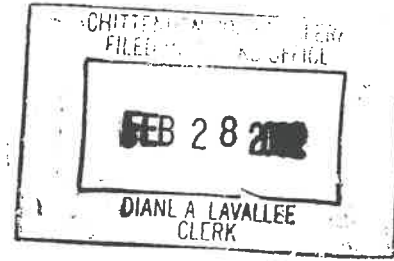


STATE OF VERMONT
CHITTENDEN COUNTY, SS.



FREDERICK and JOAN BLONDIN)
)
v.)
)
NANCY and LINWOOD CONNER)

CHITTENDEN SUPERIOR COURT
Docket No. S957-00CnC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for a final hearing on the merits on December 3, 2001. Plaintiffs were present and represented by Robert O'Neill, Esquire. Defendant Nancy Conner was present and represented by Harley Brown, III, Esquire. Linwood Conner died prior to the final hearing.

Findings of Fact

This case concerns a commercial property in the Town of Milton operated at the time pertinent to this case as a bar and grill called "The Castaways," and previously known as "The Slammer." Frederick and Joan Blondin, Plaintiffs in this action, purchased the property and operated it as a bar beginning in 1988. Subsequently, they leased it to a series of commercial tenants who operated the bar under different names.

In 1997, at the time of entering into a new lease with a new tenant, the Blondins prepared a list of all of the personal property items that were included in the property leased to the tenant for the operation of the bar. At some point following that lease, they entered into another lease of the property to a tenant named Brian Billings who operated it as The Slammer. When they entered into the lease with Brian Billings, the Blondins did not prepare or supply him with a list of the equipment and personal property that they owned and were including in the lease.

At some point in 1998, Brian Billings turned over the operation of The Slammer to Kirsten Maxfield, the daughter of Nancy and Linwood Conner, who operated it as a subtenant. Mr. Billings offered to sell The Slammer business to the Conners' daughter. In order to assist her in the purchase, the Conners gave her thirty thousand dollars which she used to purchase the business from Mr. Billings. She knew she was not purchasing the real estate but believed that she was purchasing many of the items of furniture, equipment and other personal property related to the operation of the bar. On November 2, 1998, Brian Billings executed a Bill of Sale in which

he conveyed all his right, title, and interest in the business known as The Slammer to the Conners' daughter. There was no identification in the Bill of Sale of what tangible property or other interests were included in the general description of the business.

Through early 1999, the Conners' daughter continued to sublease the premises from Brian Billings, who remained the primary tenant on the real estate lease with the Blondins. At some point in 1999, Brian Billings ended his landlord/tenant relationship with the Blondins. When he left, he owed rent for approximately two or three months. The Conners told the Blondins that they had purchased the business from Billings. When they told this to the Blondins, Joan Blondin said that some of the property in the bar was theirs, but she did not identify the items the Blondins claimed, and the issue was left unexamined.

On July 26, 1999, the Blondins and the Conners entered into a new written real estate lease of The Slammer bar premises. It was a lease for three months. It is a comprehensive, individually tailored commercial lease consisting of eleven pages, single spaced. Rent was established at \$4,000 per month due on the first day of each month. Section 8, entitled "Events of Default, Penalties, Damages," defines an "event of default" as a failure to pay rent due that continues for a period of ten days after written notice of such default from the landlord to the tenant, or a failure to perform or comply with any term of the lease agreement for a period of thirty days after notice from the landlord to the tenant specifying the items in default. If the default continues beyond thirty days, the landlord is entitled to give notice to the tenant specifying the event of default and stating that the tenant's rights under the lease will expire and terminate on the date specified in the notice which shall be at least ten days after the giving of the notice. Expiration is to take place upon the date specified.

Under Section 9 of the lease, entitled "Repairs, Replacements," the tenant was responsible for routine maintenance of the property. The landlord was responsible for structural repairs costing more than six hundred dollars (\$600.00). Under Section 12 of the lease, entitled "Landlord's Right of Access," the landlord was provided with a right to enter the premises in a reasonable manner and at all reasonable times to examine the same and to show them to prospective purchasers.

