

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CIRCUIT CIVIL DIVISION

**CASE NO. 2018-017484-CA-01
SECTION: CA 13**

**HRH 818, LLC
Plaintiff,**

vs.

**Denison Corporation (The)
Defendant.**

/

**ORDER DENYING EMERGENCY MOTION TO
DEPOSIT RENTS INTO COURT REGISTRY**

I exercise my “broad discretion”¹ to deny the plaintiffs’ 5/29/18 emergency motion to deposit rents into the court registry. Taking the allegations of the 5/29/18 complaint as true, at this stage of the proceedings - and in the absence of discovery and the presentation of evidence as to abandonment - those allegations do not allege circumstances sufficient to rise to the level of constructive eviction so as to merit payment of the rent into the court registry.

According to the complaint, the plaintiffs have been leasing space on Lincoln Road from the defendant since mid to late 2015. There, they operate an art gallery showcasing the work of artist Romero Britto. Plaintiffs allege as follows:

12. For example, Defendant has permitted crowds of vagrants to congregate at the Property, thereby intimidating Plaintiffs' customers and disrupting Plaintiffs' business operations on a regular basis.

13. In fact, the Miami Beach Police Department routinely makes arrests at the Property and the immediately surrounding area for offenses such as assault, battery, public drunkenness, trespass, burglary, disorderly conduct and other crimes that disrupt Plaintiffs' business operations.

¹ *Tixe Designs, Inc. v. Green Ice, Inc.*, 207 So. 3d 348 (Fla. 3d DCA 2016).

14. Defendant has also permitted street performers to create a nuisance at the Property by blaring loud music and drawing away Plaintiffs' customers.

Plaintiffs claim that these conditions interfered with their right to quiet and peaceful enjoyment of their tenancy. Plaintiffs do not allege how long these conditions have existed at the property. Nor do they allege that they have abandoned the property. In Count 3, plaintiffs claim that these conditions amount to a constructive eviction by the landlord/defendant, and they ask me to declare that they are discharged from any further obligations under their lease, and to order a return of their security deposits.

I have held two hearings on this motion with counsel for all parties present. Among the defendant's arguments, is that abandonment of the premises by the tenant is required before such tenant may make a claim for constructive eviction. The landlord also argues that the circumstances alleged by tenant (the existence of vagrants and street performers), are not caused by, or within the control of, the landlord. Indeed, the defense argues, it is the City of Miami Beach through, among other things, its police department and code enforcement who has the right and responsibility to address nuisances and disruptions on Lincoln Road in the area outside the gallery itself.

With regard to abandonment as a prerequisite to a claim for constructive eviction, plaintiffs cite to two opinions as their "best cases" which they contend stand for the proposition that abandonment is not always required. The first case is *Berwick Corp. v. Kleinginna Inv. Corp.*, 143 So. 2d 684 (Fla. 3d DCA 1962). In that case, the tenant closed the doors, put up a sign that said "Closed -- water damage," and **vacated the premises**. The Third District Court of Appeal affirmed the trial court's finding of a constructive eviction. That case does not support an argument that abandonment is not required.

The next case plaintiffs rely on is *Bass v. Wollitz*, 384 So. 2d 704 (Fla. 1st DCA 1980). There, the tenant also abandoned the premises, but did so early in the fifth year of a five year lease. The landlord's contention was that the tenant waived the right to claim a constructive eviction because the condition complained of had existed for years, and the tenant had failed to abandon the premises within a reasonable time from the condition first began to occur. In *Bass*, the appellate court affirmed the trial court's finding that the tenant "should have vacated the premises promptly," and its failure to do so prevented it from claiming constructive eviction.

In dicta, however, the *Bass* Court addressed some of the exceptions to the abandonment/waiver rule, which it did not apply to the facts of the case before it.

A tenant who does not promptly abandon the uninhabitable premises may nevertheless be excused, and his future rent abated, if the objectionable condition became more aggravated or produced a cumulative effect during the tenant's continued possession, or if the tenant relied for a time on the landlord's promise to remedy the situation, or if he was mollified by landlord attempts to repair, or if the cost of acquiring new quarters is so prohibitive as to preclude any real choice between abandoning or retaining possession. But those exceptions do not reach this case.

Bass v. Wollitz, 384 So. 2d 704, 708 (Fla. 1st DCA 1980)(footnotes omitted). In affirmative the application of the rule requirement abandonment within a reasonable time or deeming it a waiver, the *Bass* held: "We affirm the circuit court's judgment in this case because we recognize that the waiver rule, for all its rigidity in times past, **has current value in testing subjective and problematic claims of uninhabitability** and in expressing the ultimate conclusion of the trier of fact that, under all the circumstances, it was unreasonable for a tenant to have lived so long with a condition he considers so intolerable as to justify abandoning the leasehold." *Bass v. Wollitz*, 384 So. 2d 704, 708–09 (Fla. 1st DCA 1980).

The legal issue as to whether abandonment is required in order to claim a constructive eviction and, if so, when such abandonment must take place relative to when the condition began to occur which causes the abandonment has confronted courts across the country.

In general, vacation or **abandonment** of the premises by the tenant within a reasonable time after the wrongful act of the landlord **is essential** to enable the tenant to claim a constructive eviction based upon that wrongful act, or to defend against liability for rent, on account of such act. However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord's wrongful act, there is no constructive eviction if the tenant continues in possession of the premises. Possession must be given up by the tenant in consequence of the landlord's acts, and those acts must be such as to justify the tenant in doing so. Where an eviction is constructive, breach of the covenant of quiet enjoyment does not require a physical ouster; rather, a showing of abandonment of the premises under pressure is sufficient.

Some jurisdictions dispense with the abandonment requirement depending upon the type of relief requested, thereby making a distinction between an action based on the common-law defense of constructive eviction and an action for breach of the covenant of quiet enjoyment. **Where the tenant requests a release from the lease agreement and future rental obligations, abandonment is required on the theory that it would be unjust to permit a tenant to remain in possession and escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, have been unaccompanied by the exercise of that right.** However, where the tenant continues to pay the rent and occupy the premises, eviction is not a prerequisite for **recovery of damages** based on the landlord's breach of the covenant of quiet enjoyment.

49 Am. Jur. 2d Landlord and Tenant § 505 (emphasis added). This issue has also been exhaustively examined in an ALR article. *See, Time within which tenant must yield or abandon premises after claimed constructive eviction*, 91 A.L.R.2d 638 (2018).

For all of these reasons, especially that abandonment is the general rule which has certain factual exceptions, and under the circumstances alleged in this case, I deny the emergency motion to deposit rents into the court registry.

DONE AND ORDERED in chambers, at Miami-Dade County, Florida, this 10th day of June, 2018.



Signed by Thomas Rebull in 2018 01/10/18 on 06/10/2018 19:23:04 5bQPjCPW

Thomas J. Rebull
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION. CLERK TO RECLOSE CASE IF POST JUDGMENT.

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