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O P I N I O N

COURT OF APPEALS REVERSED;  
CASE REMANDED TO TRIAL COURT  
WITH INSTRUCTIONS.

REID, J.

This case presents for review the decision of the trial court granting summary judgment to the defendant/lessee in an unlawful detainer action to recover possession of certain commercial property leased to the defendant by the plaintiff. The award of summary judgment is reversed, and the case is remanded to the trial court.

**I**

The facts and circumstances which form the context for the questions of law presented are not disputed. In 1974, the Cain Partnership LTD (Cain), a limited partnership, leased a tract of commercial real property located in Knox County for a term of 20 years and granted the lessee the right to extend the lease for three terms of 20 years each and an additional term of 15 years. In 1987, the lease was assigned to a subsidiary of the defendant, Pioneer Investment Services Co. (Pioneer), and later transferred to Pioneer.

The provisions of the lease relevant to the issues are:

In consideration of the lease aforesaid the Lessee contracts and agrees to pay for the aforesaid premises an annual rental of \$18,000.00, payable at the rate of \$1,500.00 per month in advance, the first said monthly payment to be due on the 1st day of January, 1975. The rental shall be paid at the office of the general partner of Lessor in Knoxville, Tennessee, promptly when due and without demand either upon the premises or elsewhere.

As further consideration for said lease, and in addition to the monthly payment provided for herein, the Lessee shall pay all real property taxes assessed against said property by taxing authorities during the term of this lease and any renewal thereof. Said taxes shall be paid promptly when due during the entire term.

The lease contains no language regarding defaults in payment or performance, forfeiture, or remedies for breach of the terms of the lease, except for a provision allowing the recovery of attorneys' fees in the event Cain should be required to take legal action to enforce the terms of the lease.

In 1984, in order to facilitate an arrangement between Pioneer and First National Bank of Louisville (the Bank) for a development loan from the Bank to Pioneer to be secured by a deed of trust on the lessee's leasehold interest in the property, Cain executed a "Landlord'S Estoppel Certificate" for the benefit of the Bank and Pioneer, whereby

Cain agreed that it would give notice to the Bank of any default by Pioneer in the performance of the lease and would give the Bank 30 days from the date of its receipt of the notice within which to cure the default. In return, the Bank agreed to give Cain notice of any default in Pioneer's obligation to the Bank.

The lease which is the subject of this litigation has been the subject of extensive legal proceedings, including a case decided by the Sixth Circuit Court of Appeals.<sup>1</sup> Though not controlling the determination of the issues in this case, those proceedings provide relevant circumstances and put the issues in focus.

On April 12, 1989, Pioneer filed a voluntary petition in bankruptcy and became a debtor-in-possession. On May 25, 1989, Cain filed a motion to lift the automatic stay so that Cain could repossess the leased property, on the ground that the lease had "automatically" terminated because the lessee had failed to pay the property taxes when due. The bankruptcy court refused to lift the stay, holding that in the absence of a specific forfeiture provision, a non-residential lease does not terminate automatically upon

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<sup>1</sup>In Re Pioneer Inv. Serv. Co. 946 F.2d 445 (6th Cir. 1991), cert. denied, 504 U.S. 946 (1992).

default in payment or performance by the lessee. On appeal, the district judge affirmed the holding by the bankruptcy judge and, in addition, found that because the lease contained no forfeiture or termination provision, no default by the defendant would constitute grounds for termination of the lease. The Sixth Circuit Court of Appeals affirmed the decision of the district court, but limited its approval to the first ground. That court's interpretation of Tennessee law on the subject was stated as follows:

[T]he bankruptcy court and the district court determined that Tennessee law requires affirmative conduct by a lessor in order to terminate a nonresidential lease which lacks a termination or forfeiture clause on the ground of breach. Accordingly, the courts below concluded that the Colonial Lease, which lacks a termination or forfeiture clause, was not terminated prior to the filing of Pioneer's bankruptcy petition because the Partnership took no action to terminate the lease. We think that the District Court properly interpreted and applied Tennessee law in reaching this conclusion.

In Re Pioneer Inv. Serv. Co., 946 F.2d at 450.

