed by the physicians than had been furnished them during their occupancy before from month to month.

The court instructed the jury, refusing to give appellants requested instructions Nos. 1 and 9 as follows:

"Instruction No. 1: You are instructed that each of the defendants has admitted that he executed the particular lease on which the plaintiff's suit against each of said defendants is based, and each of said defendants admits he has not paid the amount of rent stipulated to be paid in the lease which the plaintiff seeks to recover against the respective defendants, and you should find for the plaintiff against each of the defendants, unless you further believe, from the evidence that the plaintiff breached the terms of the respective leases by failing to provide the defendants with necessary heat, light, gas, water, elevator and janitor service, as specified under the terms of said leases."

"Instruction No. 9: You are instructed that, if any of the defendants has established, by the greater weight or preponderance of the evidence, that the elevator, janitor and other service furnished by the plaintiff was not what such defendant or defendants desired it to be, and should further find that such services were reasonable, taking into consideration the general character of the building, and its occupants, the professions or business of its occupants, the use to which it was being put, and the demands upon it by daily use, then you will find for the plaintiff against such defendant or defendants."

From the judgment against her, appellant prosecutes this appeal.

George P. Whittington and *Cooper B. Land,* for appellant.

Walter J. Hebert and *C. Floyd Huff,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists first that the court erred in not giving her requested instruction No. 1, which would have submitted the only question in the case to the jury. The undisputed testimony shows that appellee leased the premises that they had been occupying for some time before the leases were executed; that they executed the leases, and, after some time occupancy of the premises thereunder, under conditions about as theretofore under their monthly occupancy, they and each of them, without giving notice of any complaint or claim of forfeiture because of failure to furnish service that they regarded themselves entitled to under the terms of the leases, abandoned and vacated the premises and took offices in the new building upon its completion which they had contracted for before the execution of the leases to appellant. If there was such a failure upon the part of the lessor to furnish the service as agreed to be furnished in the leases as would have warranted forfeiture, appellant would have had the right to notice of such claim and a reasonable opportunity to remedy or repair the condition before appellees would have been justified in abandoning and vacating the building. The failure, if any, to furnish the service agreed to be furnished was not shown to have been complete at any time, nor sufficient to prevent the continued occupancy of the offices, but at most to render some of them occasionally uncomfortable for only a short time; most of the tenants who complained on account of it being able to supply the service needed at a very small outlay of expense—a negligible amount as compared with the rent reserved and to be paid. Under such circumstances, according to the undisputed proof, the tenants should have furnished or procured the service and taken credit therefor on the rent account, and were not warranted in abandoning the premises because of any such claim of failure. In other words, the testimony does not show any substantial failure upon the lessor's part to furnish the services agreed to be furnished in the leases as would have warranted the abandonment of the premises by the tenants under a claim of forfeiture. *Ashmore* v. *Hays,* 159 Ark. 234, 252 S. W.

11. See also *Tedstrom* v. *Puddephatt,* 99 Ark. 193, 137 S. W. 816; *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W. 740.

The said requested instruction No. 1 not only should have been given, but No. 9 as well. In fact, the appellees admitted the execution of the leases and occupancy of the premises and their vacation thereof before the expiration of the time stipulated without payment of the rent, attempting to justify their conduct by a claim of forfeiture of said leases because of the default of the landlord in supplying the service agreed to be furnished under their terms. The testimony introduced in support of the claim of forfeiture and justification of the tenants' vacation of the premises was insufficient to establish the right thereto, and the court would have been warranted in directing a verdict in favor of appellant.

The judgment herein will be reversed, and the cause remanded for a new trial. It is so ordered.