

IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE, IN AND FOR
NEW CASTLE COUNTY
COURT NO. 13

Compton Park Preservation Associates, LLC)

APPELLANT)

v.)

Civil Action No. JP13-12-017651

Sedonia Cannon,)

RESPONDENT)

Decision following Plaintiff's Motion for Re-argument/New Trial heard September 3rd, 2013 and
subsequent briefings.

ORDER.

Upon Consideration of Further Argument.

JUDGMENT STANDS.

Michael P. Morton, Esquire; Michael P. Morton P.A., 1203 North Orange Street, Wilmington,
DE 19801. Attorney for Plaintiff Compton Park Preservation.

Sedonia Cannon, 650F North Walnut Street, Wilmington, DE 19801; Defendant *Pro Se*.

Lee, McCormick, & Ufberg, J.

Procedural History of the Case at Bar.

The action currently before the Court began December 19, 2012 when Plaintiff Compton Park (a publically subsidized housing agency) filed against Defendant Cannon seeking possession of a rental unit, alleging that either Ms. Cannon or her guest had smoked marijuana within the rental unit. If so, such activity would violate several sections of the lease, HUD regulations, and would allow Plaintiff to terminate the lease immediately both pursuant to the lease terms and 25 Del. Code § 5513 (citing irreparable harm)¹. A trial was held in the matter on February 5th, 2013. Judgment was rendered on March 6th, 2013 by means of a written order in favor of the Defendant. The order closed by stating “To make the serious decision of disposing a tenant, the smell or odor of marijuana alone is not sufficient evidence under the provisions of the lease, or the Landlord Tenant Code to evict.”²

Pursuant to 25 Del. Code § 5717, Plaintiff exercised their right to appeal the decision to a three-judge panel. The appellate panel convened on May 20th, 2013 and considered the matter *de novo*. At the conclusion of the hearing, the Panel reserved decision to allow Plaintiff’s Counsel to provide the Court with copies of orders from other Magistrates which supported his contention (e.g., that the smell of marijuana alone was sufficient for the purpose of termination.) Ultimately, the Panel held in favor of the Defendant on July 17th, 2013 stating in its decision “The case at bar has no other facts to rely on other than the (admittedly well-trained) nose of one individual. While the Court does not doubt that a case for termination could be based upon smell

¹ 25 Del. Code § 5513(b) states in pertinent part that “When a breach by a tenant causes or threatens to cause irreparable harm to any person or property . . . the landlord may . . . immediately terminate the rental agreement upon notice to the tenant and bring an action for summary possession;” The Court has long held that illegal drug use causes irreparable harm to the community at large.

² Compton Park Preservation Associates, LLC v. Cannon, Civil Action No. JP13-12-017651 (Ross, J.); Judgment of the Court below, Page 2, Paragraph 3.

alone under the right circumstance, it does not believe that smell alone sufficiently rises to the standard required to prevail in this instance.”³

Plaintiff subsequently filed a motion for “Re-argument/New Trial” pursuant to Justice of the Peace Civil Rule No. 59. In the motion, Plaintiff held that the Court had erred in admitting evidence of an offer of compromise which should have been disallowed in that it was not probative and should have been excluded pursuant to DRE 408. Further on this issue, Counsel advised the Court that “counsel for Plaintiff requested an additional hearing to argue this evidence and the Court informed Counsel he was entitled to have such a hearing, but no hearing was subsequently held prior to the issuance of [the Panel’s] opinion.”^{4, 5} Plaintiff also argued that the Court made a mistake of law in the legal standard applicable to this instant matter – specifically, that it applied an unknown and unknowable higher standard of proof than that of a preponderance of evidence.

The Panel reconvened on September 3rd, 2013 to hear Plaintiff’s motion. After considering further arguments in the matter, the Panel issued an order on November 8th, 2013 allowing for re-argument on both the evidentiary issue and the contention that the Court made a mistake of law. A briefing schedule was established. The Court now comes to address the further argument presented.

³ Compton Park Preservation Associates, LLC v. Cannon/Appeal *de novo*. Civil Action No. JP13-12-01765; Initial order of the Panel, Page 5, Paragraph 2.

⁴ Plaintiff’s Motion for Re-argument/New Trial, dated July 30, 2013, Page 2 No. 6.

⁵ None of the panel members recall Plaintiff’s Counsel making a request for a subsequent hearing either during the course of the Trial *de novo* or in writing thereafter. Upon receiving the motion, the Court sought to review the audio recording of the proceeding to investigate Counsel’s assertion. Upon doing so, the Court found that no audio recording of the proceeding existed. It was later determined that the recording program had been improperly installed. Although it gave the appearance of recording, it in fact did not do so. Due to an absence in the record of the proceedings, the Court allowed for re-argument on the salient issues in the interest of justice.