On November 12, 1991, subsequent to the termination of the proceedings in federal court, this suit was commenced. The complaint alleges unlawful detainer (Tenn. Code Ann. § 29-18-104 (1980)) and seeks possession of

the leased premises, incidental damages, and attorney's fees. The plaintiff contends that the lease automatically terminated upon the defendant's failure to pay the taxes when due, and, in the alternative, that the defendant persisted in its failure to comply with the provisions of the lease for the payment of taxes after the receipt of adequate notice and an opportunity to cure the default.

The Bank, which was allowed to intervene, filed a motion to dismiss the complaint, contending that pursuant to the estoppel certificate, Cain was obligated to give the Bank notice of and an opportunity to cure any default prior to the initiation of any action to have the lease terminated.

The trial court accepted Pioneer's argument that the lease could not be judicially terminated because it contains no provision for termination, declared the issue raised by the Bank moot, and dismissed the complaint.

The Court of Appeals held that the Bank had not been given an opportunity to cure the default before the suit was filed, as required by the estoppel certificate, and affirmed the trial court's dismissal of the suit.<sup>2</sup>

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<sup>2</sup>Subsequently, the Bank entered into an agreement to release the liens on the leased property, and notified this Court pursuant to Tenn. R. App. P. 14 that "all differences

For the purposes of this appeal, the record supports the trial court's finding that the lessee failed to pay the taxes assessed against the property, and that failure was a breach of a material provision of the lease.

## II

The only issue before the Court is the relief available to the lessor. Consequently, the issue presented is a question of law. Questions of law are reviewed de novo with no presumption of correctness. See Tenn. R. App. P. 13(d); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993).

## III

The principles defining the rights and obligations of the parties to a lease of real property developed as part of the common law and arise from both property and contract law. A short review regarding the evolvement of these principles is helpful in determining the rights and obligations of the parties in this case.

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with its borrowers . . . with respect to any interest which it may have had in the property which is the subject matter of this litigation," had been resolved. Consequently, the Bank is no longer before the Court.

## The Nature of a Lease

A lease for a definite term originally served as a moneylending device, used to avoid the ecclesiastical ban on usury<sup>3</sup>, and consequently, a lease was deemed to be a personal and contractual interest. 2 Richard R. Powell, Real Property §16.02[1][a] (1994). Gradually, the lease became used instead, to allow landowners to contract for the farming of their lands by the landless; again "the tenant was by definition 'one who had no right in the land, but merely the benefit of a contract.'" Id (quoting 2 F. Pollock & F. Maitland, History of English Law 36 (1895)). Between 1200 and 1500, the lessee became recognized as the owner of an interest in land, and the lease as a "conveyance" of an estate in land.

The reasons why this change was made were partly legal and partly economic. We have seen that the machinery of a term of years had ceased for technical legal reasons to be employed in the creation of a mortgage. Therefore the beneficial lease for this purpose went out of use. We have seen that the decay of the labour-service system was the

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<sup>3</sup>"[T]he money-lending function occurred as follows: The landowner would lease the property to the lender, fixing a term of sufficient duration to allow the lender to recover, from the productivity of the land, both the principal and interest of the loan." 2 Richard R. Powell, Real Property §16.02[1][a], n. 1 (1994); see also 1 Milton R. Friedman, Friedman on Leases §1.1, n.10 (1990).



cause of a great extension in the practice of letting the land to lessees for years for longer or shorter terms. It is quite clear that such lessees, if ejected, would not have been compensated adequately if they had only been given damages. We have seen, too, that the government desired to stop the depopulation of the country caused by the conversion of arable land into pasture for sheep. It is obvious that a rule that the ejected lessee could not recover the land would have facilitated the operations of the landlords, who were pursuing this undesirable policy.

3 William Holdsworth A History of English Law, 216-17 (5th ed. reprinted 1991).

More recently, the utility of a lease has been its provision of shelter, and the maintenance of habitable conditions for a growing population: "The urbanization of the population resulting from the growth of cities has shifted the focus of the lease transaction from land to shelter, and has produced an inequality of bargaining power between landlord and tenant, factors that have been cited prominently in recent judicial decisions expanding the rights of residential tenants." 2 Richard R. Powell, Powell on Real Property at §16.02[1][a]. The historical background and practical services that a lease provides have culminated into the present status of a lease which has been summarized as follows:

A lease of land creates rights and duties based on two independent grounds. First, the lease represents a conveyance of an estate in real property and a relationship arises between the lessor and lessee based on ownership of the demised premises. The parties are said to be in privity of estate as long as the landlord-tenant relationship exists. Second, the lease agreement creates a contractual relationship between the lessor and lessee. The parties are said to be in privity of contract with the terms of the lease defining their rights and obligations. Typically, the lessee's obligation to pay rent and taxes arises by virtue of both privity of estate and privity of contract. See Schoshinski, American Law of Landlord and Tenant §8.1, at 532 (1980); Consumer's Ice Co. v. Bixler, 84 Md. 437 35 A. 1086 (1896).