Section 19 of the lease is entitled "Personal property," and states: "The Landlord represents that it is the owner of certain personal property located upon the Leased Premises on the Commencement Date." It further provides for a right to use such property and the responsibility on the part of the tenant to replace it at the expiration of the lease. No list of personal property is attached to the lease, and at no time did any list of personal property get prepared or discussed between the Blondins and the Conners, despite the fact that they had previously each claimed to own personal property and equipment in the bar.

The lease was signed on July 26, 1999, and therefore was set to expire on October 26, 1999. In the fall of 1999 there was a lawsuit between Brian Billings and the Conners or their daughter concerning payment of the daughter's purchase price of The Slammer. In the course of this lawsuit, in September, 1999 the Blondins, at one point, stated to the Conners that they, the

Blondins, owned all items of personal property on the premises. However, again, no list of personal property was provided to the Conners to identify the personal property the Blondins claimed to own. The most recent list the Blondins had was the one from 1997, which had been given to a prior tenant. This had never been updated, and even this outdated list was not given to the Conners. Similarly, the Conners did not identify for the Blondins the personal property they claimed they owned. When the Conners signed the lease with the Blondins on July 26 of 1999, it was unclear what items of personal property were actually owned by the Blondins and what items had been owned by Brian Billings and sold to the Conners' daughter. The following items, however, were attached to the property as fixtures: steam table, freezer, range, two beer coolers, sink, rails, and surveillance equipment.

On September 19, 1999, the Conners' daughter, Kristen, sold her interest in the bar business to her mother, Nancy Conner, for one dollar. This sale was memorialized in a written document. Kristen, thereafter, left Vermont to pursue other interests and opportunities in Florida. The Conners alone took over the The Castaways. Rent continued to be paid monthly according to the terms of the temporary 3-month lease, which was not changed, and no new lease was negotiated. At some point, the Conners and Kristen had opened a second dining room with the knowledge and consent of the Blondins, renamed the establishment The Castaways, and added new decor in keeping with that theme, including items such as palm trees, fish tanks, and a lobster trap. Nancy Conner had begun to operate a catering business from the restaurant. New furniture had been purchased for the second dining room. On February 17, 2000, the Conners bought some new restaurant equipment from third parties named the Whitneys, which they used in conjunction with their operation of the bar and restaurant. This included racks, pans, a slicer, a food warmer, display cases, a convection oven, a sandwich unit, a wet bar sink, coffee makers, and other miscellaneous restaurant equipment.

On April 24, 2000, there was a problem with the septic system on the property. Pursuant to the written lease terms requiring the tenant to be responsible for maintenance, the Conners had the septic tank pumped out. The cost was \$1,050, and the bill was paid by the Conners. The service person made a notation on the invoice that ground water was leaking into the septic system, indicating a more fundamental structural problem. The service slip was signed by "LK Conner for Fred Blondin." Subsequently, the septic problem returned. On June 20th, 2000, the septic system was serviced for the second time. A backhoe was brought in and serious repairs were done. The cost of such repairs was \$1,920. Frederick Blondin acknowledged to Nancy Conner that this cost was the landlord's responsibility and that the Blondins would take care of it. All in all, due to septic problems which were structural and not due to poor maintenance, the Conners were not able to operate the bar and restaurant for two weekends and thereby lost approximately \$1,000 in income for each of the two weekends.

In the spring of 2000, the Conners were having trouble making all payments on time. The payment of the May, 2000 rent was late. Payments generally were made, although at some point during the month rather than on the first. The May rent payment was made by a \$3,000 check on the 8th of the month, and payment of the septic cleaning bill from April 24, 2000. June rent was also late. It was paid on June 6, 2000.

On July 5th, Nancy Conner had not yet paid the July rent. She realized that she was not going to be able to continue to operate the property. She gave the Blondins notice that she intended to vacate the property by the end of July, and stated that the rent would be paid by the time she vacated at the end of the month.