The Standard of Evidence Applied in the Case at Bar.

In order to evict a public housing tenant on the grounds of drug related activity, the person need not have been arrested, convicted or have evidence against them that rises to the level of a criminal conviction.⁶ The burden of proof that the Court must apply is that which is used in civil actions- a preponderance of the evidence. The U.S. Department of Housing and Urban Development's Public Housing Occupancy Handbook states that this means a landlord, "...cannot simply allege that criminal activity has occurred," but that some sort of evidence be produced.⁷ For example, for a drug related eviction, there must be evidence that the substance in question is actually an illegal drug (which the handbook states is usually provided through testimony by a medical examiner or forensic laboratory) and some type of evidence tying it to the tenant or their guest.⁸ Additionally, the Public Housing Occupancy Handbook provides a landlord with the discretion to consider circumstances in determining whether to evict for alleged criminal activity, including, "...the seriousness of the offense, whether family members knew or participated in the offense, and the effect the eviction will have on family members not involved in criminal activity."⁹

Here, the Plaintiff has contended that the Court made a mistake of law in that it held him to a burden of evidence higher than what was required and/or that the Court established a standard in which the smell of marijuana alone was sufficient for purpose of termination and then contradicted itself by not applying that standard. Plaintiff points to the wording of the Court's order – "While the Court does not doubt that a case for termination could be based upon smell alone under the right circumstance, it does not believe that smell alone sufficiently rises to

⁶ 24 C.F.R. 966.4(1)(5)(iii)(A) (2003).

⁷ U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook 204 (2003), http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/phguidebook.

⁸ *Id.*

⁹ *Id.*

the standard required to prevail in this instance.” – in support of that assertion. In his final brief, Plaintiff’s Counsel argues that “This is the standard – the only standard – that the Court applied in connection with its consideration of Plaintiff’s case. On its face, this standard applied is contradictory. “Smell alone” cannot both satisfy the legal standard in this matter, and fail to satisfy the legal standard.”¹⁰

The Court will state at this juncture that it is well aware of the burden of proof necessary for Plaintiff to prevail in this instant matter, but Plaintiff did not by a preponderance of evidence establish their case. Simply put, Plaintiff needed to establish that it was more likely than not that marijuana was present and/or used as alleged. This in turn, based upon the evidence presented, is a fact of determination which the Court must make. Despite the uncontested expert testimony proffered, the Court is not sufficiently convinced. Although Plaintiff offered testimonial evidence regarding the odor of marijuana, there was no testimony offered regarding visual confirmation of drug use, the existence of paraphernalia, effects of drug use upon the alleged user or any testimony regarding the illegality of the substance used, because there existed no substance to test. The Court concedes that the wording it used in its initial order was confusing and poorly phrased and will use this opportunity to better express its meaning.

The phrasing used was intended to express disagreement with the concept that smell alone could **never** be sufficient grounds to prevail. At this time, the Court cannot conceive of an instance in which the smell of marijuana alone would be sufficient grounds for termination. That does not mean that some pattern of facts so unique and specific could not one day present itself – just because the Court cannot conceive of it does not mean it does not exist. In essence, the Court’s phrasing was intended to leave the “smell alone” doorway cracked open for future investigation.

¹⁰ Plaintiff’s reply brief, dated December 19, 2013, Page 2, Paragraph 3.

For instance, in the matter of Kimberton Apartments v. Fleming, Civil Action No. JP13-09-00873, Appeal *de novo* (2010; Davis, Lee, Tull, J.) the *de novo* panel concluded their decision by stating “[w]e are not establishing a rule here that eliminates the possibility of a future case in which the odor of drugs, in conjunction with additional testimony or documentary evidence, may be sufficient to provide grounds for eviction.”¹¹ Likewise, it was the Court’s intent to not establish a rule that eliminated the possibility of a future case in which odor alone could be deemed sufficient. But, until such time, if ever, that such a pattern of facts or new theory of law comes before the Court, the burden of proof deemed necessary to achieve a preponderance of evidence that has been established through the consideration of numerous actions within the Justice of the Peace Courts and which involve the smell of marijuana is, “smell plus other indicia.”

“Smell plus other indicia” was first established by the Court below in Fleming and was re-iterated on appeal. The same standard was applied in Kimberton v. Parker (in which case other indicia was present), and was again applied in this instant matter, both by the Court below and the Appellate Panel. In-point-of-fact, at least eight different Magistrates in New Castle County have applied that standard during the course of hearing these matters in one iteration or another. Additionally, this standard is not inconsistent with case law from other jurisdictions regarding eviction of public housing tenants for drug related activity. In fact, this court has not been able to locate reported case law where a defendant was evicted based upon an allegation of drug activity that stemmed from smell alone.