Italian Fisherman v. Middlemas, 545 A.2d 1, 4 (Md. 1988).

#### Lease as Conveyance

Under the theory that the lease conveys the property for a term of years, the tenant is the owner of the leased property for the term and, therefore, the landlord need not concern himself with the property, but only with his damages under the lease; thus, the nonpayment of rent or taxes would result, not in an effort to regain possession of the property by forfeiture, but in a suit for payment of the rent, interests and costs.

From the premise that a lease is a conveyance there were some consequences. When a landlord conveyed - executed and delivered a lease to a tenant - he had done all he had to. From then on the tenant was on his own. Landlord need not repair. Nor need he render any services to tenant. If the house burned down it did not matter. The lease continued, as well as tenant's liability for rent and other obligations.

There was also an important consequence to the landlord. By conveying to the tenant for a specified term, landlord parted with all possessory rights until the time specified in the lease for its expiration. Neither nonpayment of rent nor breach of covenant by tenant divested the estate so created or re-vested landlord with a right to possession. His remedy was to sue for rent or for breach of covenant, but with no right to dispossess. This has been changed generally in this country by statutes that give a landlord possessory remedies for nonpayment of rent, and by statutes and lease provisions that extend possessory remedies to breach of covenant and to other circumstances as well.

1 Milton R. Friedman, Friedman on Leases, §1.1 (1990).

#### Detainer and Re-entry Law

Still, there were actions under which a landlord could recover possession at common law; however, they were apparently unsatisfactory:

Courts of equity treat the landlord's right to forfeiture for breach of such conditions as being, in effect, a mere security for the payment of the obligation. Thus, equitable relief is ordinarily granted upon the payment of the principal sum with interest and costs that have accrued, these payments being regarded as compensation for nonpayment when the obligation was due ... 1 Tiffany, Real Property § 215 (3d. ed. 1939).

Dreisonstok v. Dworman Bldg. Corp., 284 A.2d 400, 404 (Md. Ct. App. 1971). Consequently, statutory enactments have become significant in this area of the law:

Although actions to recover possession of real property existed at common law the particular action of unlawful detainer resulted from the evolution of the law and did not appear in this State until passage of the first unlawful detainer statute in 1821.

Newport Hous. Auth. v. Ballard, 839 S.W.2d 86, 88 (Tenn. 1992).

The Tennessee statute creates a right to bring a cause of action for a writ of possession when a lessee remains on the leased property after the lease has been terminated. The statute provides:

Unlawful detainer is where the defendant

enters by contract, either as tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and, in either case, willfully and without force, holds over the possession from the landlord, or the assignee of the remainder or reversion.

Tenn. Code Ann. § 29-18-104 (1980). The intent of the 1821 legislative act, in creating the action of unlawful detainer, was to provide an action to determine the right of possession of real property. Newport Hous. Auth. v. Ballard, 839 S.W.2d at 89.<sup>4</sup>

The statute was intended to prevent bloodshed, violence, and breaches of the peace, too likely to arise from wrongful intrusion into the possession of another, and to give a right to restitution under the statute; it is not so absurd as to require actual bloodshed and violence, and frequent breaches of the peace, in the acquisition or retention of the possession.

Childress v. Black, 17 Tenn. 317, 320 (1836).

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<sup>4</sup>Whereas the action for unlawful detainer is a "purely possessive action" where there is no issue of legal title, Metropolitan Life Ins. Co. v. Moore, 72 S.W.2d 1050, 1051 (Tenn. 1934), and action for ejectment "is purely a legal action to be brought in circuit or chancery court with the only question being one of legal title and the right to possession in connection with the title." Newport Hous. Auth. v. Ballard, 839 S.W.2d 86, 89 (Tenn. 1992).