In response, the next day, the Blondins changed the locks on the premises and wrote a letter to the Conners advising them that "you have been evicted" and telling them that they had already changed the locks on the premises and that the Conners were not permitted on the premises unless supervised by the Blondins; furthermore they would not be permitted to remove their own personal belongings until after "a thorough damage inspection and payment of all debts owned as a result of your occupancy. If debts are not paid, personal property, according to the lease, will be confiscated." The reason for the eviction is stated as follows:

As you are aware, we have a month-to-month lease, with the rent due in total on the first of each month. You have violated the terms of the lease almost every month from the first month of your occupancy. The property is a mess and you have not met the terms of the lease for property upkeep and insurance. Your first warning was last month when the rent was again two weeks late. At that time, you were told this was your last chance.

The Conners had the locks opened and entered the premises and operated the bar and restaurant that weekend.

On July 14, 2000, the Blondins changed the locks a second time, and had the premises padlocked. Nancy Conner had a catering job coming up and had purchased a quantity of food for it, which was stored on the premises together with all personal property and equipment used for operation of the bar and restaurant. The Conners arranged for a locksmith to accompany them to the property. He cut the padlocks open, and they reentered the premises. They had brought a van and attempted to move out, taking with them all items of personal property they believed were theirs. They also took some fixtures. As they were doing so, the Blondins learned that they were there and called the police to the scene. It became clear that both parties claimed ownership of much of the personal property and equipment in the bar and restaurant. Joan Blondin made a list for the police of the items she claimed were owned by the Blondins, relying on the old 1997 list. The police prohibited the Conners from taking any more items out of the premises.

Shortly thereafter, the Blondins reentered the premises and took out all remaining items still located in the premises, putting almost all of it into dumpsters located outside. This included the furniture and decorations that had been purchased by the Conners for the opening of the second dining room, and included food that Ms. Conner had purchased for her catering job the following day. The Blondins also threw all remaining personal property of the Conners into the dumpster. The Conners went back to the dumpster within a day or two. Items such as a lobster trap, fish tank, palm trees, and other "Castaways" furnishings and decor were discarded and broken and visible in the dumpster. Nancy Conner offered at some point to return to the premises to do final cleaning, but the Blondins refused. On August 22, 2000, an Order was

issued from the Court prohibiting either party from selling any of the personal property that had previously been located on the bar premises.

The Conners placed the items they removed from the premises in storage with The Thomas Hirschak Company. Despite the Court order that nothing from the premises be sold, on October 5th, 2000 the Conners authorized an auction of some items of personal property that they considered to be unquestionably "theirs", and received therefrom gross proceeds of \$2,800 and net proceeds of \$1,468.79. There were also other items that they did not auction off that remain in storage at The Thomas Hirschak Company. The fair market value of such remaining items is now \$3,000-5,000, prior to expenses of conducting an auction and payment of storage fees. The items have been in storage approximately 20 months at a storage cost of \$60 per month. In addition, there is a third category of items that remain in storage but not at the Hirschak Company.

Subsequent to the Conners leaving the premises on July 14, 2000, the Blondins took over the property and arranged for significant renovation of the building and purchase and replacement of personal property. They have since leased the property to a new tenant. They are claiming a portion of their costs for cleaning and renovation. The court finds that the Blondins' testimony relating to damages the Blondins claim the Conners did to the property is not credible.

Plaintiff claims the following:

- \$812.00 for an unpaid water bill,
- \$1,920.00 for the septic repair costs from the second septic work,
- \$953.00 for cleaning,
- \$400.00 for disposal of rubbish,
- \$2,400.00 in repairs following termination of the tenancy, and
- \$11,000.00 in rent for May, June, and part of July.

In addition, plaintiffs claim \$38,335 as the value of personal property that the defendants removed from the premises. In addition, they are seeking interest on all of the damages, except for the value of personal property. Finally, they are seeking attorneys' fees in reliance on a provision in the lease that provides for the recovery of attorneys fees in the event of a failure of tenants to vacate upon termination of the lease.