For instance, in the seminal case of Department of Housing and Urban Development v. Rucker, the allegations against respondents included actually witnessing residents/guests

¹¹ Kimberton Apartments Assoc v. Fleming, Civil Action No. JP13-09-008743, Appeal *de novo*, (2010; Davis, Lee, Tull, J.) Page 4, Paragraph 2.

smoking marijuana and finding drug paraphernalia within an apartment, among others.¹² Likewise, in Housing Authority of Covington v. Turner, the allegations against defendant included the finding of crack cocaine, cocaine and drug paraphernalia in a room within her apartment.¹³ Finally, in Cuyahoga Metropolitan Housing Authority v. Davis, an individual possessing marijuana was found to be in Davis' apartment.¹⁴ These cases represent a broad range of examples from around the country where courts have determined that the preponderance of evidence standard was met. However, this case law provides far more compelling evidence than simply the smell of marijuana. As such, this Court will continue to apply the "smell plus other indicia" standard to this case. Here, Respondent failed to provide any evidence or testimony that other indicia existed.

The Evidentiary Issue in the Case at Bar.

Plaintiff has argued that the Defendant's offer to have herself and her guests drug-tested is an "offer of compromise" as defined by DRE 408 and therefore should have been barred upon objection. Plaintiff has argued that the evidence is irrelevant in that, "under federal law, the proper standard the Court must apply when a tenant is being evicted from federally subsidized housing due to a drug violation is that of strict liability. A "mens rea" or knowing culpability is irrelevant."¹⁵ Plaintiff has argued that the statement is not probative, and has caused Plaintiff undue prejudice.

Relevant evidence is defined by DRE 401 as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." The decision whether to admit testimony as relevant is

¹² Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (U.S. 2002).

¹³ Housing Authority of Covington v. Turner, 295 S.W.3d 123 (Ky. Ct. App. 2009)

¹⁴ Cuyahoga Metropolitan Housing Authority v. Davis, 197 Ohio App.3d 411 (Ohio Ct. App. 2011).

¹⁵ Plaintiff's opening brief of Nov. 18, 2013, Page 7, Paragraph 2, quoting Dept't of Hous. V. Rucker, 535 U.S. 125,130 (2002).

within the sound discretion of the trial judge and will not be reversed absent a clear abuse of that discretion.¹⁶ That is of course unless some other controlling statute or rule (such as DRE 408) would otherwise exclude the evidence in question based upon completeness, trustworthiness, or public policy. Plaintiff has long held out that the Defendant's statement was an offer of compromise. The Court disagrees. Plaintiff's statement was not an offer to compromise; it was an attempt to clear her name of allegations of wrong-doing. For DRE 408 to bar otherwise relevant evidence, "valuable consideration" must first be offered in an attempt to resolve the dispute in question. Plaintiff's assertion that the valuable consideration being knowingly offered by the Defendant -- the Defendant's legal right *not* to be tested by the Plaintiff -- assumes a complexity of thought and understanding by the Defendant of legal theory that has at no time been demonstrated before the Court.

The Plaintiff has argued that the statement is irrelevant because the appropriate standard in considering an allegation of a drug violation is strict liability. Plaintiff is correct in pointing to the standard -- if someone (it matters not who) violates policy regarding drug violations, and that someone is the responsibility of the tenant, then the tenant can be evicted regardless of knowledge of the drug activity. (Such was exactly the case in the matter proffered by Plaintiff, Kimberton Apts. Assoc. LP v. Coralyn Parker, Civil Action No. JP13-12-000709 (2012, Toulson, J.)) Regardless of how credible the Court found the Defendant, the Court concedes that the Defendant cannot say with factual certainty that her guests did not use drugs during her absence. But the Court did believe the Defendant when she offered the statement to show that *she* did not use or countenance drug use. The statement is probative because it induced in the Court a conviction of truth -- that is, that the Defendant did not use drugs. The statement in

¹⁶ Lampkins v. State, 465 A.2d 785 (Del. 1983).

question enhanced her credibility – no more, no less. And, the credibility of a person testifying before the Court is always relevant in and of itself.

That said, the issue of relevance matters not. Even if the Court were to agree with Plaintiff and excise the statement from its consideration, The Plaintiff has still failed in establishing by a preponderance of the evidence the existence of drug use or activity in this instant matter. For this reason, the Judgment in favor of the Defendant stands.

IT IS SO ORDERED THIS 23rd DAY OF JANUARY A.D. 2014.

The Hon. Bonita Lee,
Deputy Chief Magistrate.

The Hon. Sean P. McCormick,
Justice of the Peace.

The Hon. Susan Utberg,
Justice of the Peace.