The action in unlawful detainer was for possession of the property (Code, sec. 9257), and the judgment for rent and damages are incidental to the judgment for possession. Bloch v. Busch, 160 Tenn. 21, 22 S.W.2d 242; Code, secs. 9244 and 9247. Compare 36 C.J.S., Forcible Entry and Detainer, §3.

"The action is strictly possessory in its nature, so that ordinarily the immediate right to possession is all that is involved or can be determined."

Nashville Hous. Auth. v. Kinnard, 186 Tenn. 33, 207 S.W.2d 1019, 1021 (1948).

#### Forfeiture

However, the detainer statute by itself does not address the problem of the tenant who breaches the provisions of the lease which has not by its terms expired. Thus, at common law, the landlord had to specifically provide for forfeiture of the lease upon a breach of the terms in the lease itself. For instance, in Barnett v. Dooley, 186 Tenn. 611, 212 S.W.2d 598, 600 (1948), the Court held:

The law is that "a tenant's failure to pay rent does not terminate or forfeit his tenancy, in the absence of a provision in the lease for such forfeiture; and where there is such a provision, the landlord must make formal demand of the rent . . . unless such demand is waived by the lease or by act

of the parties." Smith v. Holt, 193  
S.W.2d 100, 102 (Tenn. Ct. App. 1946).

This harsh result has been changed in many instances by  
statute:

At common law, if the lease simply imposed a promissory obligation on the tenant and nothing more, a breach of the obligation gave the landlord an action for breach of contract, but no power to terminate the lease. In order to have the power to terminate at common law, the landlord had to couple the covenant with an express provision for forfeiture of the lease upon breach of the covenant. The common law approach has now been widely changed by statutes which give the landlord, in the absence of a lease forfeiture clause, the power to terminate the lease for at least the most serious kinds of tenant defaults, such as failure to pay rent.

2 Richard R. Powell, Powell on Real Property at  
§ 17.02[1][a][i].

It is generally recognized that a strict adherence to viewing the lease as a conveyance in property should yield to contract law in the situation of the tenant who fails to pay rent.

The Uniform Residential Landlord and Tenant Act explicitly recognizes the landlord's remedy of termination of the

lease in cases of "material noncompliance by the tenant with the rental agreement." Accordingly, under the Uniform Act, the landlord's remedy of termination, subject to proper notice to the tenant, is recognized regardless of whether the landlord has specifically reserved the right to terminate in the lease. The Restatement (Second) of Property<sup>5</sup> takes substantially the same position, allowing the landlord to terminate the lease for the tenant's failure to perform a promise within a reasonable time after being requested by the landlord to do so where as a result of the failure "the landlord is deprived of a significant inducement to the making of the lease." Upon the tenant's failure to leave voluntarily after failure to correct the breach, the landlord may pursue whatever remedies are provided under local law to recover property from a holdover tenant.

Id. at § 17.02[1][a][ii]. Cf. Tenn. Code Ann. § 66-28-505 (1993) (providing for termination of a lease governed by the Tennessee Uniform Residential Landlord and Tenant Act - "[i]f rent is unpaid when due and the tenant fails to pay, written notice by the landlord of nonpayment is required" before termination of a residential lease.) However, the Tennessee statute is limited to residential leases and does not by its terms control the rights and liabilities of the parties to a lease of non-residential property.<sup>6</sup>

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<sup>5</sup>Discussed infra at [slip op. at 18].

<sup>6</sup>But see Crawford v. Buckner, 839 S.W.2d 754 (Tenn. 1992) (extending by judicial decision the applicability of the Act's prohibition of exculpatory clauses in leases, to all counties in the state).



#### IV

Prior decisions of this Court have followed the common law concept that a lease is a conveyance of an interest in real property and the rights of the parties are determined by property law. In Planters Ins. Co. v. Digg, 67 Tenn. 563 (1876), which is relied upon by both parties, the lease provided that should the lessee fail during the term to pay the taxes and other specified charges, then the lease was to terminate and the lessor would have the immediate right of re-entry. The Court held:

These authorities conclusively settle that the forfeiture is to be enforced at the option of the lessor, and by an affirmative act on his part, that is by re-entry for such purpose, based on failure to perform or breach of the conditions, and do not take effect until this is done.