Linwood Conner died before the hearing. Nancy Conner is claiming by way of counterclaim a breach of the lease. She relies on Paragraph 18 of the lease, which provides for ten days written notice prior to termination of the lease for nonpayment of rent, and thirty days written notice with opportunity to cure for failure to comply with other lease terms. She is seeking punitive damages in the amount of \$10,000.00, and eighteen months worth of storage costs at \$60.00 per month for having stored the personal property removed from the premises pending the hearing. She is also seeking \$2000.00 damages for the two weekends that the bar was not able to be open due to septic malfunction. She further seeks declaration of sole ownership of all of the items of personal property remaining in storage, and attorneys' fees.

Conclusions of Law

1. **Breach of lease.** The Court concludes that the Blondins breached their lease agreement with the Conners when they unilaterally changed the locks and reclaimed immediate possession the day after the Conners gave notice that they intended to terminate the lease by the end of July, and again later on July 14, 2000 when they padlocked the premises and refused to allow the Conners access. Under the lease itself, the Conners were entitled to written notice of any event of default and a period of ten days prior to termination of the lease for nonpayment of rent, and 30 days written notice and opportunity to cure noncompliance with other lease terms. The Blondins' letter of July 6, 2000 did not provide notice of default with a ten day period prior to a termination date, nor a notice of noncompliance with a thirty period to cure. Instead, with no prior notice, the Blondins changed the locks and immediately attempted to prevent the Conners from any access to the property, both on July 6 and on July 14, 2000. It is true that the Conners were in default in that they had not made the July payment on the first of July as required. Nonetheless, they were entitled to written notice and ten days before the lease could be terminated. The Blondins reentered improperly and without right under the terms of the lease, and retook possession against the Conners' rights as tenants under the lease.

2. **Amounts due landlord under lease.** The Plaintiffs are entitled to damages of \$812.00 for the unpaid water bill, which Defendant concedes. Plaintiffs are also entitled to unpaid rent for one-half of the month of July. The Defendants occupied the premises until the locks were changed. The Court calculates that the amount of rent due for this period is \$2000.00. The Blondins are not entitled to rent for any period on or after July 15, 2000, since they had breached the lease themselves and had retaken possession, preventing the Conners from lawful access.

3. **Plaintiffs' claim for value of personal property.** Plaintiffs seek the value of personal property that they claim was their property taken by the Defendants when they left the premises. The Plaintiffs are entitled to the fair market value of certain items of personal property that were fixtures and could not reasonably have been understood by the Conners to be the property of anyone other than the Blondins. These include the following items: Steam table, \$80.00. Freezer \$85.00. Range, \$500.00. Two beer coolers, \$1,000. Sink, \$205.00. Rails, \$45.00. Surveillance equipment, \$600.00. Total: \$2,515.00. As to all other claims for personal property, the Plaintiffs have not met their burden of proof to establish ownership of the items by a preponderance of the evidence. They rely on a list from 1997 that was used to define their property when they were contracting with a tenant even before Brian Billings. In the interim, at least Brian Billings, Kirsten Maxfield, and the Conners assumed responsibility for running the restaurant. The testimony shows that the restaurant equipment was added to over time, and this occurred particularly under the Conners' ownership since they changed the layout, theme, and business of the restaurant. Plaintiffs cannot show, other than through personal testimony which the court does not find credible, a reliable list of personal property owned by them and leased to the Conners under the lease of July 26, 1999. The Blondins had the opportunity to protect their interests in this regard by attaching to the lease a list of personal property, but did not do so.

Their attempt to rely on the 1997 list, updated by memory at the time of the crisis on July 14, 2000, is not sufficient to meet their burden of proof.

4. Plaintiffs' claim for cost of septic work. The Plaintiffs' claim for payment of the septic repair is denied as the lease provided that anything other than routine maintenance was the responsibility of the landlord. The April septic work cost more than \$600 and was needed as a structural repair as it was due to groundwater leaking into the system. This bill did not represent routine pumping out. The second work was needed to repair the system, and Frederick Blondin acknowledged at the time of the second repair that the landlords were responsible for that repair.

5. Plaintiffs' claim for cleaning and repairs. The Plaintiffs' claim for cleaning is denied, as the evidence shows that the Conners were prevented from the opportunity to clean the premises. Mrs. Conner offered, and the Blondins would not permit her to clean. They cannot therefore charge cleaning costs against the Defendants, who were forced to leave contrary to their right to possession and never given an opportunity to clean. As to Plaintiffs' claim for damages to the premises, as stated in the Findings of Fact, the court did not find this claim to be supported by credible evidence.

