FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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DR. R. J. MEYLOR, d/b/a THE FIVE CORPORATION,

Plaintiff-Appellant,

vs.

BERNARD MARKUS, d/b/a BERNARD'S TAP, INC.,

Defendant-Appellee.

Filed February 24, 1982

1-399
2-65830

Appeal from Plymouth District Court - David J. Blair, Judge.

Plaintiff appeals from the trial court's adverse judgment in his replevin action which sought possession of certain personal property that was left on defendant's real property after termination of a lease. Plaintiff also sought damages for defendant's retention of the property. AFFIRMED.

Dennis J. Mahr, Sioux City, for plaintiff-appellant.

Richard L. Smith of Slife & Smith, Hawarden, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Plaintiff appeals from the trial court's adverse judgment in his replevin action which sought possession of certain personal property that was left on defendant's real property after termination of a lease. Plaintiff also sought damages for defendant's retention of the property. On appeal, plaintiff asserts that: (1) the landlord's self-help eviction was unlawful; (2) the plaintiff had trade fixtures on the leased premises which were subject to his removal; (3) the landlord did not have a valid lien on the tenant's trade fixtures; and (4) the landlord's lien could not take priority over the security interest on plaintiff's property. We affirm.

I.

On December 19, 1975, the plaintiff and the defendant entered into a commercial lease through their respective corporations. The lease period ran from January 1, 1976, to August 31, 1979, and the rent was $125 per month. Paragraph 10 of the lease provided:

> LIEN. Landlord shall have, in addition to the Landlord's lien provided by statute, a lien upon all personal property of Tenants kept or used in said premises during the term of this Lease and belonging to Tenants, whether such property is exempt of execution or not, and upon improvements, if any, placed or erected by Tenants on said premises, and upon the unexpired term of this Lease, to secure the payment of rent due or to become due and all expenses including attorneys' fees incurred by Landlord in litigation to collect rent hereunder, or possession, or to procure injunction to prevent removal of personal property, and to secure payment of damages to the premises caused or permitted by Tenants. The lien shall follow the property to whatever location removed, until all secured amounts are paid.

The plaintiff made numerous improvements to the building including the addition of broasters, coolers, an air conditioner, and a small wooden building. The plaintiff also borrowed money from the bank for the business and the loan was secured by a security interest in all the equipment acquired.

The plaintiff operated a restaurant on the premises until mid-May 1977, when it was determined by him and his accountant that the restaurant was losing money. On the day after this determination was made, various items were removed from the premises. The accountant informed the defendant that the restaurant was closing and the defendant arrived on the premises when the items were being removed. Defendant concluded that the premises were being abandoned in light of the accountant's statement about closing, the removal of various items from the restaurant, and the fact that the building was left unlocked. Since he had no keys to the building, defendant obtained a padlock to secure the premises.

No rent was paid for June or July of 1977 and the parties are in dispute as to whether any attempt was made by plaintiff to recover the property which remained in the building. On July 12, 1977, the plaintiff received a letter from the defendant indicating that the rent had not been paid and that the defendant was electing to forfeit under the lease. The defendant subsequently refused the plaintiff's attempted payments of the rent.

On July 30, 1980, the plaintiff filed a petition in replevin asserting that he was entitled to immediate possession of property valued at $20,094 as the owner and that the defendant had wrongful possession of the property. The plaintiff sought return of the property or damages if the property could not be found. On August 13, 1980, the defendant filed an answer denying the material allegations of the petition and claiming that plaintiff's tenancy terminated on July 12, 1977; that the defendant was claiming the property under his rights under the lease; and that he had a landlord's lien on the basis of damages suffered to his property during defendant's tenancy. Subsequently, the plaintiff amended his petition to include a claim for damages for loss of use of the property to plaintiff.

The parties sharply disputed what items were on the property and their

value. The plaintiff introduced evidence concerning the value of the equipment and improvements made to the property and claimed that his loss of use damages amount to approximately $10,000. The defendant claimed various damages resulting from the plaintiff's tenancy, that certain improvements became part of the building, and that under the lease he was entitled to assert a contractual lien as well as the statutory lien upon personal property to secure past due rent and damages.

On October 23, 1980, the court entered its decree denying the plaintiff's relief. The court concluded that the lease was properly terminated; that a roof air conditioner, furnace, heater, and separate wooden building were attached to the premises and became the property of the defendant upon termination of the lease pursuant to its provisions; and that the remaining property either no longer existed or became subject to defendant's contractual "possessory lien upon termination of the lease pursuant to its provision." On this basis, the court concluded that the defendant had established a right of possession. Plaintiff filed notice of appeal on October 23, 1980.

II.

Replevin is an action at law triable by ordinary proceedings and is reviewed upon assigned errors. Section 643.2, The Code 1980; Ritchie v. Hilmer, 251 Iowa 1002, 103 N.W.2d 858 (1960). When tried to a court without a jury, as here, the findings of facts have the force of a jury verdict, binding upon this court if based upon substantial proof. Id.

The gist of a replevin action is the immediate right to possession and whatever be the right or want of right of defendant, if the plaintiff is not entitled to present possession he cannot prevail. Id. The trial below was limited to the issue of present possession. On appeal, plaintiff makes four assignments of error: (1) that the defendant landlord's self-help eviction was unlawful; (2) that the

tenant had trade fixtures which were subject to his removal; (3) that the landlord did not have a valid lien on the tenant's trade fixtures; and (4) that the landlord's lien could not take priority over the security interest on the plaintiff's property.

At trial, the plaintiff never argued the issue of the defendant's allegedly illegal self-help eviction, the issue of whether the items in question were trade fixtures, or whether the landlord's lien could take priority over the bank's security interest in the plaintiff's property. The only issue preserved for appeal and the only issue which goes to whether plaintiff or defendant was entitled to present possession of the property is whether the trial court erred in finding that defendant had a valid landlord's lien on the personal property in question which entitled defendant to possession.[1] Thus the issue becomes whether there was substantial evidence to support the trial court's findings.

Paragraph 10 of the lease provided that the landlord would have a contractual lien as well as a statutory lien. The contractual lien was to secure, among other things, plaintiff's failure to pay rent and also any damages done to the premises by the plaintiff.

We find there was substantial evidence to support the trial court's findings that the lease was properly terminated for failure to pay rent; that notice of forfeiture of the lease was properly served upon the plaintiff; that the roof air conditioner, furnace, heater, and a separate wooden building were attached to the realty; and that other items of property allegedly wrongfully in the possession of the defendant were either no longer in existence or subject to the defendant's contractual possessory lien upon termination of the lease. We find that plaintiff failed to establish a present possessory interest superior to the defendant's

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[1] Plaintiff's constitutional argument against the landlord's lien was also never urged below and is irrelevant because the lien asserted here was contractual, not statutory.

contractual lien. Therefore, we affirm the trial court.

AFFIRMED.