

MARCH
2012

The Law Office of Kevin F. Jursinski & Associates, P.A.
COMMERCIAL LEASE NEWSLETTER

CONSTRUCTIVE EVICTION

The classic definitional terms of construction eviction and quiet enjoyment have been blurred by recent 2d DCA ruling. A 2d DCA holding in , *Coral Wood Page Inc. v. GRE Coral Wood, L.P.*, 71 So. 3d 251 (2d DCA 2011) (“*Coral Wood Page*”) is a ruling arising out of a commercial landlord-tenant case of the 20th Judicial Circuit of Lee County, Florida. The holding in this case has caused pause for some real estate practitioners and commercial landlords since it has blurred the line between as the definition of constructive eviction and held that a tenant can assert a claim for damages against a landlord for quiet enjoyment even though the elements necessary to construct an eviction are not met.

By way of background, the constructive eviction is classically defined in Florida by the following definition:

“A constructive eviction is an act which, although not amounting to an actual eviction, is done with the expressed or implied intention and has the effect of essentially interfering with the tenant’s beneficial enjoyment of the leased premises. Constructive eviction by the landlord is an intentional act or admission of the landlord permanently depriving the tenant, without its consent, of the use and beneficial enjoyment of the demised premises, or any substantial part thereof, and as the premise: *Berwick v. Kleinginna Investment Corp.*, 140 So. 2d 684 (3d DCA 1962)”.

The *Coral Wood Page* case seems to assert that there is a hybrid cause of action so that if a tenant does not claim constructive eviction, the tenant can still, nonetheless claim “breach of quiet of enjoyment” even though the landlord’s actions did not rise to the level of constructive eviction, that landlord did not interfere with the title of the tenant, and the tenant remained in possession.

One of the key elements in constructive eviction is that the actions of the tenant, as a precondition for initiating suit in the case of claiming constructive eviction, must actually not only plead and prove the actions of the landlord, but must have in addition thereto (a) offered the landlord the opportunity to cure the claimed default and (b) vacated the subject premises as a

result of the actions of the landlord resulting in the premises being unfit for the specific use of the tenant, *Richards v. Dodge*, 150 So. 2d 477 (2d DCA 1963).

Case law is also clear that if a landlord commits acts which result in constructive eviction, these acts can also be a breach of the covenant of quiet enjoyment implied in the lease. However in *Coral Wood Page*, the Court's has simply turned this holding around and instead of indicating that a breach of quiet enjoyment flows from a constructive eviction action has indicated that if a cause of action falls short of constructive eviction, those physical acts, in and of themselves, would act as a breach of quiet enjoyment which is not consistent with some of the holdings in Florida, and in fact, the 2d DCA itself in earlier rulings.

Again, the key concept in *Coral Wood Page*, is that the Court looked at the fundamental case law which affects commercial landlords in that commercial landlords cannot engage in activity which results in constructive eviction. If the landlord engages in such actions and the tenant abandons, the tenant has a claim not only for termination of the lease (which is consistent with the abandonment and avoids the tenant from having any further obligation under the lease) but also a claim for damages based upon the constructive eviction and if not duplicative, a claim for breach of quiet enjoyment.

However in *Coral Wood Page*, what the Court has now done is redefined the breach of quiet enjoyment. The facts in *Coral Wood Page* indicated that the commercial landlord placed security guards in the parking lot of the premises and the tenant, in operating a bar, alleged that such activity interfered with the tenant's bar and restaurant inasmuch as it intimidated the patrons of the bar and restaurant since the allegations were that the security officers harassed the tenant's customers by "parking multiple marked police vehicles directly in front of the entrance of the leased premises and by stalking/harassing the customers by approaching customers as they exited the premises to conduct a visual inspection of each person in a menacing fashion."

While those acts may have caused a contractual dispute of a set off by the tenant in such action for an affirmative defense, the Appellate Court should have only indicated such a ruling on a claim that a factual dispute was created therefore negating Summary Judgment of Fla. Rules of Civil Procedure 1.510.

To expand this to indicate that a cause of action for breach of quiet enjoyment can exist by the physical acts of the landlord interfering with the use of the common areas, even though such actions do not rise to the level of constructive eviction, clearly exceeds the cause of action for quiet enjoyment.

The result of the ruling in *Coral Wood Page*, again in this author's opinion, is that the Appellate Court redefined the definition of the breach of quiet enjoyment as established more than eighty (80) years ago by the Florida Supreme Court case which indicated "the ordinary lease of realty raised an implied covenant that the lessee shall have the quiet and peaceful possession of the leased premises, so far as regards the lessor, or anyone asserting a title to the leased premises superior or paramount to the lessor, *Hankins vs. Smith*, 138 So. 2d 494 (Fla 1932).

Suggestions To Be Included In All Commercial Leases - Well Defined Use Rights:

The classic definition of breach of quiet enjoyment has been the interference with the title of the tenant not interfere with the physical use of the premises. Commercial landlords are advised that in today's real estate economy their leases should provide specific use rights for the tenant and that such use rights should identify what can be and cannot be engaged in by the tenant since the lease is a specific grant for use and may be restricted.

Commercial landlords and property managers should utilize specific use provisions and indicate that any use other than as specifically provided for would violate the use rights and the lease. The commercial landlord can avoid rulings like *Coral Wood Page* by use of a well-defined and drafted commercial lease.

The material contained herein is copyrighted and provided as public service to educate the intended audience. The material contained herein, should not be considered as providing legal advice as to a specific case or situation. Your situation may differ and you should consult the attorney of your choice for more information.

Atty. Kevin F. Jursinski copyright 2011