6. Defendants' claim for lost profits due to septic malfunction. The Defendant is entitled to lost profits in the amount of \$2,000.00 for two weekends when the bar could not operate due to the malfunctioning of the septic system that was landlord's responsibility.

7. Defendants' claim for punitive damages. Defendant claims punitive damages, which generally requires proof of a wilful and wanton disregard of the Defendant's rights. Punitive damages may be awarded in cases involving breach of contract. *Ainsworth v. Franklin County Cheese Corp.*, 156 Vt. 325 (1991). The court ruled: "Vermont. . . has consistently followed a . . . rule that punitive damages are appropriate in contract actions 'in certain extraordinary cases where the breach has the character of a willful and wanton or fraudulent tort.' [citations omitted]. See also *Clarendon Mobile Home Sales, Inc. v. Fitzgerald*, 135 Vt. 594 (1977), in which the Court stated that in such cases, "[P]unitive damages are awarded not as compensation to the sufferer, but 'on account of the bad spirit and wrong intention' of the breacher," (citing *Parker v. Hoefer*, 118 Vt. at 20 (1953)). *Id.*

In this case, the court concludes that the Defendant has proved the claim for punitive damages. The Blondins, in total disregard for their own lease agreement, failed to give the Conners ten days notice of default prior to termination of the lease. Instead they unilaterally locked the doors and prevented access. Furthermore, without even giving the Conners an opportunity to come in and obtain the personal property that was clearly theirs, the Blondins threw the Conners' property in the dumpster, including food purchased for ongoing operation and decor purchased for the Conners' "Castaways" theme. This was done in total disregard for the rights and interests of the Conners in property to which the Blondins could have no valid claim. The manner in which this was done, both the peremptory padlocking of the premises and simply throwing food, decorations and furniture into the dumpster, establishes the Blondins' bad spirit

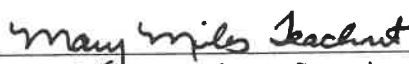
and wrong intention in relation to its breach of its own contract, and therefore is solid support for an award of punitive damages to the Defendant. The Court concludes that the Defendant is entitled to \$3,000.00 in punitive damages, plus the ownership of the items listed in paragraph 8 below.


8. Defendant's claim for personal property. As noted above, the Plaintiffs have not proved their claim of ownership of the contents of the restaurant, other than the fixtures, by a preponderance of the evidence. The Defendants have proved ownership of items purchased from the Whitneys, and other items purchased for The Castaways theme. The Defendants might be entitled to the value of personal property items destroyed by the Blondins when they discarded it into the dumpster, but Defendant has not proved the value for such items. The remaining property has limited value, particularly after payment of the storage charges Defendant was obliged to incur as a result of the court Order. Because Defendants proved their claim for punitive damages, Defendant Nancy Conner is entitled to ownership of all remaining personal property in her possession and in storage. She shall be solely responsible for the storage costs that have been incurred.

Summary. The Plaintiffs' total claims aggregate to \$5,327.00. The Defendant's total claims aggregate to \$5,000.00, plus ownership of the remaining personal property. The net judgment is therefore a judgment of \$327.00 for the Plaintiffs, and ownership of all remaining personal property in Defendant's possession to the Defendant.

Attorneys' Fees. Because the Plaintiffs' breached the lease in such a fundamental manner, they are not entitled to attorneys' fees under the terms of the lease, and their claim for attorneys' fees is denied. Even though they proved their claims for the water bill, value of fixtures, and one-half month's rent, these claims were offset by punitive damages caused by their breach of the lease and the manner in which they did so, and the judgment to the Defendant offsetting their valid claims. Defendant has not shown a basis for attorneys' fees. Although the punitive damages might provide such a basis, this is offset by the Plaintiff's valid claims.

DATED at Burlington this 28 day of February, 2002.


Mary Miles Teachout, Superior Judge


Thomas M. Crowley, Assistant Judge