Id. at 568. As previously noted, in Barnett v. Dooley, 212 S.W.2d 598, 600 (Tenn. 1948), and also in Smith v. Holt, 193 S.W.2d 100 (Tenn. App. 1946), the Court recognized the common law rule that the failure to pay rent does not terminate the tenancy in the absence of a forfeiture provision in the lease; and that where there is a forfeiture provision, the landlord must make a formal demand for the rent unless such demand is waived by the parties.

Historically, the chief distinction between a condition and a covenant in an instrument of conveyance pertains to the remedy available to the grantor; breach of a condition subjects the grantee's estate to forfeiture, breach of a covenant subjects the grantor to an action for damages only. See Sloan v. Cantrell, 45 Tenn. 571, 577 (1868).

This common law concept, which is based on the technical characteristics of conditions, covenants, and limitations<sup>7</sup> has been replaced in most jurisdictions by statutes which provide the landlord a summary procedure whereby the tenant may be evicted after a default in the payment of rent, whether or not the lease has a clause terminating the lease on failure to pay rent. Restatement of Property (Second) § 12.1 (1977); 2 Powell on Real Property at § 17.02[1][a][ii]. However, Tennessee has no such statute applicable to non-residential leases.

The positions of the parties in this case demonstrate the failure of these traditional common law rules of property law to accommodate present business conditions. Cain's position is that Pioneer "irrevocably breached" the lease by failing to pay the taxes, thereby allowing Cain to terminate the lease at its will. Cain contends that the

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<sup>7</sup>2 Powell on Real Property at § 17.02[1][a][i].

commencement of the unlawful detainer suit constituted its election to terminate the lease. Pioneer, on the other hand, contends that a leasehold estate in non-residential property "cannot be terminated" in the absence of a clearly stated condition subsequent, and proof of breach, notice and re-entry. Pioneer contends that Cain's only remedy for Pioneer's failure to pay the taxes (or any other breach or default) was an action, or perhaps successive actions, against Pioneer for damages. The history of this case is ample evidence of the inadequacy of these common law rules of property.

In the case before the Court, the lessee's obligation to pay the taxes is stated in the same language and in the same context as the obligation to pay the rent. The instrument evidences the intention that these obligations, which are "in consideration of the lease," are of equal significance. In analyzing the issues in this case, there is no basis on which to distinguish between a covenant and a condition. The terms of the lease are unambiguous in providing that both rent and taxes were to be paid by the lessee. It is recognized that, "[t]he covenant of a tenant to pay taxes, like a covenant to pay rent, involves the payment of a sum of money which is ascertained, or readily ascertainable, 2 Pomeroy's Equity Jurisprudence § 454A. (5th

Ed. 1941)." Dreisonstok v. Dworman Bldg. Corp., 284 A.2d 400, 404 (Md. Ct. App. 1971). The consequences of the tenant's failure to pay taxes may be more detrimental to the lessor than the failure to pay rent.

The intention of the parties is not given expression in the technical differences between covenants and conditions. The parties' rights and liabilities should turn on an interpretation of the lease, the conduct of the parties, and rules which are consistent with modern business practice. The timely evolution of the common law requires that this result be accomplished.<sup>8</sup>

The provisions of the Restatement of Property (Second), § 13.1 (1977), reflect the principles of mutuality and fairness which should govern the determination and enforcement of the legal rights at issue in this case. Consequently, the resolution of the issues presented will be according to that section, which states:

Nonperformance of Tenant's Promise--  
Remedies Available

Except to the extent the parties to a lease validly agree otherwise, if the tenant fails to perform a valid promise

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<sup>8</sup>See Broadwell v. Holmes, 871 S.W.2d 471, 472-73 (Tenn. 1994).

contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the landlord is deprived of a significant inducement to the making of the lease, if the tenant does not perform his promise within a reasonable period of time after being requested to do so, the landlord may:

(1) terminate the lease and recover damages; or

(2) continue the lease and obtain appropriate equitable and legal relief, including

(a) recovery of damages, and

(b) recovery of the reasonable cost of performing the tenant's promise.

This decision requires that the case be remanded to the trial court for further proceedings. The parties may be allowed to amend their pleadings if necessary to address all of the issues relevant to the resolution of their rights and obligations under the lease.

The costs are assessed against the appellants and appellees equally.

Reid, J.

Concur:

Drowota and Birch, JJ.,  
and Wade, Sp. JJ.

O'Brien, Sp. J., filing separate Opinion  
Concurring in Results.